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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

[Docket No. 0908041219–1413–02]

RIN 0648–AX79

Overflight Regulations for the Channel Islands, Monterey Bay, Gulf of the Farallones, and Olympic Coast National Marine Sanctuaries

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

ACTION: Final rule.

SUMMARY: NOAA is amending the regulations for the Channel Islands, Monterey Bay, Gulf of the Farallones, and Olympic Coast National Marine Sanctuaries by requiring that motorized aircraft maintain certain minimum altitudes above specified locations within the boundaries of the listed sanctuaries and stating that failure to comply with these altitude limits is presumed to disturb marine mammals and seabirds and is a violation of the sanctuary regulations.

DATES: These regulations are effective on February 27, 2012.

FOR FURTHER INFORMATION CONTACT: Office of National Marine Sanctuaries, 1305 East-West Highway, Silver Spring, MD 20910. Phone: (301) 713–3125.

SUPPLEMENTARY INFORMATION:

Electronic Access

This **Federal Register** document is also accessible via the Internet at *http://www.gpoaccess.gov/fr/index.html.*

I. Background

The National Marine Sanctuaries Act (NMSA) authorizes NOAA to prohibit or otherwise regulate activities to prevent or minimize the destruction of, loss of, or injury to a resource of a national marine sanctuary (16 U.S.C. 1436(1)).

Regulations for the Monterey Bay, Channel Islands, Gulf of the Farallones and Olympic Coast National Marine Sanctuaries all restrict low altitude overflights within specified zones in each sanctuary (subject to certain exceptions) in order to protect marine mammals and seabirds from disturbance by aircraft. At Monterey Bay, Channel Islands, and Gulf of the Farallones, flights below 1000 feet are prohibited within the designated zones. At Olympic Coast, flights below 2000 feet are prohibited within one nautical mile of Flattery Rocks, Quillayute Needles, or Copalis National Wildlife Refuge, or within one nautical mile seaward from the coastal boundary of the sanctuary.

These regulations vary slightly with each sanctuary. The regulations for the Monterey Bay and Olympic Coast sanctuaries prohibit overflights below a certain level within designated zones—1000 feet in Monterey Bay and 2000 feet in Olympic Coast, as noted above—without requiring a specific showing that marine mammals or seabirds have been disturbed. The regulations for the Channel Islands and the Gulf of the Farallones prohibit disturbing marine mammals or seabirds by flying below 1000 feet within specified zones of the sanctuaries.

With this final rule, NOAA has standardized these regulations by adopting a single, consistent and clear regulatory approach regarding overflights in these sanctuaries. The regulations for each sanctuary now establish a rebuttable presumption that flying motorized aircraft below the existing minimum altitudes within any of the existing zones results in the disturbance of marine mammals or seabirds. This means that if a pilot were observed flying below the established altitude within a designated zone, it would be presumed that marine mammals or seabirds had been disturbed and that a violation of sanctuary regulations had been committed. This presumption of disturbance could be overcome by contrary evidence that disturbance did not, in fact, occur (*e.g.,* evidence that no marine mammals or seabirds were present in the area at the time of the low overflight). Adding a rebuttable presumption to these regulations is justified by ample evidence in the administrative records that were developed for the designations of these sanctuaries. These administrative records describe the need to protect nearshore and offshore resources from unnecessary disturbance, and explain how low altitude overflights can disrupt various marine mammal and seabird behavior patterns, including breeding and nesting.

Low overflights in these sites clearly pose a risk of harmful disturbance to marine mammals and seabirds, including movement and evacuation in response to low overflights where the young (pups, chicks, eggs) are crushed during an evacuation or exposed to predation as a consequence of loss of parental protection. Indeed, given the connection between low overflights and disturbance, the Southwest Region of the National Marine Fisheries Service developed marine mammal viewing guidelines for its region (which includes the three California sanctuaries), recommending that aircraft avoid flying below 1000 feet over marine mammals. Similarly, the State of California prohibits overflights less than 1000 feet above designated wildlife habitat areas within the state waters of each sanctuary off of California. In the Olympic Coast National Marine Sanctuary, offshore islands of the Flattery Rocks, Quillayute Needles, and Copalis National Wildlife Refuges have high pinnacles that provide important habitats for 14 species of seabirds, warranting the prohibition on flights below 2000 feet in this sanctuary to better protect these sanctuary resources. This prohibition is further consistent with an advisory published by the Federal Aviation Administration (FAA) that applies to these same areas (FAA Advisory Circular AC 91–36D).

The existing NOAA overflight regulations are not indicated on current FAA aeronautical charts. The FAA has advised NOAA that with the promulgation of this final rule, it will revise the notation on current aeronautical charts to indicate the sanctuaries' overflight regulations. The notation on FAA aeronautical charts in no way imposes additional FAA obligations on aircraft operators. Rather,

NOAA expects that the revised notation will likely result in improved compliance and thereby help to ensure the protection of resources under NOAA's stewardship.

II. Summary of Rulemaking

NOAA is amending ONMS regulations (15 CFR part 922) for these four sanctuaries. The amendments harmonize NOAA's long-standing regulatory provisions prohibiting low overflights over certain areas within these sanctuaries and more clearly connect the adverse impacts upon marine mammals or seabirds caused by low overflights as the regulatory basis for NOAA's overflight regulations.

III. Response to Comments

The comments received on the proposed rule that was published on December 7, 2010 (75 FR 76319) are summarized below, together with responses from NOAA. There were 169 submissions from individuals, organizations, state representatives, state agencies, and Federal agencies. Because many of the submissions contained the same or similar comments, those comments have been grouped together by subject and responded to as one comment.

1. *Comment:* FAA is the sole authority for restricting airspace.

Response: NOAA recognizes FAA's authority to regulate airspace and has worked closely with the FAA to craft the rule in a way that is explicitly linked to NOAA's statutory authority. NOAA and the FAA share the view that the final rule does not alter or change either agency's existing authority.[1]

2. *Comment:* The proposed amendments to the existing regulations for low overflights in designated areas of the four national marine sanctuaries should be implemented for several reasons, including: to reduce the risk of disturbance from low flying aircraft on normal wildlife behavior; to improve pilot compliance with minimum altitude restrictions; to standardize the application of these regulations with a single, consistent and clear regulatory approach; and to apply the presumption of disturbance for any flight below the minimum altitude level.

Response: NOAA agrees the amendments to the existing overflight regulations will reduce the risk of harmful disturbance to marine mammals and seabirds. NOAA believes the amended, standardized language, along with the publication of these altitude limitations on FAA's aeronautical charts, will improve notice to pilots and increase compliance.

3. *Comment:* The proposed amendments to the existing regulations for low overflights in designated areas of the four national marine sanctuaries should be adopted but without the inclusion of a rebuttable presumption.

Response: The addition of the rebuttable presumption to the overflight regulations was made to link failure to comply with the altitude limits within any of the designated zones to disturbance of marine mammals or seabirds and is thus a violation of sanctuary wildlife protection regulations, rather than FAA flight regulations. This change is important because (1) it avoids the appearance that NOAA is infringing on the FAA's authority, since the regulations are tied to a resource disturbance, not merely altitude limits; and (2) it is responsive to industry's concern with an absolute prohibition on flying at certain altitudes. Including a rebuttable presumption will also facilitate compliance efforts with the regulation.

4. *Comment:* The rebuttable presumption puts an unreasonable burden on pilots to prove their innocence.

Response: A rebuttable presumption does not impose an unreasonable burden on pilots. The rebuttable presumption provides pilots with the opportunity to show that there is no violation if no marine mammals or seabirds are disturbed. Rebuttable presumptions have commonly been used in analogous legal authorities. For example, the Endangered Species Act imposes a rebuttable presumption with regard to species held in captivity (16 U.S.C. 1538(b)(1)), and NOAA regulations apply a rebuttable presumption in certain commercial fisheries (*e.g.*, 50 CFR 635.4(f)(1); 697.20(c)) as well as in some national marine sanctuaries (*e.g.*, 15 CFR 922.92(a)(5)(ii); 922.112(a)(2). Combined with notification of NOAA's overflight regulations on FAA aeronautical charts, pilots will better understand the potential legal consequences of ignoring sanctuary overflight prohibitions, and it is expected that the vast majority of pilots will comply with the regulations.

5. *Comment:* If a rebuttable presumption is added to the regulations, the presumption of a violation should focus on the presence or absence of marine mammals or seabirds rather than whether there has been a disturbance of marine mammals or seabirds, since some disturbances, such as spikes in hormones, cannot be observed.

Response: NOAA is sensitive to the concern that some disturbance effects on marine mammals or seabirds, such as hormonal responses, may be difficult to assess where this regulation is violated. However, basing a violation strictly on the presence or absence of marine mammals and seabirds creates a potential violation where marine mammals or seabirds are present but not disturbed by low overflight. The regulations as written make clear that it is not NOAA's intent to consider a violation when marine mammals or seabirds are present during a low overflight, but not disturbed.

6. *Comment:* NOAA should define minimum altitude as measured from the highest terrain within 2000 feet laterally of the designated zones in the Gulf of Farallones and the Monterey Bay national marine sanctuaries. This is needed because seabirds nest along shoreline cliffs as high as 600 feet. Consequently, a minimum height of 1000 feet above water could only be 400 feet from nesting seabirds and thus fail to protect.

Response: The minimum altitude prohibitions of the four west coast national marine sanctuaries included in this amended rule were determined at the time of each sanctuary's designation, and this accounts for the terrain in setting the minimum altitude. When the sanctuaries were created, NOAA followed NEPA and APA procedures and developed environmental impact statements that underwent public review. Changes to the current minimum altitudes are beyond the scope of this regulatory action.

7. *Comment:* NOAA does not have any proof that the regulations are necessary.

Response: The administrative records establishing overflight restrictions in all four sanctuaries describe the need to protect nearshore and offshore resources from unnecessary disturbance, and explain how low altitude overflights can disrupt various marine mammal and seabird behavior patterns including breeding and nesting.

Additional documentation supporting the need for overflight regulations in order to reduce the risk of harmful disturbance to marine mammals and seabirds was submitted during the public comment period and can be found at *Regulations.gov,* Docket No. NOAA–NOS–2009–0237.

8. *Comment:* The use of the term ''restrict'' in the NPRM appears to contradict FAA's definition of the term. The phrase ''restricted area'' has a very specific and well-defined meaning within Federal Aviation Regulations (FARs) airspace designated under part

[1] The FAA, in a letter concerning this rulemaking to the Aircraft Operators and Pilots Association (AOPA), stated that it does not view NOAA's rulemaking action as an airspace regulation nor as an infringement on the FAA's stated authority.

73 within which the flight of aircraft, while not wholly prohibited, is subject to restriction.

Response: NOAA used the terms ''restrict'' and ''restrictions'' in the NPRM interchangeably with the terms ''regulations'', ''prohibitions'', and ''limitations''. In order to avoid confusion with FAA terminology, NOAA has removed the terms ''restrict'' and ''restrictions'' from this final rule and replaced them with comparable terms.

9. *Comment:* The final rule for the Olympic Coast National Marine Sanctuary should exempt flight operations for the purposes of taking off and landing at Copalis, Quillayute, or Sekiu airports.

Response: NOAA agrees that exemptions for flight operations to and from Copalis airport may be necessary because the proximity of the airport to the Olympic Coast National Marine Sanctuary makes it difficult for pilots to comply with sanctuary regulations when merely flying in and out of the airport. However, since such a change in ONMS regulations is beyond the scope of this action, NOAA will consider this in a separate rulemaking action, subject to review and comment. NOAA disagrees, however, that exemptions are necessary for Quillayute or Sekiu airports because both airports are far enough inland that no exemption is necessary. The configuration and location of Quilayute Airport (KUIL) does not require general aviation aircraft to descend below 2,000 feet above ground level (AGL) over the ocean during downwind or straight-in approach to this airport's only open runway, Runway 04/22 (RWY 04/22). Sekiu Airport (11S) is located on the Strait of Juan de Fuca and is over 10 nautical miles from the boundary of Olympic Coast National Marine Sanctuary.

10. *Comment:* Search and rescue operations should be exempted from the final rule.

Response: Current ONMS regulations specifically exempt activities as may be necessary to respond to an emergency threatening life, property, or the environment. Search and rescue operations would be considered an emergency activity and are therefore exempt from the regulations. Accordingly, NOAA made no changes to the regulations in response to this comment.

11. *Comment:* Penalties for violations should be defined.

Response: The assessed penalty amount for a violation of sanctuary overflight regulations would be determined in accordance with NOAA's regulations at 15 CFR 904 and with the National Marine Sanctuaries Act Vessel/Aircraft Schedules of NOAA's policy for assessment of penalties and permit sanctions. See *www.gc.noaa.gov/documents/031611_penalty_policy.pdf.*

12. *Comment:* NOAA should prepare an EIS for this action.

Response: NOAA disagrees. The amendments to the sanctuary regulations in the four national marine sanctuaries identified in this notice do not have significant environmental impacts and are categorically excluded from the need to prepare an environmental assessment pursuant to the National Environmental Policy Act. Specifically, the proposed amendments to the regulations are legal in nature, establishing a rebuttable presumption regarding disturbance below a certain level and are thus categorically excluded by NOAA Administrative Order 216–6 Section 6.03c.3(i).

13. *Comment:* The Olympic Coast National Marine Sanctuary regulation would create a safety concern. Cloud ceilings are typically at 2000 to 2500 feet in this sanctuary. FAA requires pilots to remain 500 feet below clouds to maintain safe flight, but doing so would routinely violate NOAA's regulation.

Response: This rule does not change the applicable long-standing minimum altitudes that are codified in the regulations for the Olympic Coast National Marine Sanctuary and the national marine sanctuaries off California. These existing regulations have not created a safety issue of this nature in the 18 years since OCNMS was designated. Nonetheless, if weather conditions are such that maintaining visual flight rules (VFR) cannot be achieved while avoiding the flight ceiling, rather than violating the overflight regulations the pilot could instead choose to do any of the following: (1) Avoid flying over sanctuary waters by flying inland; (2) fly instrument flight rules (IFR) through the clouds; or (3) fly above the clouds.

14. *Comment:* NOAA's regulations would require new charting symbols.

Response: NOAA disagrees. FAA has the responsibility for preparation and publication of aeronautical charts. NOAA will provide any information necessary to assist FAA.

15. *Comment:* Tomales Bay should be added to the list of protected areas under the Gulf of Farallones regulation.

Response: NOAA recognizes the significance of Tomales Bay as an important area for seabirds and marine mammals. However, the identification of this area as a new designated zone is beyond the scope of this rulemaking.

16. *Comment:* The final amendments should expressly maintain the existing exemptions for Navy activities involving low-level military overflights of sanctuaries.

Response: This rulemaking does not alter the existing exemptions for Department of Defense activities from certain sanctuary prohibitions.

17. *Comment:* How will NOAA educate pilots about the amended regulations in the designated zones?

Response: As mentioned above, one of the purposes of this rulemaking is to facilitate the publication of these overflight regulations on aeronautical charts. In addition, however, NOAA will continue to collaborate with FAA to educate pilots on the overflight regulations for sanctuaries. Such coordination would include working with local FAA aviation safety program managers to get the word out to pilot associations. Other outreach strategies would likely include press releases, presentations to flight clubs, articles in general aviation magazines, and flyers/posters at local airports. The addition of the notation to the aeronautical charts is to assist aircraft operators by placing the information on a chart, which is a logical place for operators to consult for flight information.

IV. Summary of Changes From the Proposed Rule

NOAA has made two changes to this final rule as compared to the proposed rule. NOAA corrected the Channel Islands National Marine Sanctuary regulatory citation from § 922.72 paragraph (a)(5) to § 922.72 paragraph (a)(7) and the Olympic Coast National Marine Sanctuary regulatory citation from § 922.152 paragraph (a)(6) to § 922.152 paragraph (a)(7).

IV. Classifications

A. National Environmental Policy Act

The amendments to the sanctuary regulations in the four national marine sanctuaries identified in this notice do not have significant environmental impacts and are categorically excluded from the need to prepare an environmental assessment pursuant to the National Environmental Policy Act. Specifically, the proposed amendments to the regulations are legal in nature, establishing a rebuttable presumption regarding disturbance below a certain level and are thus categorically excluded by NOAA Administrative Order 216–6 Section 6.03c.3(i).

B. Executive Order 12866: Regulatory Impact

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

C. Executive Order 13132: Federalism Assessment

NOAA has concluded this regulatory action does not have federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 13132.

D. Paperwork Reduction Act

This rule does not contain any new or revisions to the existing information collection requirement that was approved by OMB (OMB Control Number 0648–0141) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

E. Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published with the proposed rule and is not repeated here. No comments were received regarding the economic impact of this rule. As a result, a final regulatory flexibility analysis was not prepared.

List of Subjects in 15 CFR Part 922

Administrative practice and procedure, Environmental protection, Fish, Harbors, Marine pollution, Marine resources, Natural resources, Penalties, Recreation and recreation areas, Research, Water pollution control, Water resources, Wildlife, Overflights.

Dated: January 20, 2012.

Holly A. Bamford,

Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.

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

PART 922—NATIONAL MARINE SANCTUARY PROGRAM REGULATIONS

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

Authority: 15 U.S.C. 1431 *et seq.*

Subpart G—Channel Islands National Marine Sanctuary

■ 2. Amend § 922.72 by revising paragraph (a)(7) to read as follows:

§ 922.72 Prohibited or otherwise regulated activities—Sanctuary-wide.

(a) * * *

(7) Disturbing marine mammals or seabirds by flying motorized aircraft at less than 1,000 feet over the waters within one nautical mile of any Island, except to engage in kelp bed surveys or to transport persons or supplies to or from an Island. Failure to maintain a minimum altitude of 1,000 feet above ground level over such waters is presumed to disturb marine mammals or seabirds.

* * * * *

Subpart H—Gulf of Farallones National Marine Sanctuary

■ 3. Amend § 922.82 by revising paragraph (a)(8) to read as follows:

§ 922.82 Prohibited or otherwise regulated activities.

(a) * * *

(8) Disturbing marine mammals or seabirds by flying motorized aircraft at less than 1,000 feet over the waters within one nautical mile of the Farallon Islands, Bolinas Lagoon, or any ASBS, except to transport persons or supplies to or from the Islands or for enforcement purposes. Failure to maintain a minimum altitude of 1,000 feet above ground level over such waters is presumed to disturb marine mammals or seabirds.

* * * * *

Subpart M—Monterey Bay National Marine Sanctuary

■ 4. Amend § 922.132 by revising paragraph (a)(6) to read as follows:

§ 922.132 Prohibited or otherwise regulated activities.

(a) * * *

(6) Disturbing marine mammals or seabirds by flying motorized aircraft, except as necessary for valid law enforcement purposes, at less than 1,000 feet above any of the four zones within the Sanctuary described in Appendix B to this subpart. Failure to maintain a minimum altitude of 1,000 feet above ground level above any such zone is presumed to disturb marine mammals or seabirds.

* * * * *

Subpart O—Olympic Coast National Marine Sanctuary

■ 5. Amend § 922.152 by revising paragraph (a)(7) to read as follows:

§ 922.152 Prohibited or otherwise regulated activities.

(a) * * *

(7) Disturbing marine mammals or seabirds by flying motorized aircraft at less than 2,000 feet over the waters within one nautical mile of the Flattery Rocks, Quillayute Needles, or Copalis National Wildlife Refuges or within one nautical mile seaward from the coastal boundary of the Sanctuary, except for activities related to tribal timber operations conducted on reservation lands, or to transport persons or supplies to or from reservation lands as authorized by a governing body of an Indian tribe. Failure to maintain a minimum altitude of 2,000 feet above ground level over any such waters is presumed to disturb marine mammals or seabirds.

* * * * *

[FR Doc. 2012–1593 Filed 1–25–12; 8:45 am]

BILLING CODE 3510–NK–P

INTERNATIONAL TRADE COMMISSION

19 CFR Part 206

Rules for Investigations Relating to Global and Bilateral Safeguards Actions, Market Disruption, Trade Diversion, and Review of Relief Actions

AGENCY: United States International Trade Commission.

ACTION: Interim rule with request for comments.

SUMMARY: The United States International Trade Commission (Commission) is adopting interim rules that amend the Commission's Rules of Practice and Procedure to make technical amendments and to provide rules for the conduct of safeguard investigations under statutory provisions that implement bilateral safeguard provisions in free trade agreements that the United States has negotiated with Australia, Bahrain, Chile, Colombia, the Dominican Republic and five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua), Jordan, Korea, Morocco, Oman, Panama, Peru, and Singapore. With the exception of the free trade agreements with Colombia, Korea, and Panama, all of the aforementioned free trade agreements have entered into force. The free trade

agreements with Colombia, Korea, and Panama are expected to enter into force imminently. The interim rules would amend and expand upon current rules that pertain to the conduct of bilateral safeguard investigations under the North American Free Trade Agreement (NAFTA) Implementation Act with respect to imports from Canada and Mexico.

DATES: *Effective date:* January 26, 2012.

Deadline for filing written comments: March 26, 2012.

ADDRESSES: You may submit comments, identified by docket number MISC–039, FTA safeguards rulemaking, by any of the following methods:

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

—*Agency Web Site: http://edis.usitc.gov.* Follow the instructions for submitting comments on the Web site.

—*Mail:* For paper submission. U.S. International Trade Commission, 500 E Street SW., Room 112A, Washington, DC 20436.

—*Hand Delivery/Courier:* U.S. International Trade Commission, 500 E Street SW., Room 112A, Washington, DC 20436. From the hours of 8:45 a.m. to 5:15 p.m.

Instructions: All submissions received must include the agency name and docket number (MISC–039, FTA safeguards rulemaking), along with a cover letter stating the nature of the commenter's interest in the proposed rulemaking. All comments received will be posted without change to *http://edis.usitc.gov* including any personal information provided. For paper copies, a signed original and 8 copies of each set of comments should be submitted to James R. Holbein, Secretary, U.S. International Trade Commission, 500 E Street SW., Room 112A, Washington, DC 20436. For access to the docket to read background documents or comments received, go to *https://edis.usitc.gov* and/or the U.S. International Trade Commission, 500 E Street SW., Room 112A, Washington, DC 20436.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, Secretary, telephone (202) 205–2000 or William Gearhart, Esquire, Office of the General Counsel, United States International Trade Commission, telephone (202) 205–3091. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal at (202) 205–1810. General information concerning the Commission may also be obtained by accessing its Web site at *http://www.usitc.gov.*

SUPPLEMENTARY INFORMATION: The preamble below is designed to assist readers in understanding these amendments to the Commission Rules. This preamble provides background information, a regulatory analysis of the amendments, a section-by-section explanation of the amendments, and a description of the amendments to the Rules. The Commission encourages members of the public to comment, in addition to any other comments they wish to make on the amendments, on whether the amendments are in language that is sufficiently clear for users to understand.

These amendments are being promulgated in accordance with the Administrative Procedure Act (5 U.S.C. 553) (APA), and will be codified in 19 CFR part 206.

Background

Section 335 of the Tariff Act of 1930 (19 U.S.C. 1335) authorizes the Commission to adopt such reasonable procedures, rules and regulations as it deems necessary to carry out its functions and duties. The Commission is amending its rules governing investigations relating to global and bilateral safeguard actions, market disruption, trade diversion and review of relief actions (Part 206 of its Rules). The amendments principally concern Subpart D of Part 206, Investigations Relating to Bilateral Safeguard Actions, but also include several technical and conforming changes to the general rules in Subpart A of Part 206. The current rules in Subpart D apply only to Commission investigations under the bilateral safeguard provision in the NAFTA Implementation Act with respect to imports from Canada and Mexico. However, in recent years Congress has enacted legislation that implements bilateral safeguard provisions in several additional free trade agreements, including most recently agreements with Colombia, Korea, and Panama. The implementing legislation for each of those free trade agreements directs the Commission, upon receipt of a petition, to conduct an investigation and determine whether, as a result of the reduction or elimination of a duty under the agreement, an article is being imported into the United States in such increased quantities, in absolute terms or relative to domestic production, and under such conditions that imports of such article constitute a substantial cause of serious injury or the threat thereof to the domestic industry producing an article that is like or directly competitive with the imported article. If the Commission makes an affirmative determination, it must recommend a remedy to the President; the President makes the final decision on remedy.

In addition to the NAFTA Implementation Act, the Commission is required to conduct bilateral safeguard investigations and make determinations under section 311(b) of the United States-Australia Free Trade Agreement Implementation Act, section 311(b) of the United States-Bahrain Free Trade Agreement Implementation Act, section 311(b) of the United States-Chile Free Trade Agreement Implementation Act, section 311(b) of the United States-Colombia Trade Promotion Agreement Implementation Act, section 311(b) of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act, section 211(b) of the United States-Jordan Free Trade Area Implementation Act, section 311(b) of the United States-Korea Free Trade Agreement Implementation Act, section 311(b) of the United States-Morocco Free Trade Agreement Implementation Act, section 311(b) of the United States-Oman Free Trade Agreement Implementation Act, section 311(b) of the United States-Panama Trade Promotion Agreement Implementation Act, section 311(b) of the United States-Peru Trade Promotion Agreement Implementation Act, and section 311(b) of the United States-Singapore Free Trade Agreement Implementation Act (for U.S. Code citations to the respective implementation acts, see the text of interim rule section 206.31 *infra*).

These amendments expand upon existing rules in Subpart D of Part 206 that provide for investigations and determinations under the NAFTA Implementation Act. Each of the statutory provisions listed above contains requirements that are similar both substantively and procedurally to the provision in the NAFTA Implementation Act. These amended rules identify the types of entities that may file a petition, describe the information that must be included in a petition, indicate the time for Commission determinations and reporting, and establish procedures for the limited disclosure of confidential business information under administrative protective order in those instances in which the Commission is authorized to make such disclosure.

Procedure for Adopting the Interim Amendments

The Commission ordinarily promulgates amendments to the Code of Federal Regulations in accordance with the rulemaking procedure in section 553 of the Administrative Procedure Act

(APA) (5 U.S.C. 553). That procedure entails publishing a notice of proposed rulemaking in the **Federal Register** that solicits public comment on the proposed amendments, considering the public comments in deciding on the final content of the amendments, and publishing the final amendments at least 30 days prior to their effective date. In this instance, however, the Commission is amending its rules in 19 CFR Part 206 on an interim basis, effective upon publication of this notice in the **Federal Register**.

The Commission's authority to adopt interim amendments without following all steps listed in section 553 of the APA is derived from section 335 of the Tariff Act of 1930 (19 U.S.C. 1335) and section 553 of the APA.

Section 335 of the Tariff Act authorizes the Commission to adopt such reasonable procedures, rules, and regulations as it deems necessary to carry out its functions and duties. The Commission has determined that the need for interim rules is clear in this instance. Recently enacted legislation that implements safeguard provisions in free trade agreements, including agreements with Colombia, Korea, and Panama, requires the Commission to conduct new kinds of investigations and make determinations. It is important that the Commission adopt implementing rules as quickly as possible because the three new agreements are expected to enter into force imminently. The interim amendments will also apply in the case of investigations under legislation that implements safeguard provisions in free trade agreements that have already entered into force with respect to the other countries listed above. In light of the similarity of the provisions in the various implementing statutes, the Commission did not view it as practical to issue a notice of interim rulemaking applicable to investigations involving goods from one or several free trade agreement partners and at the same time issue a substantially identical notice of proposed rulemaking applicable to investigations involving goods from other free trade agreement partners. These interim rules will apply to investigations and determinations under a particular free trade agreement implementation act only after the relevant agreement has entered into force.

Section 553(b) of the APA allows an agency to dispense with publication of a notice of proposed rulemaking when the following circumstances exist: (1) The rules in question are interpretive rules, general statements of policy, or rules of agency organization, procedure or practice; or (2) the agency for good cause finds that notice and public comment on the rules are impracticable, unnecessary, or contrary to the public interest, and the agency incorporates that finding and the reasons therefor into the rules adopted by the agency.

Section 553(d)(3) of the APA allows an agency to dispense with the publication of notice of final rules at least thirty days prior to their effective date if the agency finds that good cause exists for not meeting the advance publication requirement and the agency publishes that finding along with the rules.

In this instance, the Commission has determined that the requisite circumstances exist for dispensing with the notice, comment, and advance publication procedure that ordinarily precedes the adoption of Commission rules. For purposes of invoking the section 553(b) exemption from publishing a notice of proposed rulemaking that solicits public comment, the Commission finds that the interim amendments to Part 206 are ''agency rules of procedure and practice.'' Moreover, the entry into force of the new agreements, particularly the agreement with Korea, which applies to a significant amount of U.S. import trade and which could not be predicted sufficiently far in advance, makes the establishment of rules a matter of urgency. Hence, it clearly would have been impracticable for the Commission to comply with the notice of proposed rulemaking and public comment procedure.

For the purpose of invoking the section 553(d)(3) exemption from publishing advance notice of the interim amendments to Part 206 at least thirty days prior to their effective date, the Commission finds the fact that the implementing legislation was signed by the President on October 21, 2011, makes such advance publication impracticable and constitutes good cause for not complying with that requirement.

The Commission recognizes that interim rule amendments should not respond to anything more than the exigencies created by the new legislation. Each interim amendment to Part 206 accordingly falls into one or more of the following categories: (1) A revision of a preexisting rule to make it applicable to one or more of the new kinds of investigations of relief actions; (2) clarification of the manner in which a preexisting rule is to be applied to one or more of the new kinds of investigations; or (3) a new rule covering a matter addressed in the new legislation but not covered by a preexisting rule.

After taking into account all comments received and the experience acquired under the interim amendments, the Commission will replace them with final amendments promulgated in accordance with the notice, comment, and advance publication procedure prescribed in section 553 of the APA.

Regulatory Analysis of Proposed Amendments to the Commission's Rules

The Commission has determined that the proposed rules do not meet the criteria described in section 3(f) of Executive Order 12866 (58 FR 51735, October 4, 1993) and thus do not constitute a significant regulatory action for purposes of the Executive Order.

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is inapplicable to this rulemaking because it is not one for which a notice of final rulemaking is required under 5 U.S.C. 553(b) or any other statute.

These interim rules do not contain federalism implications warranting the preparation of a federalism summary impact statement pursuant to Executive Order 13132 (64 FR 43255, August 4, 1999).

No actions are necessary under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*) because the interim rules will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and will not significantly or uniquely affect small governments.

The interim rules are not major rules as defined by section 804 of the Congressional Review Act (5 U.S.C. 801 *et seq.*). Moreover, they are exempt from the reporting requirements of that Act because they contain rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

The amendments are not subject to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), since they do not contain any new information collection requirements.

Section-by-Section Explanation of the Proposed Amendments

PART 206—INVESTIGATIONS RELATING TO GLOBAL AND BILATERAL SAFEGUARD ACTIONS, MARKET DISRUPTION, AND REVIEW OF RELIEF ACTIONS

Section 206.1 of subpart 206, which lists the statutory authorities and investigations to which subpart 206

applies, is being amended to add a reference to the list of the statutory authorities that are being added in Subpart D of subpart 206 under which the Commission may conduct a bilateral FTA safeguard investigation. Section 206.1 is being further amended to delete the cross references between statutory authorities and part 206 subparts. This information is readily apparent either from the title of the subpart or the first section in each subpart, which lists the statutory authorities and investigations to which the subpart applies.

Subpart A of Part 206 sets forth rules of general application for Commission safeguard investigations. This subpart is being amended in two principal respects. Section 206.2 is amended to extend to entities filing petitions under bilateral safeguard provisions the requirement that the petitioning entity identify the statutory authority and rule subpart under which the petition is filed. Section 206.6(a)(2) is amended to state that the Commission, if it makes an affirmative determination or is equally divided in its determination, will include in its report such remedy recommendations or proposals as may be appropriate under the statute and an explanation of the basis for each recommendation or proposal. The amendment deletes a reference to a statutory provision that applies only in certain market disruption investigations.

Subpart D of Part 206 is amended to apply to Commission investigations under several statutory authorities that implement FTA safeguard provisions. As amended, Subpart D is divided into seven sections. Section 206.31 lists the statutory authorities under which the Commission conducts such investigations. Section 206.32 sets forth definitions for terms applicable to some or all such investigations, including ''substantial cause,'' ''domestic industry,'' ''critical circumstances,'' ''perishable agricultural product,'' and ''Korean motor vehicle article.'' The definitions of ''substantial cause,'' ''domestic industry,'' and ''Korean motor vehicle article'' are not in the current rule; however, they reflect statutory definitions.

Section 206.33(a) lists the types of entities that may file a petition. The list is the same as in the current rule, but the rule is revised to refer to the list of statutory authorities in section 206.31. Current section 206.33(b) is redesignated as section 206.33(d) and is amended to list the countries whose goods might be the subject of a request for provisional relief with respect to a perishable agricultural product. New section 206.33(b) lists the agreements for which U.S. implementing legislation has been enacted that provides for the subject Commission investigations. Current section 206.33(c) is deleted and is replaced by a new section 206.33(c) that relates to allegations of critical circumstances and lists the FTA countries whose goods might be the subject of a request for provisional relief when critical circumstances are alleged. The Commission is deleting current section 206.33(c), which describes the President's authority to provide relief after expiration of the transition period in NAFTA cases, because it finds it impractical and unnecessary to describe more generally the President's authority under the various free trade agreement implementing statutes.

Section 206.34 describes the information that must be included in a petition filed under Subpart D. The information required is similar to that in current section 206.34 for petitions filed under the NAFTA safeguard provisions. Like the current rule, the amended rule recognizes that not all of the requested information may be available to the entity seeking to file a petition. Accordingly, the amended rule directs that the entity provide the requested information to the extent that such information is publicly available from governmental or other sources, or best estimates and the basis therefor if such information is not available.

Section 206.35 sets forth the time period that the Commission has to make its injury determination and transmit its report after an investigation is initiated, and also indicates the time period for making and reporting determinations when provisional relief is requested. These time periods are the same as in the implementing statutes.

Section 206.36, which states that the Commission will make its reports available to the public (with the exception of confidential business information) and will publish a summary in the **Federal Register**, is not changed.

New section 206.37 is added to provide for limited disclosure of certain confidential business information under administrative protective order in investigations under implementing statutes that authorize such disclosure. With the exception of the implementing statutes for the NAFTA and the Jordan FTA, each of the implementing statutes listed in section 206.31 provides for such disclosure.

List of Subjects in 19 CFR Part 206

Administrative practice and procedure, Australia, Bahrain, Business and industry, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Imports, Investigations, Jordan, Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Singapore, Trade agreements.

For the reasons stated in the preamble, the United States International Trade Commission amends 19 CFR Part 206 as follows:

PART 206—INVESTIGATIONS RELATING TO GLOBAL AND BILATERAL SAFEGUARD ACTIONS, MARKET DISRUPTION, TRADE DIVERSION, AND REVIEW OF RELIEF ACTIONS

■ 1. Revise the authority citation for part 206 to read as follows:

Authority: 19 U.S.C. 1335, 2112 note, 2251–2254, 2436, 2451–2451a, 3351–3382, 3805 note, 4051–4065, and 4101.

■ 2. Revise § 206.1 to read as follows:

§ 206.1 Applicability of part.

Part 206 applies to proceedings of the Commission under 201–202, 204, 406, and 421–422 of the Trade Act of 1974, as amended (2251–2252, 2254, 2436, 2451–2451a), sections 301–317 of the North American Free Trade Agreement Implementation Act (19 U.S.C. 3351–3382) (hereinafter NAFTA Implementation Act), and the statutory provisions listed in section 206.31 of this part 206 that implement bilateral safeguard provisions in other free trade agreements into which the United States has entered.

■ 3. Revise § 206.2 to read as follows:

§ 206.2 Identification of type of petition or request.

An investigation under this part 206 may be commenced on the basis of a petition, request, resolution, or motion as provided for in the statutory provisions listed in §§ 206.1 and 206.31. Each petition or request, as the case may be, filed by an entity representative of a domestic industry under this part 206 shall state clearly on the first page thereof ''This is a [petition or request] under section [citing the statutory provision] and Subpart [B, C, D, E, F, or G] of part 206 of the rules of practice and procedure of the United States International Trade Commission.''

■ 4. Amend § 206.6 by revising paragraph (a)(2) to read as follows:

§ 206.6 Report to the President.

(a) * * *

(2) If the determination is affirmative or if the Commission is equally divided in its determination, such remedy recommendation or proposal as may be appropriate under the statute and an

explanation of the basis for each recommendation or proposal.

* * * * *

■ 5. Revise § 206.31 to read as follows:

§ 206.31 Applicability of subpart.

This subpart D applies specifically to investigations under section 311(b) of the United States-Australia Free Trade Agreement Implementation Act (19 U.S.C. 3805 note), section 311(b) of the United States-Bahrain Free Trade Agreement Implementation Act (19 U.S.C. 3805 note), section 311(b) of the United States-Chile Free Trade Agreement Implementation Act (19 U.S.C. 3805 note), section 311(b) of the United States-Colombia Trade Promotion Agreement Implementation Act (19 U.S.C. 3805 note), section 311(b) of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (19 U.S.C. 4061(b)), section 211(b) of the United States-Jordan Free Trade Area Implementation Act (19 U.S.C. 2112 note), section 311(b) of the United States-Korea Free Trade Agreement Implementation Act (19 U.S.C. 3805 note), section 311(b) of the United States-Morocco Free Trade Agreement Implementation Act (19 U.S.C. 3805 note), section 302(b) of the NAFTA Implementation Act (19 U.S.C. 3352(b)), section 311(b) of the United States-Oman Free Trade Agreement Implementation Act (19 U.S.C. 3805 note), section 311(b) of the United States-Panama Trade Promotion Agreement Implementation Act (19 U.S.C. 3805 note), section 311(b) of the United States-Peru Trade Promotion Agreement Implementation Act (19 U.S.C. 3805 note), and section 311(b) of the United States-Singapore Free Trade Agreement Implementation Act (19 U.S.C. 3805 note). For other applicable rules, see subpart A of this part and part 201 of this chapter.

■ 6. Revise § 206.32 to read as follows:

§ 206.32 Definitions applicable to subpart D.

For the purposes of this subpart, the following terms have the meanings hereby assigned to them:

(a) The term *substantial cause* has the same meaning as section 202(b)(1)(B) of the Trade Act.

(b) The terms *domestic industry, serious injury,* and *threat of serious injury* have the same meanings as in section 202(c)(6) of the Trade Act.

(c) *Critical circumstances* mean such circumstances as are described in section 202(d) of the Trade Act;

(d) *Perishable agricultural product* means any agricultural product or citrus product, including livestock, which is the subject of monitoring pursuant to section 202(d) of the Trade Act.

(e) *Korean motor vehicle article* means a good provided for in heading 8703 or 8704 of the U.S. Harmonized Tariff Schedule that qualifies as an originating good under section 202(b) of the United States-Korea Free Trade Agreement Implementation Act.

■ 7. Revise § 206.33 to read as follows:

§ 206.33 Who may file a petition.

(a) *In general.* A petition under this subpart D may be filed by an entity, including a trade association, firm, certified or recognized union, or group of workers, that is representative of a domestic industry producing an article that is like or directly competitive with an article that is allegedly, as a result of the reduction or elimination of a duty provided for under a free trade agreement listed in paragraph (b) of this section, being imported into the United States in such increased quantities, in absolute terms or relative to domestic production, and under such conditions that imports of the article constitute a substantial cause of serious injury, or (except in the case of a Canadian article) threat thereof, to such domestic industry. Unless the implementation statute provides otherwise, a petition may be filed only during the transition period of the particular free trade agreement.

(b) *List of free trade agreements.* The free trade agreements referred to in paragraph (a) of this section include the United States-Australia Free Trade Agreement, the United States-Bahrain Free Trade Agreement, the United States-Chile Free Trade Agreement, the United States-Colombia Trade Promotion Agreement, the Dominican Republic-Central America-United States Free Trade Agreement, the United States-Jordan Free Trade Area Agreement, the United States-Korea Free Trade Agreement, the United States-Morocco Free Trade Agreement, the North American Free Trade Agreement (NAFTA), the United States-Oman Free Trade Agreement, the United States-Panama Trade Promotion Agreement, the United States-Peru Trade Promotion Agreement, and the United States-Singapore Free Trade Agreement, to the extent that such agreements have entered into force.

(c) *Critical circumstances.* An entity of the type described in paragraph (a) of this section that represents a domestic industry may allege that critical circumstances exist and petition for provisional relief with respect to imports if such product is from Australia, Canada, Jordan, Korea, Mexico, Morocco, or Singapore.

(d) *Perishable agricultural product.* An entity of the type described in paragraph (a) of this section that represents a domestic industry producing a perishable agricultural product may petition for provisional relief with respect to imports of such product from Australia, Canada, Jordan, Korea, Mexico, Morocco, or Singapore, but only if such product has been subject to monitoring by the Commission for not less than 90 days as of the date the allegation of injury is included in the petition.

(e) *Korean motor vehicle article.* An entity of the type described in paragraph (a) of this section that is filing a petition with respect to a product from Korea shall state whether it represents a domestic industry producing an article that is like or directly competitive with a Korean motor vehicle article.

■ 8. Revise § 206.34 to read as follows:

§ 206.34 Contents of petition.

A petition under this subpart D shall include specific information in support of the claim that, as a result of the reduction or elimination of a duty provided for under a free trade agreement listed in § 206.33(b), an article is being imported into the United States in such increased quantities, in absolute terms or relative to domestic production, and under such conditions that imports of the article constitute a substantial cause of serious injury, or (except in the case of a Canadian article) threat thereof, to the domestic industry producing an article that is like or directly competitive with the imported article. If provisional relief is requested in a petition concerning an article from Australia, Canada, Jordan, Korea, Mexico, Morocco, or Singapore, the petition shall state whether provisional relief is sought because *critical circumstances* exist or because the imported article is a *perishable agricultural product.* In addition, a petition filed under this subpart D shall include the following information, to the extent that such information is publicly available from governmental or other sources, or best estimates and the basis therefor if such information is not available:

(a) *Product description.* The name and description of the imported article concerned, specifying the United States tariff provision under which such article is classified and the current tariff treatment thereof, and the name and description of the like or directly competitive domestic article concerned;

(b) *Representativeness.*

(1) The names and addresses of the firms represented in the petition and/or the firms employing or previously

employing the workers represented in the petition and the locations of their establishments in which the domestic article is produced;

(2) The percentage of domestic production of the like or directly competitive domestic article that such represented firms and/or workers account for and the basis for claiming that such firms and/or workers are representative of an industry; and

(3) The names and locations of all other producers of the domestic article known to the petitioner;

(c) *Import data.* Import data for at least each of the most recent 5 full years that form the basis of the claim that the article concerned is being imported in increased quantities in absolute terms;

(d) *Domestic production data.* Data on total U.S. production of the domestic article for each full year for which data are provided pursuant to paragraph (c) of this section;

(e) *Data showing injury.* Quantitative data for each of the most recent 5 full years indicating the nature and extent of injury to the domestic industry concerned:

(1) With respect to serious injury, data indicating:

(i) A significant idling of production facilities in the industry, including data indicating plant closings or the underutilization of production capacity;

(ii) The inability of a significant number of firms to carry out domestic production operations at a reasonable level of profit; and

(iii) Significant unemployment or underemployment within the industry; and/or

(2) With respect to the threat of serious injury, data relating to:

(i) A decline in sales or market share, a higher and growing inventory (whether maintained by domestic producers, importers, wholesalers, or retailers), and a downward trend in production, profits, wages, productivity, or employment (or increasing underemployment);

(ii) The extent to which firms in the industry are unable to generate adequate capital to finance the modernization of their domestic plants and equipment, or are unable to maintain existing levels of expenditures for research and development;

(iii) The extent to which the U.S. market is the focal point for the diversion of exports of the article concerned by reason of restraints on exports of such article to, or on imports of such article into, third country markets; and

(3) Changes in the level of prices, production, and productivity.

(f) *Cause of injury.* An enumeration and description of the causes believed to be resulting in the injury, or threat thereof, described under paragraph (e) of this section, and a statement regarding the extent to which increased imports of the subject article are believed to be such a cause, supported by pertinent data;

(g) *Relief sought and purpose thereof.* A statement describing the import relief sought, including the type, amount, and duration, and the specific purposes therefor, which may include facilitating the orderly transfer of resources to more productive pursuits, enhancing competitiveness, or other means of adjustment to new conditions of competition;

(h) *Efforts to compete.* A statement on the efforts being taken, or planned to be taken, or both, by firms and workers in the industry to make a positive adjustment to import competition.

(i) *Critical circumstances.* If the petition alleges the existence of critical circumstances, a statement setting forth the basis for the belief that there is clear evidence that increased imports (either actual or relative to domestic production) of the article are a substantial cause of serious injury, or the threat thereof, to the domestic industry, and that delay in taking action would cause damage to that industry that would be difficult to repair, and a statement concerning the provisional relief requested and the basis therefor.

■ 9. Revise § 206.35 to read as follows:

§ 206.35 Time for determinations, reporting.

(a) *In general.* The Commission will make its determination with respect to injury within 120 days (180 days if critical circumstances are alleged) after the date on which the investigation is initiated. The Commission will make its report to the President no later than 30 days after the date on which its determination is made.

(b) *Perishable agricultural product.* In the case of a request in a petition for provisional relief with respect to a perishable agricultural product that has been the subject of monitoring by the Commission, the Commission will report its determination and any finding to the President not later than 21 days after the date on which the request for provisional relief is received.

(c) *Critical circumstances.* If petitioner alleges the existence of critical circumstances in the petition, the Commission will report its determination regarding such allegation and any finding on or before the 60th day after such filing date.

■ 10. Add § 206.37 to read as follows:

§ 206.37 Limited disclosure of certain confidential business information under administrative protective order.

Except in the case of an investigation under the United States-Jordan Free Trade Area Implementation Act or the NAFTA, the Secretary shall make available to authorized applicants, in accordance with the provisions of § 206.17, confidential business information obtained in an investigation under this subpart.

By order of the Commission.

Issued: January 19, 2012.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2012–1500 Filed 1–25–12; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

[Docket No. FDA–2011–N–0003]

Oral Dosage Form New Animal Drugs; Deracoxib

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Novartis Animal Health U.S., Inc. The supplemental NADA provides for veterinary prescription use of deracoxib tablets in dogs for the control of postoperative pain and inflammation associated with dental surgery and the addition of a 12-milligram (mg) size tablet.

DATES: This rule is effective January 26, 2012.

FOR FURTHER INFORMATION CONTACT: Amy L. Omer, Center for Veterinary Medicine (HFV–114), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8336, email: *amy.omer@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Novartis Animal Health U.S., Inc., 3200 Northline Ave., Suite 300, Greensboro, NC 27408, filed a supplement to NADA 141–203 that provides for veterinary prescription use of DERAMAXX (deracoxib) Chewable Tablets in dogs for the control of postoperative pain and inflammation associated with dental surgery and the addition of a 12-mg size tablet. The supplemental NADA is

approved as of November 23, 2011, and 21 CFR 520.538 is amended to reflect the approval.

A summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

Under section 512(c)(2)(F)(iii) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(c)(2)(F)(iii)), this supplemental approval qualifies for 3 years of marketing exclusivity beginning on the date of approval.

The Agency has determined under 21 CFR 25.33 that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects in 21 CFR Part 520

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is amended as follows:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: 21 U.S.C. 360b.

■ 2. In § 520.538, revise paragraphs (a), (d)(1), and (d)(2) to read as follows:

§ 520.538 Deracoxib.

(a) *Specifications.* Each tablet contains 12, 25, 50, 75, or 100 milligrams (mg) deracoxib.

* * * * *

(d) * * *

(1) *Amount.* Administer orally as needed, as a single daily dose based on body weight:

(i) 1 to 2 mg/kilogram (kg) (0.45 to 0.91 mg/pound (lb)), for use as in paragraph (d)(2)(i) of this section.

(ii) 1 to 2 mg/kg (0.45 to 0.91 mg/lb) for 3 days, for use as in paragraph (d)(2)(ii) of this section.

(iii) 3 to 4 mg/kg (1.4 to 1.8 mg/lb) for up to 7 days, for use as in paragraph (d)(2)(iii) of this section.

(2) *Indications for use.* (i) For the control of pain and inflammation associated with osteoarthritis.

(ii) For the control of postoperative pain and inflammation associated with dental surgery.

(iii) For the control of postoperative pain and inflammation associated with orthopedic surgery.

* * * * *

Dated: January 23, 2012.

William T. Flynn,

Acting Director, Center for Veterinary Medicine.

[FR Doc. 2012–1622 Filed 1–25–12; 8:45 am]

BILLING CODE 4160–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2011–0730; FRL–9620–9]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Consumer and Commercial Products

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the Commonwealth of Virginia. The SIP revision adds a new chapter (9VAC5–45—Consumer and Commercial Products) in order to control volatile organic compounds (VOC) from portable fuel containers, consumer products, architectural and industrial (AIM) coatings, adhesives and sealants, and asphalt paving operations within the Northern Virginia and Fredericksburg VOC Emissions Control Areas. The SIP revision also includes new and revised documents incorporated by reference into the Virginia regulations (9VAC5–20–21—Documents Incorporated by Reference) in order to support the new and revised regulations. This action is being taken under the Clean Air Act (CAA).

DATES: *Effective Date:* This final rule is effective on February 27, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2011–0730. All documents in the docket are listed in the *www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

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

SUPPLEMENTARY INFORMATION:

I. Background

On November 8, 2011 (76 FR 69214), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Virginia. The NPR proposed approval of Virginia's consumer and commercial products regulations. The formal SIP revision was submitted by the Commonwealth of Virginia on March 18, 2010.

II. Summary of SIP Revision

The SIP revision consists of the following: (1) Amendments to Chapter 9VAC5–20–21—Documents Incorporated by Reference, in order to make administrative changes for clarity, style, format, renumbering, and incorporate by reference into the Virginia regulations the new and revised regulations; (2) adds a new chapter, 9VAC5–45—Consumer and Commercial Products (Chapter 45) for regulations pertaining to consumer and commercial products; (3) adds special provisions in Chapter 45 that specify monitoring, compliance, notification, general testing, recordkeeping and reporting requirements; (4) establishes standards for portable fuel containers for products manufactured before and after August 1, 2010; (5) establishes standards for consumer products for products manufactured before and after August 1, 2010; (6) establishes standards for architectural and industrial maintenance coatings; (7) establishes standards for adhesives and sealants; and (8) establishes standards for asphalt paving operations. These SIP revisions contain the required elements for a federally enforceable rule: emission limitations, compliance procedures and test methods, compliance dates and record keeping provisions. The Commonwealth of Virginia has adopted the standards and requirements of the consumer and commercial products regulations as recommended by the Ozone Transport Commission model

rule. Other specific requirements and the rationale for EPA's proposed action are explained in the NPR and will not be restated here. No public comments were received on the NPR.

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

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

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

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

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

IV. Final Action

EPA is approving the consumer and commercial products regulations as a revision to the Virginia SIP. This SIP revision will control emissions of VOCs, which will reduce the formation of ozone, and thereby protect public health and welfare.

V. Statutory and Executive Order Reviews

A. General Requirements

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

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

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

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other

required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 26, 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 pertaining to Virginia's consumer and commercial products regulations, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: January 4, 2012.

W.C. Early,

Acting Regional Administrator, Region III.

40 CFR Part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart VV—Virginia

■ 2. In § 52.2420, the table in paragraph (c) is amended by adding a new Chapter 45 in numerical order and the table in paragraph (e) is amended by adding an entry for Documents Incorporated by Reference to the end of the table. The amendments read as follows:

§ 52.2420 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
*	*	*	*	*
9VAC5, Chapter 45	**Consumer and Commercial Products (applicable to the Northern Virginia and Fredericksburg VOC Emissions Control Areas)**			
	Part I Special Provisions			
5–45–10	Applicability	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–20	Compliance	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–30	Emission testing	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–40	Monitoring	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–50	Notification, records and reporting	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
	Part II Emission Standards			
	Article 1 Emission Standards For Portable Fuel Containers And Spouts Manufactured Before August 1, 2010			
5–45–60	Applicability	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–70	Exemptions	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–80	Definitions	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–90	Standard for volatile organic compounds.	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–100	Administrative requirements	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–110	Compliance	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–120	Compliance schedules	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–130	Test methods and procedures	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–140	Monitoring	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–150	Notification, records and reporting	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
	Article 2 Emission Standards For Portable Fuel Containers And Spouts Manufactured On Or After August 1, 2010			
5–45–160	Applicability	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES—Continued

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
5–45–170	Exemptions	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–180	Definitions	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–190	Standard for volatile organic compounds.	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–200	Certification procedures	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–210	Innovative products	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–220	Administrative requirements	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–230	Compliance	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–240	Compliance schedules	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–250	Test methods and procedures	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–260	Monitoring	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–270	Notification, records and reporting	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
Article 3 Emission Standards For Consumer Products Manufactured Before August 1, 2010				
5–45–280	Applicability	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–290	Exemptions	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–300	Definitions	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–310 (Except subsection B).	Standard for volatile organic compounds.	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–320	Alternative control plan (ACP) for consumer products.	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–330	Innovative products	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–340	Administrative requirements	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–350	Compliance	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–360	Compliance schedules	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–370	Test methods and procedures	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–380	Monitoring	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–390	Notification, records and reporting	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
Article 4 Emission Standards For Consumer Products Manufactured On or After August 1, 2010				
5–45–400	Applicability	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–410	Exemptions	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–420	Definitions	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–430 (Except subsection B).	Standard for volatile organic compounds.	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–440	Alternative control plan (ACP) for consumer products.	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–450	Innovative products	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–460	Administrative requirements	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–470	Compliance	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–480	Compliance schedules	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES—Continued

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
5–45–490	Test methods and procedures	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–500	Monitoring	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–510	Notification, records and reporting	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
Article 5 Emission Standards For Architectural And Industrial Maintenance Coatings				
5–45–520	Applicability	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–530	Exemptions	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–540	Definitions	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–550	Standard for volatile organic compounds.	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–560	Administrative requirements	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–570	Compliance	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–580	Compliance schedules	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–590	Test methods and procedures	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–600	Monitoring	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–610	Notification, records and reporting	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
Article 6 Emission Standards For Adhesives And Sealants				
5–45–620	Applicability	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–630	Exemptions	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–640	Definitions	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–650	Standard for volatile organic compounds.	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–660	Control technology guidelines	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–670	Standard for visible emissions	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–680	Administrative requirements	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–690	Compliance	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–700	Compliance schedules	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–710	Test methods and procedures	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–720	Monitoring	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–730	Notification, records and reporting	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–740	Registration	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–750	Facility and control equipment maintenance or malfunction.	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
Article 7 Emission Standards For Asphalt Paving Operations				
5–45–760	Applicability	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–770	Definitions	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–780	Standard for volatile organic compounds.	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.

EPA-APPROVED VIRGINIA REGULATIONS AND STATUTES—Continued

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
5–45–790	Standard for visible emissions	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–800	Standard for fugitive dust/emissions	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–820	Compliance	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–830	Test methods and procedures	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–840	Monitoring	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
5–45–850	Notification, records and reporting	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added.
*	*	*	*	*	*	*

* * * * * (e) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
*	*	*	*	*	*	*
Documents Incorporated by Reference (9 VAC 5–20–21, Sections E.1.a.(2), (16)–(19), E.2.a.(3), E.2.b., E.4.a.(23)–(27), E.11.a.(4)–6), E.12.a.(3), (5) and (9)–(11)).	Northern Virginia and Fredericksburg VOC Emissions Control Areas.	3/17/10	1/26/2012 [*Insert page number where the document begins*].	Added section.

[FR Doc. 2012–1339 Filed 1–25–12; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2008–0637; FRL–9622–5]

Approval and Promulgation of Air Quality Implementation Plans; Oklahoma; Infrastructure Requirements for 1997 8-Hour Ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving submittals from the State of Oklahoma pursuant to the Clean Air Act (CAA or the Act) that address the infrastructure elements specified in the CAA, necessary to implement, maintain, and enforce the 1997 8-hour ozone and the 1997 and 2006 fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS or standards). This action is being taken under the CAA.

DATES: This final rule is effective on February 27, 2012.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R06–OAR–2008–0637. 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. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The state submittal is also available for public inspection during official business hours, by appointment, at the Oklahoma Department of Environmental Quality, 707 North Robinson, P.O. Box 1677, Oklahoma City, Oklahoma 73101–1677.

FOR FURTHER INFORMATION CONTACT: Terry Johnson, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–2154; fax number (214) 665–7263; email address: *johnson.terry@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document wherever ''we,'' ''us,'' or ''our'' is used, we mean the EPA.

I. Background
II. Final Action
III. Statutory and Executive Order Reviews

I. Background

The background for today's action is discussed in detail in our November 16, 2011, proposal (76 FR 70940). In that

notice, we proposed to approve submittals from the State of Oklahoma, pursuant to the CAA, that address the infrastructure elements specified in the CAA section 110(a)(2), necessary to implement, maintain, and enforce the 1997 8-hour ozone, the 1997 fine particulate matter ($PM_{2.5}$), and 2006 $PM_{2.5}$ NAAQS. Those submittals are dated December 5, 2007, June 24, 2010, and April 5, 2011, respectively. We noted that those submittals did not include revisions to the SIP, but documented how the current Oklahoma SIP already included the required infrastructure elements. Therefore, we proposed to find that the following section 110(a)(2) elements were contained in the current Oklahoma SIP and provided the infrastructure for implementing the 1997 8-hour ozone and the 1997 and 2006 $PM_{2.5}$ standards: CAA sections 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). In addition, we proposed to find that the current Oklahoma SIP satisfies the section 110(a)(2)(D)(i)(II) infrastructure element pertaining to emissions from sources in Oklahoma not interfering with measures required in the SIP of any other state under part C of the Act to prevent significant deterioration of air quality, with regard to the 2006 $PM_{2.5}$ NAAQS.

Our November 16, 2011, proposal provides a detailed description of the submittals and the rationale for EPA's proposed actions, together with a discussion of the opportunity to comment. The public comment period for these actions closed on December 16, 2011, and we did not receive any comments.

II. Final Action

We are approving the December 5, 2007, and June 24, 2010, submittals provided by the State of Oklahoma as they demonstrate that the Oklahoma SIP meets the requirements of section 110(a)(1) and (2) of the Act for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS as set forth in the CAA sections 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). Likewise, we are approving the April 5, 2011, submittal provided by the State of Oklahoma as it demonstrates that the Oklahoma SIP meets the requirements of section 110(a)(1) and (2) of the Act for the 2006 $PM_{2.5}$ NAAQS as set forth in the CAA sections 110(a)(2)(A), (B), (C), (D)(i)(II), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). This action is being taken under authority of section 110 of the CAA.

III. Statutory and Executive Order Reviews

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

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 26, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purpose of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: January 13, 2012.

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 LL—Oklahoma

■ 2. The first table in § 52.1920(e) entitled ''EPA-Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Oklahoma SIP'' is amended by adding entries for ''Infrastructure for the 1997 Ozone and 1997 and 2006 $PM_{2.5}$ NAAQS'' and ''Interstate transport for the 2006 $PM_{2.5}$ NAAQS'' at the end to read as follows:

§ 52.1920 Identification of plan.

* * * * *

(e) * * *

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

Name of SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanation
*	*	*	*	*
Infrastructure for the 1997 Ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS.	Statewide	12/5/2007 6/24/2010 4/5/2011	1/26/2012 [Insert FR page number where document begins].	Approval for 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).
Interstate transport for the 2006 $PM_{2.5}$ NAAQS (Noninterference with measures required to prevent significant deterioration of air quality in any other State).	Statewide	4/5/2011	1/26/2012 [Insert FR page number where document begins].	Approval for 110(a)(2)(D)(i)(II).

[FR Doc. 2012–1534 Filed 1–25–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 17, 22, 24, 25, 27, 80, 87 and 90

[WT Docket No. 08–61; WT Docket No. 03–187; FCC 11–181]

National Environmental Policy Act Compliance for Proposed Tower Registrations; Effects of Communications Towers on Migratory Birds

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (FCC or Commission) adopts a rule that affects the process of tower construction by instituting a pre-application notification process so that members of the public will have a meaningful opportunity to comment on the environmental effects of proposed antenna structures that require registration with the Commission. As an interim measure pending completion of a programmatic environmental analysis and subsequent rulemaking proceeding, the Commission also requires that an EA be prepared for any proposed tower over 450 feet in height.

DATES: The rules in this document contain information collection requirements that have not been approved by OMB. The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date.

FOR FURTHER INFORMATION CONTACT: Mania Baghdadi, Wireless Telecommunications Bureau, (202) 418–2133, email *Mania.Baghdadi@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order on Remand in WT Docket Nos. 08–61 and 03–187, adopted December 6, 2011, and released December 9, 2011. The full text of the Order on Remand is available for public inspection and copying during business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. It also may be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554; the contractor's Web site, *http://www.bcpiweb.com* or by calling (800) 378–3160, facsimile (202) 488–5563, or email *FCC@BCPIWEB.com*. Copies of the Order on Remand also may be obtained via the Commission's Electronic Comment Filing System (ECFS) by entering the docket numbers WT Docket No. 08–61 or WT Docket No. 03–187. Additionally, the complete item is available on the Federal Communications Commission's Web site at *http://www.fcc.gov*.

I. Introduction

1. In this Order, the Commission takes procedural measures to ensure, consistent with its obligations under Federal environmental statutes, that the environmental effects of proposed communications towers, including their effects on migratory birds, are fully considered prior to construction. The Commission institutes a pre-application notification process so that members of the public will have a meaningful opportunity to comment on the environmental effects of proposed antenna structures that require registration with the Commission. As an interim measure pending completion of a programmatic environmental analysis and subsequent rulemaking proceeding, the Commission also requires that an Environmental Assessment (EA) be prepared for any proposed tower over 450 feet in height. Through these actions and the Commission's related ongoing initiatives, the Commission endeavors to minimize the impact of communications towers on migratory birds while preserving the ability of communications providers rapidly to offer innovative and valuable services to the public.

2. The Commission's actions in this Order respond to the decision of the Court of Appeals for the District of Columbia Circuit in *American Bird Conservancy* v. *FCC,* 516 F.3d 1027 (DC Cir. 2008) (*American Bird Conservancy*). In *American Bird Conservancy,* the court held that the Commission's current antenna structure registration (ASR) procedures impermissibly fail to offer members of the public a meaningful opportunity to request an EA for proposed towers that the Commission considers categorically excluded from review under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* The notification process that the Commission adopts today addresses that holding of the court. In addition, the court held that the Commission must perform a programmatic analysis of the impact on migratory birds of registered antenna structures in the Gulf of Mexico region. The Commission is already responding to this holding by conducting a nationwide environmental assessment of the ASR program. The Commission has also asked the U.S. Fish and Wildlife Service (FWS) to perform a conservation review of the ASR program under the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*

3. The Commission's action also occurs in the context of its ongoing rulemaking proceeding addressing the effects of communications towers on migratory birds. In 2006, the Commission sought comment on what

this impact may be and what requirements, if any, the Commission should adopt to ameliorate it. Effects of Communications Towers on Migratory Birds, WT Docket No. 03–187, *Notice of Proposed Rulemaking,* 71 FR 67510 (November 22, 2006) (*Migratory Birds NPRM* or Migratory Birds proceeding). Evidence in the record of that proceeding indicates, among other things, that the likely impact of towers on migratory birds increases with tower height. Consistent with that evidence and with a Memorandum of Understanding (MOU) submitted May 4, 2010, by representatives of communications providers, tower companies, and conservation groups, the Commission requires, as an interim measure, that an EA be prepared for any proposed tower over 450 feet in height. The Commission expects to take final action in the Migratory Birds proceeding following completion of the programmatic EA and, if necessary, any subsequent programmatic Environmental Impact Statement (EIS).

4. Specifically, the Commission takes the following actions in this Order:

- The Commission requires that prior to the filing of an ASR application for a new antenna structure, members of the public be given an opportunity to comment on the environmental effects of the proposal. The applicant will provide notice of the proposal to the local community and the Commission will post information about the proposal on its Web site. Commission staff will consider any comments received from the public to determine whether an EA is required for the tower.
- Environmental notice will also be required if an ASR applicant changes the lighting of existing tower to a less preferred lighting style.
- The Commission modifies its procedures so that EAs for those registered towers that require EAs will also be filed and considered prior to the ASR application. Those EAs are currently filed together with either the ASR application or a service-specific license or permit application.
- The Commission institutes an interim procedural requirement that an EA be filed for all proposed registered towers over 450 feet in height. Staff will review the EA to determine whether the tower will have a significant environmental impact. This processing requirement is an interim measure pending completion of the ongoing programmatic environmental analysis of the ASR program.

5. Also pending before the Commission are two Petitions for Expedited Rulemaking: one filed May 2, 2008, by CTIA—The Wireless Association, National Association of Broadcasters, National Association of Tower Erectors, and PCIA—The Wireless Association; and another filed April 24, 2009, by American Bird Conservancy, Defenders of Wildlife and National Audubon Society. In light of the Commission's adoption of an environmental notification process that provides a meaningful opportunity for the public to raise environmental concerns as to prospective ASR applications, together with the commencement of the programmatic EA, the Commission grants in part and dismisses in part these petitions for expedited rulemaking. To the extent that this Order adopts a notification process for prospective ASR applications and otherwise responds to concerns raised by the court, the Petitions are granted in part. Insofar as the Petitions seek relief beyond the scope of this Remand Order, they are dismissed without prejudice. Either Petition may be refiled to seek relief on any issues that may remain relevant following completion of the programmatic NEPA analysis.

II. Background

A. NEPA and CEQ Rules

6. NEPA requires all Federal agencies, including the FCC, to identify and take into account environmental effects when deciding whether to authorize or undertake a major Federal action. Although NEPA does not impose substantive requirements upon agency decision-making, Title I requires Federal agencies to take a ''hard look'' at proposed major Federal actions that may have significant environmental consequences and to disseminate relevant information to the public. *Robertson* v. *Methow Valley Citizens Council,* 490 U.S. 332, 349–50 (1989). Specifically, Section 102(2)(C) of NEPA requires the preparation of a detailed EIS for any ''major Federal action[] significantly affecting the quality of the human environment. * * *'' 42 U.S.C. 4332(2)(C). In preparing the EIS, the action agency must consult with any other Federal agency with jurisdiction or expertise over any environmental impact involved.

7. Section 204 of NEPA, 42 U.S.C. 4344, created the Council on Environmental Quality (CEQ) and entrusted it with oversight responsibility regarding the NEPA activities of Federal agencies. To implement Section 102(2) of NEPA, CEQ promulgated regulations, 40 CFR parts 1500–1508, that ''tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act.'' 40 CFR 1500.1(a). These regulations are ''applicable to and binding on all Federal agencies for implementing the procedural provisions of [NEPA] * * * except where compliance would be inconsistent with other statutory requirements.'' 40 CFR 1500.3. Thus, as mandated by NEPA, each Federal agency issues its own regulations and procedures that implement its NEPA responsibility to identify and account for the environmental impacts of projects it undertakes or authorizes. 42 U.S.C. 4332(2)(B). Such regulations must follow the requirements specified in CEQ regulations. 40 CFR 1507.1, 1507.3.

8. CEQ's regulations direct agencies to identify their major Federal actions as falling into one of three categories. 40 CFR 1507.3(b)(2). The first such category encompasses those actions that normally have a significant environmental impact. These actions always require an EIS. 42 U.S.C. 4332(2)(C). *See also* 40 CFR 1508.11. A second category of agency actions includes those actions that ordinarily may, but do not routinely, have a significant environmental impact. For actions in this category, an agency may conduct an EA in lieu of an EIS. 47 CFR 1.1307. *See also* 47 CFR 1.1308(b). An EA is briefer than an EIS, and its purpose is to determine whether an EIS is required, 40 CFR 1508.9. *See also* 40 CFR 1501.4(b). If an EA shows that a proposed action will have no significant environmental impact, then the agency issues a Finding of No Significant Impact (FONSI), *see* 40 CFR 1508.13, and the proposed action can proceed. However, if an EA indicates that the action will have a significant environmental impact, the agency must proceed with the EIS process.

9. The third category of actions—''categorical exclusions''—are those actions agencies have identified ''which do not individually or cumulatively have a significant effect on the human environment * * * and for which * * * neither an environmental assessment nor an environmental impact statement is required.'' *See* 40 CFR 1507.3(b)(2)(ii). *See also* 40 CFR 1508.4. CEQ regulations require that an agency that chooses to establish categorical exclusions must also provide for ''extraordinary circumstances'' under which a normally excluded action may have a significant effect. CEQ regulations also state that an agency may decide, in its procedures or otherwise, to prepare EAs for specific reasons even when not required to do so. Thus, although categorically excluded actions presumptively are exempt from environmental review,

agency decisions or ''extraordinary circumstances'' may require their review in the form of the preparation of EAs or EISs. 40 CFR 1508.4, 1507(b)(1).

10. One of NEPA's central goals is to facilitate public involvement in agency decisions that may affect the environment. 40 CFR 1500.1(b), 1500.2(d). Section 1506.6 of CEQ's regulations governs public involvement in federal agencies' implementation of NEPA. 40 CFR 1506.6. Section 1506.6(a) provides generally that agencies shall ''make diligent efforts to involve the public in preparing and implementing their NEPA procedures.'' Section 1506.6(b) specifically directs agencies to provide ''public notice of * * * the availability of environmental documents'' to parties who may be interested in or affected by a proposed action. Environmental documents include EAs, EISs, FONSIs, and Notices of Intent (NOIs). 40 CFR 1508.10. For actions ''with effects primarily of local concern,'' Section 1506.6(b)(3) suggests nine ways of providing local public notice, while Section 1506.6(b)(2) discusses methods of providing notice for actions ''with effects of national concern.'' In a memorandum to agencies, the CEQ has explained that ''[a] combination of methods may be used to give notice, and the methods used should be tailored to the needs of particular cases.'' *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations,* 46 FR 18026 March 23, 1981.

B. The Commission's NEPA Process

11. *The NEPA Rules.* CEQ has approved the Commission's rules implementing NEPA, 47 CFR 1.1301 through 1.1319. *See* Petition by Forest Conservation Council, American Bird Conservancy and Friends of the Earth for National Environmental Policy Act Compliance, *Memorandum Opinion and Order,* 21 FCC Rcd 4462, 4468, para. 18 (2006). These rules apply to the processing of antenna structure registration applications, which the Commission has deemed to constitute a major Federal action. Streamlining the Commission's Antenna Structure Clearance Procedure, *Report and Order,* 61 FR 4359 (February 6, 1996) (*Antenna Structure Clearance R&O).* Consistent with CEQ regulations, the Commission's current environmental procedures: (1) Require preparation of an EIS for any proposed action deemed to significantly affect the quality of the human environment, 47 CFR 1.1305, 1.1314, 1.1315, 1.1317; (2) require preparation of an EA for any proposed action that may have a significant environmental effect, 47 CFR 1.1307; and (3) categorically exclude from environmental processing proposed actions deemed individually and cumulatively to have no significant environmental effect, 47 CFR 1.1306.

12. Sections 1.1307(a) and (b) of the Commission's existing rules identify those types of communications facilities that may significantly affect the environment and for which applicants must always prepare an EA that must be evaluated by the Commission as part of its decision-making process. Thus, Commission licensees and applicants must currently ascertain, prior to construction or application for Commission authorization or approval, whether their proposed facilities may have any of the specific environmental effects identified in these rules. 47 CFR 1.1308. The rules currently do not identify facilities that may affect migratory birds as requiring preparation of an EA. The Commission notes, however, that licensees and applicants must consider effects on migratory birds that are listed or proposed as endangered or threatened species under the ESA. *See* 47 CFR 1.1307(a)(3).

13. Under the existing rules, actions not within the categories for which EAs are required under Sections 1.1307(a) and (b) of the Commission's rules ''are deemed individually and cumulatively to have no significant effect on the quality of the human environment and are categorically excluded from environmental processing * * * [e]xcept as provided in Sections 1.1307(c) and (d).'' 47 CFR 1.1306(a). Thus, most antenna structure registrations are categorically excluded from environmental processing. Under Sections 1.1307(c) and (d), the agency shall require an EA if it determines that an otherwise categorically excluded action may have a significant environmental impact. These provisions satisfy Section 1508.4 of CEQ's rules, 40 CFR 1508.4, requiring that ''[a]ny [categorical exclusion] provisions shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.'' Thus, even though a potentially significant effect on migratory birds is not one of the categories of proposed actions identified in Section 1.1307(a) of the rules as requiring an EA, the Commission has on several occasions considered the impact of particular proposed construction projects on migratory birds and, in appropriate circumstances, has required modifications to protect them.

14. *NEPA Review for Towers Subject to ASR.* Section 303(q) of the Communications Act vests the Commission with authority to require the painting and/or lighting of radio towers if and when in its judgment such structures constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation. 47 U.S.C. 303(q). To implement this provision, Part 17 of the Commission's rules requires that, if notification of proposed construction must be provided to the Federal Aviation Administration (FAA) under its rules, then such proposed antenna structures or modifications to antenna structures must also be registered in the Commission's ASR System prior to construction. 47 CFR 17.4(a). Notification to the FAA is generally required for any antenna structure that is over 200 feet in height above ground level or that meets certain other criteria, such as proximity to an airport runway. 14 CFR 77.13; 47 CFR 17.7. Before the antenna structure is registered with the FCC, the tower owner must obtain a No Hazard to Air Traffic Determination (No Hazard Determination) from the FAA. The Commission has determined that the process of FAA clearance and FCC registration effectively constitutes a pre-construction approval process within the Commission's Section 303(q) authority and is therefore subject to the provisions of NEPA and other Federal environmental statutes. *Antenna Structure Clearance R&O,* 61 FR 4359 (February 6, 1996).

15. To register an antenna structure, the antenna structure owner must submit to the Commission a valid ASR application (FCC Form 854, Application for Antenna Registration), along with the No Hazard Determination from the FAA. Because the processing of ASR applications is a major Federal action, the tower owner must certify in response to current Question 38 on Form 854 (the number may change on the revised form) whether the proposed antenna structure may have a significant environmental effect, as defined by Sections 1.1307(a) and (b) of the rules, for which an EA must be prepared. The Commission will not process an ASR application if Question 38 is not answered. A ''no'' answer signifies that none of the circumstances delineated in Sections 1.1307(a) and (b) of the Commission's rules apply to the proposed tower and that an EA is not required to be submitted with the application. In that event, the ASR system verifies against the FAA's database the accuracy of the lighting and marking specifications provided by the applicant. The ASR system then issues an antenna structure registration (Form 854R) without the Commission

having provided prior public notice of the pending ASR application.

16. If the response to Question 38 is ''yes,'' the applicant must submit an EA, along with supporting documentation, when it files the ASR application with the Commission. This means that the application will not be processed until the Bureau has resolved the environmental concerns addressed in the EA. 47 CFR 17.4(c). Such an application is placed on public notice for thirty (30) days, by publication of a notice in the Daily Digest. This process affords interested persons an opportunity to comment on the EA and also, pursuant to Section 1.1307(c), to seek environmental review with respect to effects, such as impact on migratory birds, that do not routinely require preparation of an environmental assessment.

17. Under the Commission's rules, applicants for some proposed towers may be required not only to file an ASR application but also to file service-specific applications. For example, applicants for certain public safety and wireless radio service facility authorizations may be required to file both an ASR application and a site-by-site license application. The license application (Form 601, Application for Wireless Telecommunications Bureau Radio Service Authorization) may be placed on public notice pursuant to the Commission's licensing rules. To date, those applicants have been permitted to choose whether to attach any required EA to FCC Form 854 or FCC Form 601. Broadcast construction applicants are, on the other hand, required to submit the EA, if any is required, with the service-specific application and do not submit a copy of the EA with the associated FCC Form 854. Similarly, while pre-construction approval is generally not required for satellite earth stations, if an EA is required, the applicant must submit a service-specific application on FCC Form 312 (Application for Satellite Space and Earth Station Authorizations) and attach the EA to that application, which is then placed on 30-day public notice, prior to construction. 47 CFR 25.115, 25.151.

18. *Towers Not Subject to ASR.* Licensees may also construct and use towers that do not require registration with the Commission. In the event an EA is required for one of these towers, it is filed with the appropriate license application and processed by the Bureau responsible for licensing that service. If a tower company that is not a licensee or license applicant wishes to construct a tower that does not require antenna structure registration, but does require an EA, that company typically registers the tower by filing an FCC Form 854 as a vehicle for submitting the EA. This Order does not change processing procedures for towers that do not require ASR filings.

19. *Collocations.* Licensees are often able to collocate antennas on existing buildings or structures. Under the Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, 47 CFR part 1, appendix B, collocation is defined as ''the mounting or installation of an antenna on an existing tower, building or structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.'' Because collocations are unlikely to have environmental effects, with limited exceptions they are not subject to environmental processing, except upon a determination by the processing Bureau under Section 1.1307(c) or (d), based on its examination of a petition submitted by an interested person or its own motion, that the proposed collocation may significantly affect the environment. 47 CFR 1.1306 (Note 1); *see* 47 CFR 1.1307(c)–(d). The procedures adopted in this Order will apply only to certain collocations that may have a significant effect on migratory birds because they involve a substantial increase in size of a registered tower.

C. The Gulf Petition and Litigation

20. *The Gulf Petition.* Alleging that the Gulf Coast is critically important for migratory birds, Forest Conservation Council, American Bird Conservancy, and Friends of the Earth (petitioners) filed in 2002 a ''Petition for National Environmental Policy Act Compliance'' asking the Commission to, *inter alia:* (1) Implement public participation procedures set forth in 40 CFR 1506.6 by providing notice and opportunity to comment on all proposed ASR applications for the Gulf Coast region; (2) commence preparation of an EIS evaluating, analyzing, and mitigating the direct, indirect, and cumulative effects of all past, present and reasonably foreseeable antenna structure registrations on migratory birds in the Gulf Coast region; and (3) initiate formal Section 7 ESA consultation with FWS with respect to the impact of the Commission's ASR decisions on endangered and threatened species in the Gulf Coast region. Forest Conservation Council, American Bird Conservancy, and Friends of the Earth, Petition for National Environmental Policy Act Compliance, submitted August 26, 2002 (Gulf Petition).

21. *The Gulf Memorandum Opinion and Order.* In its 2006 *Memorandum Opinion and Order* addressing the Gulf Petition, the Commission dismissed that petition in part and denied it in part. Petition by Forest Conservation Council, American Bird Conservancy and Friends of the Earth for National Environmental Policy Act Compliance, *Memorandum Opinion and Order,* 61 FR 4359 (February 6, 2006) (*Gulf Memorandum Opinion and Order*). Of relevance here, the Commission declined to implement new public notice procedures, declined to commence a programmatic EIS, and denied the request to initiate formal Section 7 consultation on the cumulative effects that towers in the Gulf Coast region have on endangered and threatened species. The Commission also deferred to the ongoing Migratory Birds proceeding petitioners' request that it take action under the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703–712, to reduce intentional and unintentional takes of migratory birds.

22. *The American Bird Conservancy Decision.* In *American Bird Conservancy,* the court affirmed the Commission's deferral of the MBTA issues already under consideration in the ongoing nationwide Migratory Birds proceeding. However, it vacated the NEPA and ESA portions of the *Gulf Memorandum Opinion and Order* as well as the Commission's decision not to implement new public notice procedures.

23. First, the court rejected the Commission's dismissal of petitioners' request for an EIS. The court held that neither the lack of specific evidence concerning the impact of towers on the environment, nor the lack of consensus among scientists regarding the impact of communications towers on migratory birds, was sufficient to render a NEPA analysis unnecessary. Rather, because the court found there is no real dispute that towers *may* have a significant environmental impact, it directed that the Commission address petitioners' request for a programmatic EIS based on a less stringent threshold for NEPA analysis. Although petitioners had requested an EIS, the court stated that the Commission could initially prepare an EA in order to determine whether an EIS is required.

24. Second, the court vacated the Commission's refusal to engage in programmatic consultation with FWS under the ESA. The court remanded the issue, holding that the Commission had failed to describe what kind of showing, short of petitioners conducting an EIS themselves, could demonstrate sufficient environmental effects to

justify the programmatic consultation sought by petitioners.

25. Third, the court ordered the Commission on remand to determine how it will provide notice of pending tower registration applications that will ensure meaningful public involvement in implementing NEPA procedures. The court noted that while the Commission's rules permit interested persons to seek environmental review of a particular action otherwise categorically excluded from environmental processing, its process confers ''a hollow opportunity to participate in NEPA procedures'' because ''the Commission provides public notice of individual tower applications only *after* approving them * * * [and] [i]nterested persons cannot request an EA for actions * * * already completed.'' The court noted the ''suggest[ion] during oral argument that a simple solution would be for the Commission to update its Web site when it receives individual tower applications.''

D. Migratory Birds Rulemaking Proceeding

26. Meanwhile, the Commission had a related proceeding ongoing—the Migratory Birds rulemaking. On August 20, 2003, the Commission had issued the *Migratory Birds NOI* ''to gather comment and information on the impact that communications towers may have on migratory birds.'' Effects of Communications Towers on Migratory Birds, *Notice of Inquiry,* WT Docket No. 03–187, 68 FR 53696 (September 12, 2003) (*Migratory Birds NOI*). While the Gulf Petition focused on the environmental effects of registered towers in the Gulf Coast region, particularly with respect to migratory birds, the *Migratory Birds NOI* (and the subsequent rulemaking notice) addressed the effects of communications towers on migratory birds nationwide. In response to the *Migratory Birds NOI,* the Commission received a number of comments and reply comments that referred to studies of past incidents of migratory birds colliding with communications towers. To help the Commission evaluate these studies, the Commission retained Avatar Environmental, LLC (Avatar), an environmental risk consulting firm. After reviewing the scientific studies referenced in the comments and reply comments, Avatar submitted a report of its findings. *See* Notice of Inquiry Comment Review Avian/Communication Tower Collisions, Final, Prepared for Federal Communications Commission, by Avatar Environmental, LLC, WT Docket No. 03–187 (filed December 10, 2004) (Avatar Report).

27. After reviewing the comments and the Avatar Report, the Commission in 2006 issued the *Migratory Birds NPRM* seeking comment on whether it should adopt regulations specifically for the protection of migratory birds nationwide. Effects of Communications Towers on Migratory Birds, *Notice of Proposed Rule Making,* WT Docket No. 03–187, 71 FR 67510 November 22, 2006 (*Migratory Birds NPRM*). In particular, the Commission sought comment on scientific and technical issues relevant to the environmental effects of communications towers on migratory birds, on its authority and responsibility to adopt regulations specifically for the protection of migratory birds, and on what scientifically supported measures it could take to reduce any such impacts. It tentatively concluded that its obligation, under NEPA, to identify and to take into account the environmental effects of actions that it undertakes may provide a basis for the Commission to make the requisite public interest determination under the Communications Act to support regulations specifically for the protection of migratory birds. The Commission also tentatively concluded that, for communications towers subject to its Part 17 rules, the use of medium intensity white strobe lights for nighttime conspicuity (i.e., visibility) is to be considered the preferred system over red obstruction lighting systems to the maximum extent possible without compromising safety. Finally, it specifically sought comment on whether to amend Section 1.1307(a) to routinely require environmental processing with respect to migratory birds and, if so, whether such revisions should apply to all new tower construction or only to antenna structures having certain physical characteristics deemed most problematic in terms of potential environmental impacts on migratory birds.

28. The Commission received more than 2400 comments and reply comments in response to the *Migratory Birds NPRM.* In this Order, the Commission does not take final action in the Migratory Birds rulemaking, but rather defers such action until it is able to consider the results of the programmatic EA and any subsequent EIS. The Commission does, however, consider the record in that proceeding in adopting an interim processing measure to reduce potential impacts on migratory birds pending completion of the environmental analysis.

E. The Rulemaking Petitions and the Memorandum of Understanding

29. *Petitions for Expedited Rulemaking.* On May 2, 2008, CTIA—The Wireless Association, the National Association of Broadcasters, the National Association of Tower Erectors, and PCIA—The Wireless Infrastructure Association (the Infrastructure Coalition) filed the Infrastructure Coalition Petition. The Infrastructure Coalition Petition asks the Commission to respond to the remand in *American Bird Conservancy* by initiating a rulemaking to institute a notice, comment, and approval process for ASR applications modeled after the process for applications for assignments and transfers of authorizations. According to the Infrastructure Coalition, the assignment and transfer process rules were designed to minimize delays and reduce transaction costs, and these goals apply to processing ASR applications. Further, the Infrastructure Coalition Petition asks the Commission to apply Section 1.939 of the Commission's rules, 47 CFR 1.939, which establishes criteria for filing a petition to deny, to objections to proposed ASR structures in order to prevent frivolous objections.

30. Ten parties filed comments on the Infrastructure Coalition Petition. Comments from communications providers and tower companies generally support the Infrastructure Coalition Petition, with some differences as to certain details. These commenters assert that the Infrastructure Coalition's proposed rules reasonably balance the goals of rapid deployment of wireless infrastructure and public involvement, in compliance with the court's decision. Commenters representing environmental protection groups, however, reject the rules and procedures proposed by the Infrastructure Coalition as not ensuring meaningful public involvement, and they ask for the cessation of registration of all antenna structures until the Commission complies with NEPA.

31. On April 14, 2009, American Bird Conservancy, Defenders of Wildlife, and National Audubon Society (Conservation Groups) filed the Conservation Groups Petition. The Conservation Groups Petition asks the Commission to adopt new rules on an expedited basis to comply with NEPA, the MBTA, and the court's mandate in *American Bird Conservancy.* It asks the Commission to: amend the NEPA regulations to ensure that only Commission actions that have no significant environmental effects individually or cumulatively are categorically excluded; prepare a

programmatic EIS addressing the environmental consequences of its ASR program on migratory birds, their habitats, and the environment; promulgate rules to clarify the roles, responsibilities, and obligations of the Commission, applicants, and non-Federal representatives in complying with the ESA; consult with FWS on the ASR program regarding all effects of antenna structures on endangered and threatened species; and complete the rulemaking in WT Docket No. 03–187 to adopt measures to reduce migratory bird deaths in compliance with the MBTA. Citing 12 sources by 14 authors, the Conservation Groups Petition argues that communications towers have impacts on migratory birds that are both demonstrable and avoidable. The Conservation Groups Petition also points out specific instances in which FWS has requested that the Commission undertake a programmatic EIS with regard to the ASR process or otherwise requested that the Commission take action to mitigate the impact of communications towers on migratory birds.

32. The Commission received 19 comments and four replies in response to the Conservation Groups Petition. Those conservations organizations that filed comments generally support the Conservation Groups Petition. Opponents of the Conservation Groups Petition argue that communications towers do not have a significant environmental impact on migratory birds, and they challenge the validity of the estimates and evidence submitted in the Conservation Groups Petition. On reply, the Conservation Groups cite additional studies that they state establish a link between bird deaths and towers.

33. *Memorandum Of Understanding.* On May 4, 2010, the Infrastructure Coalition and the Conservation Groups filed a Memorandum of Understanding (MOU) setting forth their joint proposal as to how the Commission could best fulfill its environmental responsibilities under NEPA with respect to towers during the interim period while it considers permanent rule changes to implement the court's decision in *American Bird Conservancy.* Under this joint proposal, ASR applications for new towers taller than 450 feet above ground level (AGL) would require an EA for avian effects and a public notice and an opportunity to comment. New towers of a height of 351 to 450 feet AGL or ASR applications involving a change of lighting system from a more preferred to a less preferred FAA Lighting Style would not initially require an EA based on avian concerns, but would be placed on public notice, and the Commission would determine, after reviewing the application and any comments filed in response to the public notice, whether to require an EA. Under the MOU, no EA would be required for ASR applications for new towers with a height of 350 feet AGL or less, replacement towers, minor applications, and lighting system changes from a less preferred to a more preferred FAA Lighting Style. The parties to the MOU are divided as to whether public notice should be required for these applications.

F. The Programmatic Environmental Assessment

34. In *American Bird Conservancy,* the court vacated the Commission's denial of the Gulf Petition's request for a programmatic EIS. In compliance with the court's decision, Commission staff, in September 2010, began work on a nationwide programmatic environmental assessment, which will provide a comprehensive analysis upon which to base the Commission's consideration of the environmental effects of future proposed towers. The programmatic EA will cover the entire United States, not merely the Gulf Coast, because migratory bird pathways are dispersed throughout the continental United States, and because similar environmental effects may occur nationwide. On August 26, 2011, the Wireless Telecommunications Bureau released and sought comments on a draft programmatic EA. Wireless Telecommunications Bureau Seeks Comment and Announces Public Meeting on its Draft Programmatic Environmental Assessment of the Antenna Structure Registration Program, *Public Notice,* WT Docket Nos. 08–61, 03–187, 76 FR 54422 (September 1, 2011).

35. The programmatic EA will provide the basis for the agency to determine whether an EIS is warranted. The Commission will commence the preparation of a programmatic EIS if the programmatic EA demonstrates that ''*any* 'significant' environmental impacts might result from the proposed agency action. * * *'' *American Bird Conservancy,* 516 F.3d at 1034. Otherwise, the Commission will make a Finding of no Significant Impact and will terminate the programmatic environmental review. *See* 47 CFR 1.1308(d). As set forth in the draft programmatic EA, in determining whether the programmatic EA supports a FONSI or whether an EIS is required, the Commission will consider whether the evidence enables it to identify specific tower characteristics (*e.g.,* tower height, structure, lighting, or location) that are likely to cause an adverse environmental impact on migratory birds, whether requiring site-specific environmental reviews for such towers would sufficiently address any adverse environmental impact that registered towers would otherwise have, and whether there are any other appropriate measures that may substantially mitigate and minimize any adverse environmental impacts.

36. In response to the court's remand and in conjunction with the programmatic EA, the Commission also recently initiated programmatic consultation with FWS under Section 7(a)(1) of the ESA, 16 U.S.C. 1536(a)(1), regarding the effects of registered towers on threatened and endangered species and designated or proposed critical habitats. The Commission already incorporates and implements in Section 1.1307(a) of the Commission's rules its responsibility, under Section 7 of the ESA, to ensure, in consultation with the Secretary of the Interior, that individual proposed Commission actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. However, the court in *American Bird Conservancy* additionally required the Commission to address what environmental showing would require formal programmatic consultation with FWS over the cumulative effects of registered towers. FWS recommended, and the Wireless Telecommunications Bureau agreed, to proceed by means of a conservation review under Section 7(a)(1). Through this conservation review, FWS will evaluate the degree to which the ASR Program contributes to furthering the purposes of the ESA, and make possible recommendations to improve or enhance this contribution. The conservation review will also identify any subsequent formal consultation under Section 7(a)(2) that may be required for tower sites, either individually or in appropriate groupings. The conservation review will focus on procedures instituted at a programmatic level to promote the conservation of listed species and to avoid or minimize any adverse effects of the ASR program to these species or their habitats.

III. Discussion

37. Below, the Commission first describes a new notice regime to afford members of the public an opportunity to comment on the environmental effects of prospective ASR applications. The Commission then discusses an interim

procedural requirement under which an EA will be filed for all proposed registered towers over 450 feet in height.

38. The Commission has consulted with CEQ regarding these rules and procedures as required under CEQ's rules. 40 CFR 1507.3(a). Under CEQ's rules, before adopting procedures implementing NEPA an agency must publish its proposed procedures in the **Federal Register** for comment, and CEQ must determine that the procedures conform with NEPA and CEQ's regulations. 40 CFR 1506.6(a), 1507.3(a). In compliance with these rules, the Wireless Telecommunications Bureau issued a Public Notice inviting comment on the draft rules and interim procedures. Wireless Telecommunications Bureau Invites Comment on Draft Environmental Notice Requirements and Interim Procedures Affecting the Antenna Structure Registration Program, WT Docket Nos. 08–61, 03–187, *Public Notice,* 76 FR 18679 (April 5, 2011) (*Draft Rules Public Notice*). Thirteen formal comments were received in response to the *Draft Rules Public Notice.* In addition, Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, on behalf of its affected clients, submitted a Petition for Reconsideration of the *Draft Rules Public Notice* (Blooston Commenters Petition). The Commission dismisses the Blooston Commenters Petition because the *Draft Rules Public Notice* is not a final action subject to reconsideration. *See* 47 CFR 1.106(a)(1). Blooston Commenters argue that the *Draft Rules Public Notice* represents a final decision not to follow notice and comment procedures that it says are required under the Administrative Procedure Act (APA), 5 U.S.C. 553, and Sections 1.412(a)(1) and 1.415(c) of the Commission's rules, 47 CFR 1.412(a)(1), 1.415(c). However, the APA requires these procedures as a precondition for adopting certain rules. Since the *Draft Rules Public Notice* adopted no rules, it does not constitute a final action. Nevertheless, the Commission treats the Blooston Commenters Petition as comments on the *Draft Rules Public Notice* and addresses its arguments below.

39. The Commission's final rules take into account the comments submitted in response to the *Draft Rules Public Notice.* None of the comments addresses the conformity of the environmental notice and interim processing rules with NEPA and CEQ's regulations. On August 1, 2011, CEQ advised that the rules the Commission is adopting in this Order conform with NEPA and CEQ's regulations.

A. The Environmental Notification Process

40. In this Order, the Commission adopts public notice rules and establishes a pre-ASR filing environmental notification process so that members of the public have an avenue for raising environmental concerns, and the agency has a mechanism for addressing those concerns, before an antenna structure registration application is completed and filed with the Commission. We thereby provide a meaningful opportunity for interested parties to seek an EA for actions that do not ordinarily require an EA, as required by the court in *American Bird Conservancy.*

41. Under the process that the Commission adopts today, described in detail below and in a Public Notice that will be issued by the Wireless Telecommunications Bureau before the environmental notification process becomes operational, each prospective applicant for a new tower that requires antenna structure registration, or for a modification of a registered tower that is substantial enough to potentially have a significant environmental impact, must initially submit into the ASR system a partially completed FCC Form 854 that includes information about the proposed antenna structure but is not yet complete for filing. This will consist substantially of information that is already required on Form 854, augmented to include the type of tower structure and the anticipated lighting. The applicant must also provide local notice of its proposed tower through publication in a newspaper or other appropriate means, such as by following the local zoning public notice process. Applicants may provide local notice under both this process and the Commission's procedures implementing Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f, through a single publication. *See* 47 CFR part 1, appendix C, Section V.

42. After local public notice has been provided, the Commission will post the partially completed FCC Form 854 on its ASR Web site in searchable form for 30 days. Members of the public will have an opportunity to file a request for further environmental review (Request) of the proposed tower during this 30-day period. Oppositions will be due 10 calendar days after expiration of the time for filing Requests. Replies will be due 5 business days after expiration of the time for filing oppositions. Oppositions and replies must be served on the parties to the proceeding.

43. Upon completion of the 30-day notice period, the Commission staff, after reviewing any Requests, will notify the applicant whether an EA is required under Section 1.1307(c) or (d) of the Commission's rules. If no EA is required based on the partially completed Form 854 and any Requests, and if the applicant has determined that no EA is otherwise required under Section 1.1307(a) or (b), it may then update and file Form 854 certifying that the tower will have no significant environmental impact. At this point, if all other required information has been provided, the Form 854 will be deemed complete and can be processed accordingly.

44. The Commission recognizes that cases may arise that involve emergency situations, such as where temporary towers need to be built quickly to restore lost communications. Such situations often require grants of special temporary authority (STAs). In such cases, upon an appropriate showing and at the request of the applicant, the processing Bureau may waive or postpone this notice requirement. The Bureau shall ordinarily require in such cases that notice be provided within a short period after authorization or construction, unless the Bureau concludes in a particular case that provision of such notice would be impracticable or not in the public interest. In appropriate circumstances, where a temporary facility constructed in an emergency situation will be replaced by a permanent tower, environmental notification for the temporary and permanent towers may be combined.

45. In addition, after the effective date of these rules, the pre-application process will also become the procedural vehicle for filing and reviewing EAs for registered towers that require an EA. The applicant either may include an EA when it first initiates the environmental notification process if it has determined that the tower meets one of the criteria set forth in Section 1.1307(a) or (b) of the Commission's rules, or it may subsequently submit an EA if the applicant or the Commission later determines that an EA is necessary. The EA will then be posted on the ASR Web site, and members of the public will have the opportunity to object in much the same manner as they can file petitions to deny ASR applications filed with EAs today. However, local notice will be required only once for any tower unless there is a change in location, significant increase in height, or other change in parameters that may cause the tower to have a greater environmental impact. After considering the EA and any Requests, the Commission will

either issue a FONSI, require amendments to the EA, or determine that an EIS is needed. Upon issuance of a FONSI, the applicant may complete the Form 854 filing and certify no significant environmental impact.

46. The Commission takes these actions pursuant to its ''wide discretion in fashioning its own procedures'' to implement its environmental obligations. *American Bird Conservancy,* 516 F.3d at 1035. Because the Commission is only changing its procedures governing the submission of certain applications, these rule changes qualify for the procedural exception to the APA's requirements of notice and an opportunity for public comment. 5 U.S.C. 553(b)(A). For the same reason, the rules and interim procedures adopted herein do not require the preparation of a Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act (RFA). 5 U.S.C. 604(a). ''[T]he 'critical feature' of the procedural exception 'is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.' '' *JEM Broadcasting Co.* v. *FCC,* 22 F.3d 320, 326 (D.C. Cir. 1994). In other words, whether or not a rule has a ''substantial impact,'' it qualifies for the procedural exception where, as here, it does not ''purport to regulate or limit [parties'] substantive rights.'' *Public Citizen* v. *Dep't. of State,* 276 F.3d 634, 640 (D.C. Cir. 2002); *James V. Hurson Associates, Inc.* v. *Glickman,* 229 F.3d 277, 281 (D.C. Cir. 2000). For example, in *JEM Broadcasting Co.,* the Court of Appeals held that the Commission's ''hard look'' rules requiring dismissal of defective applications after the expiration of a fixed filing period with no opportunity to amend were procedural rules that were exempt from the notice and comment requirements because the rules ''did not change the *substantive standards* by which the FCC evaluates license applications.'' *JEM Broadcasting Co.* v. *FCC,* 22 F.3d at 327.

47. Like the ''hard look'' rules in *JEM Broadcasting Co.,* the public notice rules adopted in this Order govern the processing of certain types of applications without affecting the substantive standards by which those applications are evaluated. The public notice rules do not ''put[ ] a stamp of [agency] approval or disapproval on a given type of behavior'' or ''encode[ ] a substantive value judgment.'' *Chamber of Commerce of U.S.* v. *U.S. Dep't of Labor,* 174 F.3d 206, 211 (D.C. Cir. 1999); *Public Citizen* v. *Dep't of State,* 276 F.3d at 640. Instead, they merely require a tower proponent to notify the Commission and the local community of information about its proposal in advance of filing the completed ASR application with the Commission. The tower proponent will do so by submitting a partially completed ASR application consisting mostly of information that is already required on the existing Form 854. In the case where an environmental notification has an EA attached, the information is substantially the same as currently required for EAs filed with ASR applications. Although Blooston Commenters and National Telecommunications Cooperative Association state that the draft rules afford third parties new substantive rights to receive notice of ASR applications and to request further environmental processing, the right of the public to request environmental processing is already established in the Commission's rules. The notice requirements that the Commission adopts only enables members of the public more fully to exercise their existing rights of participation, consistent with the D.C. Circuit's opinion in *American Bird Conservancy.* For similar reasons, the Commission rejects Blooston Commenters' argument that notice and comment rulemaking, including an opportunity to file reply comments, is required under Sections 1.412(a)(1) and 1.415(c) of the Commission's rules. Section 1.412(b)(5) of the rules expressly states: ''Rule changes (including adoption, amendment, or repeal of a rule or rules) relating to the following matters will ordinarily be adopted without prior notice: * * * (5) Rules of Commission organization, procedure, or practice.'' The rule changes adopted in this Order relate to matters of Commission procedure, and the Wireless Telecommunications Bureau sought comment on draft rules not due to APA requirements, but to comply with Section 1507.3 of CEQ's rules. Therefore, these rule changes are outside the scope of Section 1.412(a)(1) as well as Section 1.415.

48. The Commission also notes that the record in this proceeding includes two petitions for expedited rulemaking, numerous pleadings in response to two Public Notices seeking comment on the two petitions, and several *ex parte* filings. In addition, in the *Draft Rules Public Notice,* the Wireless Telecommunications Bureau invited and received public comment on draft rules and interim procedures in this proceeding, as required by CEQ's rules. As under the APA's notice-and-comment procedures, parties have had a full opportunity to participate in the Commission's decisionmaking process. Furthermore, the Commission takes the suggestions in the petitions, as well as other filings in this proceeding, into account in this Order.

49. In this Section, the Commission begins by setting out the actions subject to the new environmental notification process. Second, the Commission discusses the timing of the environmental notification process. Third, the Commission explains its decision to require both local and national notice. Fourth, the Commission discusses the timing and pleading standards governing Requests for further environmental review. Fifth, the Commission discusses applications that require a service-specific application in addition to FCC Form 854. Finally, the Commission discusses the treatment of applications that are pending on the effective date of the new environmental notification rules and procedures.

1. Actions Subject to Notice

50. *National applicability.* The environmental notification process adopted herein will apply throughout the nation regardless of the geographic location of the proposed antenna structure for which an ASR application must be filed. Although the Gulf Petition and the court's resulting decision applied specifically to communications towers in the Gulf Coast region, the logic of the court's analysis, which hinged on the Commission's failure to provide public notice prior to grant of pending ASR applications, is not confined to that region. The concern that the current notice regime effectively deprives interested persons of the opportunity conferred by Section 1.1307(c) encompasses any proposed tower (and some types of modifications to an existing tower) that is subject to registration under the Commission's part 17 rules. The Commission finds no basis to limit the environmental notification process adopted herein to the Gulf Coast towers at issue in the court case.

51. *Types of actions subject to notice.* Under the new environmental notification process, notice will be required for new towers and modifications that could have a significant environmental impact, but not for administrative changes and modifications that are unlikely to have a significant environmental impact. The environmental notification process is necessary to effectuate fully the opportunity conferred by Section 1.1307(c) for interested persons to allege

that an EA should be prepared for an otherwise categorically excluded ASR application due to ''circumstances necessitating environmental consideration in the decision-making process.'' The notice provided through this process also serves to facilitate meaningful public participation in the NEPA process for proposed towers that require an EA. The environmental notification process must therefore be completed for all types of ASR applications that could potentially have a significant environmental impact.

52. Consistent with this principle, the Commission applies the environmental notification process to all ASR applications for new towers (except as described in paragraph 57, *infra*). The Commission rejects the Infrastructure Coalition's proposal not to require public notice for an ASR application for a tower 350 feet or less in height for which the applicant believes an EA is not required, as well as other suggestions to exclude towers from the notice requirement based on their height or lack of lighting. While the Commission recognizes that shorter towers are less likely to have significant environmental effects, including effects on migratory birds, than taller towers, nothing in the court's opinion, NEPA, or CEQ's implementing rules would support dispensing with public notice, even on an interim basis, for any ASR action that reasonably might have a significant environmental impact. Based on currently available evidence, the Commission cannot ignore the possibility that a registered tower over 200 feet in height, or a tower under 200 feet that requires FAA notification, may have a significant environmental impact that is not otherwise captured in the Commission's rules. The Commission therefore applies the environmental notification requirement to registered towers under 350 feet in height. Although the Commission decides that such towers will be placed on public notice, the Commission contemplates that a particularly clear showing would be required to demonstrate that such towers may have effects on migratory birds. For similar reasons, the Commission also declines to adopt exemptions for facilities used in connection with distributed antenna system (DAS) networks that otherwise require registration, or for state-owned towers under 450 feet in height AGL that are used for public safety purposes. While Virginia State Police suggests security concerns about identifying the specific locations of such towers, the Commission notes that the coordinates of these towers are public information in the ASR database and that local notice of these proposed towers is already required for purposes of NHPA compliance under the Nationwide Programmatic Agreement, 47 CFR part 1, appendix C, sections V.B., V.C. No commenter expresses concern about those existing disclosures.

53. FCC Forms 854 that are submitted for purely administrative purposes or to report modifications of a nature that do not have a potentially significant environmental effect will not be subject to the environmental notification process. Thus, where an applicant is required to submit an FCC Form 854 only for notification purposes, such as to report a change in ownership or contact information, the dismantlement of a registered tower, tower repair, replacement of tower parts, or any modification that does not involve the physical structure, lighting, or geographic location of a registered antenna structure, the applicant will not have to complete the environmental notification process prior to submitting the Form 854. Instead, the applicant will be able to indicate that it is submitting the application form only to effect an administrative change or notification, for which the pre-application environmental notification process is not required.

54. In the case of replacement towers or modifications to existing towers, including collocations on existing towers or other structures, the applicability of the environmental notification process will depend upon the nature of any change to the existing structure. The MOU defines a Replacement Tower for which public notice should not be required as a communications tower the construction of which does not involve a substantial increase in size to the tower it is replacing, as defined in Section III.B. of the Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (NPA), 47 CFR part 1, appendix C, or construction or excavation more than 30 feet beyond the existing tower property. Consistent with this recommendation, as an interim measure pending completion of its programmatic environmental analysis, the Commission will not require the environmental notification process for any replacement tower at the same location as an existing tower, not involving a change in lighting, so long as it does not involve a substantial increase in size under Section III.B of the NPA or construction or excavation more than 30 feet beyond the tower property. The Commission considers a replacement tower located less than one second longitude and latitude from an existing tower which does not require a new aeronautical study with an FAA determination to be at the same location. Similarly, the Commission will not require notice where an antenna is being placed on an existing tower or non-tower structure and the placement of the antenna does not involve a substantial increase in size or excavation more than 30 feet beyond the property. If a proposed tower replaces another tower but involves a substantial increase in size or construction or excavation more than thirty feet beyond the tower property, it is not exempted from the environmental notification process as a replacement tower. Additionally, where an EA is required to be filed for a replacement tower under Section 1.1307(a) or (b) of the Commission's rules or if the Bureau determines that an EA is required under Section 1.1307(c) or (d) of the Commission's rules, such a tower is not exempted from the environmental notification process.

55. The notice regime for ASR applications that involve changes in lighting to existing towers or replacement towers will depend on the nature of the lighting change. The parties to the MOU developed a ranking of FAA Lighting Styles based on their likely effect on migratory birds and recommended that public notice be required for a change to a less preferred but not to a more preferred FAA Lighting Style. However, recommendations from the Department of Interior Office of Environmental Policy and Compliance and FWS based on recent scientific literature strongly suggest that L–810 steady-burning lights pose the greatest danger of migratory bird mortality and that the differences among styles of flashing or blinking lights are not statistically significant. Therefore, the Commission declines Blooston Commenters' proposal to base decisions regarding environmental processing on whether red or white lights are used. There is insufficient evidence in the record that the color of lighting is a critical factor in determining avian mortality. In addition, Conservation Groups recommend that the Commission verify the continuing accuracy of the order of tower lighting styles specified in the MOU. Furthermore, the FAA may soon consider changes to Advisory Circular AC 70/7460 that would permit use of red flashing or blinking lights without steady-burning L–810s. In these circumstances, pending completion of its programmatic environmental

analysis, the Commission will replace the ranking of FAA Lighting Styles in the MOU with a three-tiered system, which ranks styles from most preferred to least depending on whether they employ: (1) No lights; (2) no red steady lights; or (3) red steady lights. The ranking focuses on use of red steady lights because none of the FAA Lighting Styles use white steady lights, only white medium intensity or high intensity flashing lights. The environmental notification process will not be required where the lighting is changed to a lighting style that is more preferred or within the same tier of this ranking system, but will be required where the lighting is changed to a less preferred lighting style. As recognized in the MOU, any change in lighting must be consistent with the applicable version of FAA Advisory Circular AC 70/7460, FAA policies, and local zoning requirements, whether the change is to a less preferred lighting style or to a more preferred lighting style. Furthermore, use of high intensity white lights in a residentially zoned neighborhood requires an EA under the Bureau existing rules. 47 CFR 1.1307(a)(8).

56. Where information pertaining to a prospective antenna structure registration is amended after environmental notification but prior to grant of an ASR application, the Commission generally will require a new environmental notification only if the amendment is of a nature that would have required environmental notification in the context of an application for replacement or modification of an existing tower. To prevent abuse, however, the Commission will require the applicant to provide a new environmental notification to the public for any amendment that increases the proposed tower height, even if it does not constitute a substantial increase in size.

57. *Exception for certain towers reviewed by other Federal agencies.* The Commission provides a very limited exemption from the environmental notification process for antenna structures to be located on Federal land. CEQ regulations provide for the designation of a lead agency and one or more cooperating agencies when more than one Federal agency is involved in a proposed action. *See* 40 CFR 1508.16 (lead agency) and 40 CFR 1508.5 (cooperating agency). Consistent with these regulations, Section 1.1311(e) of the Commission's rules provides that an EA need not be submitted to the Commission if another Federal agency has assumed responsibility for determining whether the facility will have a significant environmental effect and, if it will, for invoking the EIS process. For example, if a proposed facility that requires registration in the ASR system is to be located on Federal land, the landholding agency ordinarily functions as the lead agency and the Commission does not perform an environmental review except as necessary to ensure that the EA prepared by the lead agency satisfies the Commission's responsibility. The Commission cautions that the exemption is limited in scope only to towers located on Federal land, for which the landholding agency routinely assumes lead agency responsibilities. The exemption will not routinely apply in other situations where proposed antenna structures must secure environmental clearance from other Federal agencies. In those circumstances, the Commission cannot assume the other agency to be the lead agency. Rather, as part of the process of reviewing a Request filed in response to the pre-application public notice, the Commission will consider whether ongoing NEPA review of the proposed antenna structure by another Federal agency relieves the applicant of having to submit an EA to the Commission under Section 1.1311(e). The Commission delegates to the Wireless Telecommunications Bureau authority to enter into agreements with other Federal agencies that would designate the other agency as the lead agency for specified categories of actions and thereby obviate the need for the Commission's environmental notification process. We decline to adopt an exemption from notice requirements for towers that have already been reviewed by FWS, as requested by Verizon Wireless. The Commission's environmental notification process and environmental processing are not limited to concerns that would be addressed by FWS.

58. *Limitation to towers subject to antenna structure registration.* The Commission clarifies that the environmental notification process will be applicable only to towers that are registered pursuant to Part 17 of its rules, including towers constructed by non-licensee tower companies that do not require FAA notification but that are registered as the vehicle for filing an EA. The Commission notes, however, that towers that are not subject to registration under Part 17 of the rules must comply with the Commission's environmental rules. Objections based on environmental considerations to such non-ASR applications remain subject to the petition to deny standard specified in Section 1.1313(a). The Commission will also continue to entertain informal objections to such construction based on environmental considerations pursuant to Section 1.1313(b).

2. Timing of Environmental Notice

59. Applicants will be required to complete environmental notification before filing their completed ASR applications, and may do so before receiving the FAA's No Hazard Determination. (A prospective applicant that submits its environmental notification information before receiving a No Hazard Determination should specify the lighting that it expects will be prescribed for the tower. In the event the FAA specifies a less preferred lighting style, it will have to provide a second notice with the corrected information.) Thus, the environmental notification process constitutes a notification, not a certification, and submission of the partially completed Form 854 without an EA is not a representation to the Commission that the tower will have no significant environmental effects. This certification will be required when the environmental notification process is complete and the applicant files its completed FCC Form 854. Completing the pre-ASR filing environmental notification process as an initial step before a complete ASR application can be filed with the Commission ensures that interested persons have a timely opportunity to participate in a manner that can inform the Commission's decision-making with respect to an individual ASR application. This is also consistent with Section 1501.2 of the CEQ regulations, which generally directs that the Federal agency commence the NEPA process as early as possible and before there has been any inadvertent, irretrievable commitment of resources. 40 CFR 1501.2(d)(3). Earlier completion of the notification process further serves the public interest because it requires less change to the automated ASR system, upon which the FAA currently relies to ensure air navigation safety, and that has operated for more than a decade efficiently and without material error. Moreover, from a processing standpoint, applicants can complete the notice process simultaneously with other processes, including environmental reviews that may require consultation with other Federal agencies, obtaining the FAA No Hazard Determination, and local zoning. Therefore, the environmental notification process will not ordinarily cause additional delays unless environmental issues are raised.

60. In addition, under the new process EAs for proposed registered towers will be filed, made available for public comment, and reviewed prior to filing of the ASR application. Accordingly, the 30-day comment period will be announced on the Commission's ASR Web site instead of through a notice published in the *Daily Digest.* To avoid any confusion, for an initial period of six months, the Commission will place a note in the *Daily Digest* weekly advising that notice of all proposed registered towers, along with any associated EA, is now provided on the Commission's ASR Web site. Otherwise, the processing of EAs for registered towers will be substantially the same as today. Because the environmental notification process the Commission adopts today expressly seeks environmental comments and provides pertinent details of the proposed tower, it makes it easier for interested members of the public to access pertinent information about an EA, and thus better comports with the objectives underlying NEPA than the non-specific Public Notices that currently are published in the *Daily Digest.* Moreover, apart from encouraging public involvement, a uniform system of environmental processing for all ASR applications, whether or not EAs are required pursuant to Section 1.1307(a) or (b), will be easier for the Commission to administer and less confusing to applicants.

3. National and Local Notice

61. The Commission requires both national and local notice for towers that must be registered in the ASR system in order fully to inform all parties that may be interested in or affected by the environmental consequences of a proposed tower. The Commission recognizes that the environmental effects of a specific proposed tower construction may be of national concern, of local concern, or of both national and local concern. Conservation groups and some industry parties have urged that the Commission adopt national notice, while other industry commenters have suggested that the Commission adopt local notice. Their reasons in favor of one approach or another are discussed here, but in effect those reasons support using both forms of notice.

62. National notice provided online at the Commission's Web site was an approach suggested by the *American Bird Conservancy* court. The Commission finds that the ASR Web site is an efficient, efficacious means of providing notice to agencies and persons outside of the local community, including national environmental groups, that may have regional or national perspectives as to the environmental values of proposed antenna structures. In particular, national notice will aid in informing bird watchers who are not located near a proposed tower but who may be affected by the harm it would cause to migrating birds, given that migratory birds are by definition transient. The web-based process that the Commission is creating will provide national accessibility, result in the creation of an electronic database, and reduce the potential for human error and application backlogs. The Commission declines to adopt the suggestion of Southern Company Services, Inc. (Southern) that instead of requiring applicants to submit a preliminary Form 854 to commence the environmental notification process, the FCC should provide a link to the FAA's Web site so that interested parties can review the information available on the FAA Web site and file any petitions based on that information. Southern has failed to demonstrate that a link to the FAA's information about towers submitted for aeronautical study is a practical means of providing the public sufficient notice regarding proposed towers, in a manner that can be accessed easily and understood by the public. This broadly inclusive approach to notice and comment for NEPA purposes before a complete application is filed is not necessarily determinative of which individuals and/or agencies will have standing to participate in proceedings relating to the application. A variety of factors, including the environmental concern in question, will factor into that analysis.

63. Local notice complements the broad reach of national notice by enabling persons likely to be directly affected by the potential environmental effects of proposed antenna structures at specific locations to raise concerns of which national entities may not be aware. It also reaches those persons or entities without an institutional concern in safeguarding a particular aspect of the environment but with a potential interest in the effects of tower sitings in their immediate communities. The Commission has successfully implemented local notice for historic preservation review and for radio broadcast applications, and the local notice requirements the Commission promulgates today are modeled after those regimes. *See* 47 CFR part 1, appendix C, sections V.B, V.C; 47 CFR 73.3580(b), (f).

64. The Commission finds that by requiring both local and national notice, it can best meet its statutory responsibility regarding the development of procedures that incorporate environmental considerations into agency decision-making. 42 U.S.C. 4331(b), 4332(2)(B). In particular, these requirements effectuate the mandate of Section 1506.6(b) of the CEQ regulations that Federal agencies shall ''provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies that may be interested or affected.'' 40 CFR 1506.6(b). CEQ has further clarified that ''[t]he objective is to notify all interested or affected parties,'' and that ''[a] combination of methods may be used to give notice.'' *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations,* 46 FR 18026 (March 23, 1981). Although CEQ's guidance does not identify notifications of proposed categorically excluded actions as ''environmental documents,'' it does include EAs, and the Commission concludes that providing effective public notice of proposed towers before an EA or an environmental certification has been submitted is within the intent of the regulation. In this regard, the Commission's dual notice requirement will enable more interested persons to raise relevant environmental concerns regarding ASR applications than would be achieved with either a national notice or local notice alone. The requirement thus serves the public interest under the Communications Act by ensuring that the agency complies fully with NEPA without unnecessarily prolonging the processing of ASR applications.

65. In sum, the Commission will require prospective ASR applicants to provide local notice of their proposals, either by publication in a local newspaper of general circulation or by other appropriate means. The Commission will also post notice of each prospective application on its Web site on the date requested by the applicant, which must be on or after the date the applicant provides local notice. Interested parties will have an opportunity to respond to these notices by filing Requests for further environmental review with the Commission. By requesting the applicant to specify the date for national notice, the Commission allows applicants to coordinate the local and national notice periods as closely as possible, while also assuring that the

public has at least 30 days from the date of local notice to file any Requests for further environmental processing. While the Commission expects to post notices on its Web site on the date requested by the applicant, in the event a posting is delayed, parties will nonetheless have 30 days from the actual date of national notice on the Commission's Web site to file any Requests.

4. Public Comment on Environmental Notifications

66. An interested member of the public who believes that a proposed tower (including a covered tower modification) may have a significant impact on the environment may submit a Request for further environmental review to the Commission pursuant to Section 1.1307(c) of the Commission's rules. The Request must be received by the Commission within 30 days after notice of the proposed tower both has been provided locally and has been made available nationally through the ASR Web site. The time period will be computed according to the general rule prescribed in Section 1.4(c) of the Commission's rules. Requests will be subject to the pleading standard that is set forth in Section 1.1307(c) of the Commission's rules. Late pleadings or pleadings that do not meet the standards in Section 1.1307(c) may be subject to dismissal.

67. In setting the period to file a Request at 30 days, the Commission applies to all ASR filings subject to the environmental notification process the same time period that is currently in place for challenges to ASR filings with EAs. The Commission rejects the Infrastructure Coalition's proposal to set the period to object at 14 days, as well as proposals by other commenters to set the time period at 15 to 20 days, as the Commission finds that such a timeframe is inadequate to allow for meaningful public participation in this context. At the same time, the Commission rejects the 60-day comment period proposed by the Conservation Groups. The Commission does not believe that interested parties should need that much time to file comments, particularly as it does not require the objecting party to include a comprehensive study of impacts to evaluate whether the requirements of applicable environmental laws are properly met. Rather, as discussed below, it is sufficient that a Request ''set[s] forth in detail the reasons justifying or circumstances necessitating environmental consideration in the decision-making process.'' 47 CFR 1.1307(c). Therefore, the Commission concludes that a 60-day comment period would unnecessarily obstruct the timely deployment of services while providing minimal benefit.

68. Pursuant to Section 1.1307(c) of the Commission's rules, a request for further environmental processing of an otherwise categorically excluded proposed action must ''set[] forth in detail the reasons justifying or circumstances necessitating environmental consideration in the decision-making process.'' In addition, Section 1.1307(c) cross-references Section 1.1313 of the rules. Section 1.1313(a) provides that ''[i]n the case of an application to which section 309(b) of the Communications Act applies, objections based on environmental considerations shall be filed as petitions to deny.'' This means, among other things, that the objection must include ''specific allegations of fact sufficient to make a *prima facie* showing that the petitioner is a party in interest and that a grant of the application would be consistent with the public interest, convenience, and necessity.'' *See* 47 CFR 1.939(d). Section 1.1313(b) provides that informal objections based on environmental considerations must be filed prior to grant of the relevant construction permit or other authorization.

69. In its Petition, the Infrastructure Coalition asks the Commission to require that any objection on environmental grounds filed against an ASR application must be filed as a petition to deny under Section 1.1313(a). It argues that such procedures are necessary to prevent frivolous objections. Several commenters representing licensees and tower owners support the Infrastructure Coalition's petition. The Conservation Groups, however, oppose application of the petition to deny standard to these objections, arguing that it would limit the public's ability to participate in the NEPA process.

70. The Commission declines to apply the petition to deny standard to Requests for further environmental review of prospective registered towers. First, Section 1.1313(a) by its terms does not apply to such Requests. Section 1.1313(a) encompasses objections to applications to which Section 309(b) of the Communications Act applies; i.e., applications for an instrument of authorization for a station in the broadcasting or common carrier services, or in certain other services if the Commission so prescribes by rule. Here, a Request would not be filed in response to any application, but in response to a notification that precedes an application for antenna structure registration. Even if the tower proponent elects to file an associated license application before completion of the environmental notification process, such application will be filed subject to completion of the environmental notification process so that the tower proponent will not yet have made any affirmative certification as to environmental effect. Thus, the Request for environmental processing in response to the environmental notification falls outside the scope of Section 1.1313(a).

71. Moreover, the Commission finds it better as a matter of policy to require these Requests only to set forth detailed reasons for environmental consideration as provided in Section 1.1307(c). Section 1500.2(d) of the CEQ regulations requires Federal agencies to encourage and facilitate public involvement in decisions that affect the quality of the human environment. *See* 40 CFR 1500.2(d). Formal pleading requirements, while potentially useful in deterring frivolous submissions and in producing a well-informed record for agency decision-making, could thwart participation in the Commission's NEPA procedures by those lacking the legal sophistication or financial wherewithal to participate formally. Also, imposing such formality on public comments submitted in response to the pre-ASR filing environmental notifications would be inappropriate in the context of the streamlined processing of ASR applications, which places significant reliance on members of the public to alert the Commission to proposed facilities that may pose significant environmental effects. Avoidance of unnecessarily strict pleading requirements for environmental requests is also consistent with the Commission's existing practice of accepting informal objections to applications where appropriate under Section 1.1313(b). A Request for further environmental review, although not subject to the standards applicable to a petition to deny, must be filed within the prescribed 30-day public comment period and must contain a supported statement explaining the basis for the interested person's belief that the proposed tower may have a significant environmental impact, as required by Section 1.1307(c). These requirements provide safeguards that the environmental concerns raised through the environmental notification process will be legitimate claims that will not needlessly delay the processing of ASR applications. For similar reasons, we decline to require a settlement meeting among the parties after the filing of a Request, as suggested by NTCH, Inc.

Requiring such a meeting may impose an unreasonable burden on the party filing the Request. The parties are free to agree to such meetings.

5. Facilities That Also Require Service-Specific Applications

72. Under the Commission's rules, some proposed towers are subject to both ASR and service-specific application requirements. The Commission's current rules and procedures vary by licensed service regarding when and how an EA is submitted for towers that may significantly affect the environment where more than one application is filed. Applications for Wireless Radio Authorization (FCC Form 601) involving major modifications (including all applications for facilities that may have a significant environmental effect) are routinely placed on public notice, but that notice does not distinguish applications filed with attached EAs from other license applications that may not involve tower construction or potential environmental effects. An applicant may attach an EA to either its Form 601 or Form 854 application, and may rely on a resulting FONSI to certify on the other application that its action will have no significant environmental effect. Broadcast construction (*see* FCC Form 301) and satellite earth station (*see* FCC Form 312) applicants whose proposed facilities require registration in the ASR system must submit their EAs as an exhibit to their service-specific applications regardless of any other application requirement, and have been permitted to attach EAs to their service-specific applications in lieu of submitting those EAs with their FCC Forms 854.

73. Some commenters argue that Section 1506.6 of the CEQ rules requires that the Commission notify the public separately regarding each application associated with a proposed antenna structure subject to registration under part 17. Others contend that it is sufficient to provide a single opportunity, in connection with the ASR process, for the public to comment on the environmental effects of each proposed tower. Consistent with current procedures that generally require only one NEPA review for a single proposed antenna structure, the Commission is not persuaded that, from an environmental standpoint, the decision-making involved in processing service-specific construction permits or license applications raises discrete issues from those involved in determining whether to register a tower from which licensed communications service will be provided. The Commission's obligation to accommodate public participation in its NEPA procedures for registering communications towers does not require that the public be afforded multiple opportunities to comment on the environmental effects of a single tower project simply because both a tower registration and a construction permit or license are required to authorize operation from the proposed tower.

74. At the same time, it is important that every registered tower (other than the exceptions discussed above) complete procedures that ensure a specific opportunity for the public to voice environmental concerns, as stated in the court's order. The public may not have this opportunity if applicants can avoid environmental notification by attaching any required EA for a proposed antenna structure to a service-specific construction permit or license application (*e.g.,* FCC Form 301, 601), for which the public notice may not expressly mention the EA or indicate that tower construction is involved. Accordingly, the Commission will require that any required EA for a registered tower be submitted through the notification process that precedes submission of the complete ASR application, regardless of whether the licensee must also attach the EA to an associated service-specific construction permit or license application. An applicant that does not make an ASR filing should continue to attach any required EA to the appropriate licensing form.

75. The Commission also implements procedures that will enable applicants for licenses that require frequency coordination to submit FCC Form 601 before completing the environmental notification process. Under the Commission's current procedures, FCC Form 601 cannot be filed for a facility that requires antenna structure registration until antenna structure registration has been granted. The Land Mobile Communications Council expresses concern that if the Commission were to continue to require grant of ASR before the FCC Form 601 could be filed, a party whose environmental notification generated an environmental Request necessitating review could lose its frequency to a second party whose later notification generated no Requests and that the notice process itself might alert a potential competing applicant to the benefit of such action. To address such concerns, the Commission will permit wireless radio, public safety, and other license applicants whose proposed towers are subject to registration to file FCC Form 601 before completing the environmental notification process so long as the applicant has obtained its FAA No Hazard Determination and notice has been provided both locally and through the Commission's Web site. In addition, in order to guard against speculative reservations of frequencies or sites, the Commission also requires FCC Form 601 applicants that have not yet obtained their ASR Registration Number to provide the Commission with an update of the status of their environmental review every 60 days.

76. The Commission clarifies that the environmental process will not affect the processing of a licensing application for a collocation on an existing tower that has an ASR application pending for a change that is unrelated to the collocation. For example, the tower owner may have a pending application to change the lighting system or increase the tower height to accommodate a different collocator. In such instances, the processing of the license application for the unrelated collocation will proceed independently of the ASR application.

6. Applications Pending on the Effective Date of the Environmental Notification Process

77. The effective date of the environmental notification requirements will be established in a Public Notice to be issued by the Wireless Telecommunications Bureau. ASR applications that are pending on the effective date ordinarily will not be required to complete the environmental notification process. However, an amendment to an ASR filing that occurs after the effective date will be subject to the environmental notification requirements as set forth above. Similarly, amendments to an EA may require environmental notification.

B. The Processing of ASR Applications Pending Completion of the Commission's Programmatic NEPA Analysis

78. The Commission is obligated under NEPA to avoid irretrievable commitments of resources without assessing the environmental effects of its actions and ''to predict the environmental effects of a proposed action before the action is taken and those effects are fully known.'' *American Bird Conservancy,* 516 F.3d at 2033. Accordingly, the Commission takes interim measures to protect migratory birds pending completion of the programmatic EA and this proceeding. The Commission's expectation is that the record developed in the course of preparing the nationwide programmatic EA may

provide a basis to determine what, if any, permanent rule changes are necessary to effectuate its NEPA responsibilities regarding migratory bird impacts when processing ASR applications. At the conclusion of the programmatic EA and any subsequent programmatic EIS, the Commission will take whatever steps it finds necessary to effectuate the conclusions reached in the final programmatic NEPA document, including steps to resolve any issues that may remain in the Migratory Birds rulemaking.

79. Meanwhile, the Commission establishes interim processing procedures to protect migratory birds pending the completion of this process. Specifically, the Commission applies Section 1.1307(d) of its rules, 47 CFR 1.1307(d) to require that an EA that includes a discussion of potential impacts on migratory birds be filed for any proposed new registered tower over 450 feet in height AGL. This requirement will also apply to: replacement towers over 450 feet in height AGL that involve a substantial increase in size to the tower being replaced; expansions of existing towers over 450 feet in height AGL that constitute a substantial increase in size; and conversions of a tower over 450 feet in height AGL to a less preferred lighting style. For all other registered towers, an EA will not be routinely required except as specified in Section 1.1307(a) or (b). The Commission will continue to apply Section 1.1307(c) and (d) on a case-by-case basis to determine whether an EA is required for any such tower, taking into consideration any Requests received during the public notice period.

80. The Commission adopts these interim measures pursuant to the mandate in Section 1.1307(d) of its rules that the processing Bureau shall require an EA if it determines that an otherwise categorically excluded proposal may have a significant environmental effect. In *American Bird Conservancy,* the court found that the Section 1.1307(c) threshold for requiring EAs had been met for at least some towers in the Gulf Coast region. Accordingly, on its own motion, the Commission adopts these interim standards to require an EA for certain categories of towers that are most likely to have significant effects on migratory birds. Sections 4(i) and 4(j) of the Communications Act provide additional authority for the adoption of the interim processing guidelines set forth in this Section. 47 U.S.C. 154(i), (j); 47 CFR 1.1307(c).

81. The Commission's selection of 450 feet AGL as the threshold for the interim EA filing requirement is consistent with evidence in the Migratory Birds rulemaking record and elsewhere. As illustrated in Figure 12 of the Draft Programmatic Environmental Assessment of the Antenna Structure Registration Program (Aug. 26, 2011) (Draft Programmatic EA), data from existing studies show no evidence of large-scale mortality for towers less than approximately that height. Data from the peer-reviewed Michigan Bird Study, for instance, confirm the relevance of tower height in assessing the degree of risk to migratory birds at individual towers. That study suggests that avian collisions occur 68–86 percent less frequently at towers between 380 and 480 feet AGL compared with towers greater than 1,000 feet AGL. Joelle Gehring, Paul Kerlinger, and Albert M. Manville II, *The Role of Tower Height and Guy Wires on Avian Collisions with Communications Towers,* 75 The Journal of Wildlife Management 848 (2011). Other bird studies have also recognized tower height as a factor potentially affecting avian collisions. For example, the Avatar report commissioned by the FCC identified height and lighting as tower characteristics that increase hazards to migratory birds. Notice of Inquiry Comment Review Avian/Communications Tower Collisions, filed by Avatar Environmental, LLC, WT Docket No. 03–187 (Dec. 10, 2004). An Avian Risk Assessment for a specific project prepared by Dr. Paul Kerlinger concluded, *inter alia,* that decreasing the heights of specific towers would virtually eliminate the risk to birds. *Mr. Andrew Skotdal,* 23 FCC Rcd 8574 (Media Bur. Audio Div. 2008). *See also* Draft Programmatic EA, Figure 11: Mean Annual Bird Mortality and Tower Heights. Thus, while there is not consensus as to whether sufficient scientific research exists to support adoption of permanent rule changes designed to protect migratory birds, the Commission finds that there is sufficient evidence to give special attention to tall towers on an interim basis while it completes the programmatic EA and any subsequent programmatic EIS, if required.

82. The Commission adopts the EA requirement for proposed towers over 450 feet in height AGL as a reasonable, temporary measure for the protection of migratory birds pending completion of the programmatic EA, which will evaluate whether scientific evidence supports adoption of permanent measures. Further, the interim measure is temporary and is consistent with the tower height threshold for requiring an EA proposed in the consensus MOU between industry representatives and environmental groups. In particular, under the MOU, new towers taller than 450 feet AGL would require an EA for avian effects. New towers of a height of 450 feet or less AGL, as well as replacement towers and other ASR filings, would not initially require an EA as a categorical matter. The inclusion in the MOU of a 450-foot threshold for an interim EA filing requirement supports the Commission's conclusion that this interim requirement strikes an appropriate balance between protecting migratory birds and ensuring that ASR applications can be processed in a manner that facilitates the rapid deployment of communications services.

83. In assessing, pursuant to Sections 1.1307(c) and (d), whether further environmental processing is necessary for particular towers 450 feet in height or less AGL, the Commission expects that the processing Bureau will consider factors including the height of the tower and the lighting to be used. Consistent with the MOU, the Commission recognizes that a tower close to 450 feet in height AGL is more likely to have a significant environmental impact on migratory birds than a tower closer to 200 feet in height. The Commission further expects that the Bureau will afford significant weight to the absence of public objection in response to the notice of proposed construction that the Commission requires today.

84. The Commission clarifies that if a proposed tower is initially submitted for environmental notification with a height of 450 feet AGL or less and the submission is subsequently amended so that the height will exceed 450 feet AGL, an EA will be required even if the change does not constitute a substantial increase in size. The Commission finds that this provision is necessary in order to ensure that prospective applicants for towers just above 450 feet AGL do not game the system.

85. For purposes of clarity, the Commission adds a note to Section 1.1307(d) of its rules to describe the circumstances in which the Wireless Telecommunications Bureau shall require, or consider whether to require, an environmental assessment with respect to migratory birds for antenna structures subject to registration under part 17 of its rules. This note will remain in effect pending the outcome of the programmatic EA and any subsequent programmatic EIS if required, and pending the completion of this rulemaking by means of a decisional order. The Commission delegates authority to the Wireless Telecommunications Bureau to adopt

appropriate changes to its processing procedures, processes, and forms to apply these interim standards.

IV. Steps in the Environmental Notification Process

86. This Section outlines the environmental notification process that an applicant for the registration of an antenna structure must undertake before filing a completed Antenna Structure Registration (ASR) application on FCC Form 854. Technical details about the process for submitting this pre-filing notification will be provided in a Public Notice that will be released before the rules take effect. The Commission delegates to the Wireless Telecommunications Bureau (WTB) the authority to change procedural aspects of the process outlined below by Public Notice so long as those changes do not affect the substantive rights of any party.

A. Commencement of the Process

• Applicants will commence the process by submitting information on FCC Form 854, including information regarding the location, height, type, and lighting of the proposed structure. This is a pre-application submission that does not constitute the filing of a completed application.

○ The applicant may commence the environmental notification process on Form 854 either before or after it receives an FAA No Hazard Determination. If the applicant commences the process before the No Hazard Determination is received, the applicant must provide the anticipated lighting and must later amend its submission if the FAA-approved lighting is different.

○ The environmental notification process may be conducted simultaneously with other processes, including environmental reviews that may require consultation with other Federal agencies and local zoning procedures.

○ The FCC will assign the proposed construction a unique file number when the partially completed Form 854 is submitted.

• Following the initial Form 854 submission, the applicant shall provide local notice either by publication in a local newspaper of general circulation or by other appropriate means, such as by following local zoning public notice requirements.

○ The text of the local notice must include:

▪ The descriptive information submitted in the Form 854 as part of the environmental notification process;

▪ Instructions for filing any Request for further environmental review no later than 30 days after information on the proposed tower is posted on the FCC's Web site, including the relevant electronic and regular mail addresses and the unique Form 854 File Number issued by the FCC; and

▪ Instructions for serving a copy of any Request upon the applicant.

○ Applicants may provide through a single publication local notice under both this process and the Commission's procedures implementing section 106 of the National Historic Preservation Act (NHPA), *see* 47 CFR part 1, appendix C, section V (Nationwide Programmatic Agreement), through a single publication, provided that:

▪ The single notice satisfies the timing requirements of both provisions, and it clearly describes and distinguishes both the requirement to file environmental Requests with the Commission and the separate process for submitting comments regarding potentially affected historic properties to the applicant.

▪ The applicant forwards any comment that substantially relates to potentially affected historic properties to the State Historic Preservation Officer or Tribal Historic Preservation Officer, in accordance with the terms of the Nationwide Programmatic Agreement.

• The applicant shall state in its initial FCC Form 854 submission the date on which it requests that the FCC provide national notice of the proposed construction. This date must be on or after the date the applicant provides local notice.

○ On or after the national notice date the applicant has requested, the Commission will post the information contained in the applicant's initial Form 854 submission, or a link to such information, in searchable form on its Web site. This information will remain posted for 30 days.

○ If local notice is not provided before the requested national notice date, the applicant must amend its Form 854 submission to provide a new national notice date.

• Facilities That Also Require Service-Specific Applications.

○ Applicants that submit both an ASR application and a service-specific application for a particular tower must complete the environmental notification process on Form 854 and submit any required Environmental Assessment (EA) through that process. Depending on the service, the applicant may also be required to file a copy of the EA with its service-specific application.

1. ULS Applicants

• Wireless radio, public safety, and other applicants whose proposed towers are subject to registration and require a license application on FCC Form 601 must have begun the Form 854 environmental notification process before filing Form 601, but may file Form 601 before completing the Form 854 environmental notification process.

○ In the event an EA is required, it shall be filed only with Form 854. WTB will provide instructions at a later date for completing the environmental question on Form 601 in such situations.

○ Applicants whose proposed towers require an EA but do not require registration shall continue to file an EA with Form 601.

• An applicant that chooses to file FCC Form 601 before the environmental notification process is complete must have already obtained an FAA No Hazard Determination and provided local notice of the proposed construction, and the FCC must have posted notification of the proposed construction on its Web site.

○ Such an applicant shall provide its Form 854 File Number in place of the ASR Registration Number that is currently required.

○ Upon grant of the ASR application, the applicant must amend the FCC Form 601 to replace the Form 854 File Number with the ASR Registration Number.

• FCC Form 601 applicants that have not yet obtained their ASR Registration Number must provide the Bureau with an update of the status of their environmental review every 60 days from the date the FCC Form 601 was filed. Failure to provide the update may result in dismissal of the FCC Form 601 application.

○ Such an update must reflect active pursuit of the environmental review.

○ Updates will not be required while action on the environmental notification filing is pending at the Commission, such as when the Commission is considering whether to grant a Request for further environmental processing or is reviewing a filed EA.

○ WTB will prescribe by public notice the procedures for providing such updates.

• An applicant electing to file the associated license application after completion of environmental processing should use its ASR Registration Number to file FCC Form 601 in the first instance, as is the practice today.

2. Broadcast Applicants

• An applicant to build a facility in any broadcast service that also requires the completion of FCC Form 854 will now be required to submit a Form 854 environmental notification filing and,

when necessary, attach an EA to both its Form 854 environmental notification filing and its application for a broadcast construction permit, FCC Form 301, 318, 340, 346, or 349.

○ The same EA must be submitted with both the broadcast construction permit application and the Form 854 environmental notification submission.

○ Applicants whose proposals do not require registration but do require an EA under Section 1.1307 (such as construction in a flood plain that does not require ASR) should file the EA only with the construction permit application form.

• The Media Bureau may continue to accept applications requiring ASR that are submitted prior to obtaining an ASR Registration Number, with the caveat that such applications will not be granted until the environmental notification process has been completed and the ASR Registration Number supplied.

○ Applicants whose applications can be filed outside specified filing windows, such as applications for minor changes to existing authorizations, and whose tower projects require registration, may elect to file their construction permit applications either before or after completing the Form 854 environmental notification process.

○ Applicants that file the construction permit application after completing the environmental notification process and obtaining a grant of Antenna Structure Registration shall either answer ''Yes,'' or ''No'' with an attached EA, in response to the environmental certification question on the construction permit application.

○ Applicants that file their construction permit applications before completion of the environmental notification process are advised to check ''No'' in response to the environmental certification question on the construction permit application, indicating that the project has not been determined to be excluded from environmental processing.

▪ Such an applicant should also attach to the Application an Exhibit (called for by the environmental certification item in each broadcast construction permit form) explaining whether or not the applicant has commenced the evaluation of the environmental effects of any proposed construction and where the applicant is in that process.

• Applicants for new construction permits or major changes that are subject to the Commission's competitive bidding procedures initiate the process with the generic FCC Form 175 (Application to Participate in an FCC Auction) rather than a service-specific application (such as those listed above) containing an environmental certification.

○ FCC Form 175 does not contain an environmental certification, and no environmental review or environmental notice is necessary to submit it.

○ Only the winning bidder who has made the final bid payment will need to submit a ''long-form,'' service-specific application, and it is at that time that an applicant subject to ASR will need to undertake the pre-ASR environmental notification process and complete Form 854.

○ Similarly, after a dispositive preference is awarded under Section 307(b) of the Communications Act, an applicant subject to ASR will need to undertake the pre-ASR environmental notification process and complete Form 854.

3. Earth Station Applicants

• An earth station license applicant using FCC Form 312 or 312EZ, which is required under Part 17 to notify the FAA of its plans to construct an antenna structure (e.g., an earth station), must complete the environmental notification process prior to submission of a complete FCC Form 854 to register the antenna structure.

○ An applicant filing FCC Form 312 will be required to attach a completed FCC Form 854 to its FCC Form 312 application.

○ An applicant filing FCC Form 312EZ electronically will instead be required to provide its ASR Registration Number in the appropriate Section of the FCC Form 312EZ.

○ If an EA was required as part of the environmental notification process and the Bureau issued a Finding of No Significant Impact (FONSI), the applicant will no longer be required to submit an EA with its FCC Form 312 or 312EZ. Instead, the applicant will be able to rely on the FONSI in order to indicate on its license application that the proposed earth station will not have a significant environmental effect.

B. Amendments

• Amendments to FCC Form 854 that are filed after the provision of local notice or posting on the FCC's Web site do not require new local or national notice if made only for the following purposes:

○ Changes to administrative information or other changes not affecting the structure's location, height, lighting, or physical configuration.

○ Changes to a more preferred or equally preferred lighting style as set forth in amended rule Section 17.4(c)(1)(iii), including removal of proposed lighting.

○ Reduction in the height of the structure, unaccompanied by any other change in the physical structure of the proposed tower.

• All other changes to the location, physical characteristics, or lighting of the proposed structure will require an additional local notice, an additional national notice, and re-initiation of the 30-day period for interested persons to submit Requests for further environmental review.

○ Such changes include any increase in the height of the structure even if the increase does not constitute a substantial increase in size.

• An amendment to add an EA will require a new posting on the FCC's Web site and opportunity for comment but not a new local notice (see Section F below).

C. Requests for Further Environmental Review

• Requests for further environmental review must be received by the Commission within 30 days after information regarding a proposed construction is posted on the Commission's Web site. Late filed Requests may be subject to dismissal.

○ The Wireless Telecommunications Bureau will make provision for filing of Requests either electronically or by mail. To ensure timely receipt and to facilitate processing, electronic filing will be strongly encouraged.

○ Requests must be served on the prospective applicant.

• Oppositions will be due 10 calendar days after expiration of the time for filing Requests. Replies will be due 5 business days after expiration of the time for filing oppositions. Oppositions and replies must be served on the parties to the proceeding.

• Proceedings involving environmental filings for a specific structure are restricted proceedings under Section 1.1208 of the Commission's rules. Information presented to the Bureau must be served on all parties pursuant to Section 1.1202(d) of the Commission's rules.

D. Disposition of Filings Without EAs

• After completion of the 30-day notice period and after reviewing any Requests, the Commission staff will notify the applicant whether an EA is required under Section 1.1307(c) or (d) of its rules. Staff will make every effort to provide this notification as promptly as possible, particularly in cases where no Requests are received.

• If no EA is required based on the Form 854 filing and any Requests, and if the applicant has determined that no EA is otherwise required under Section 1.1307(a) or (b), it may then update Form 854 to certify that the tower will have no significant environmental impact.

• At this point, if all other required information has been provided, the Form 854 will be deemed complete and can be processed accordingly.

E. Filings With EAs

• If an applicant is required, under the Commission's rules, to file an Environmental Assessment (EA) in connection with a structure that is required to be registered, such EA must be filed as part of the environmental notification process.

○ An applicant may determine that an EA is necessary when it makes its initial filing, in which case it will attach the EA to that filing.

○ Alternatively, an EA may be supplied at a later date by amending an existing filing, if either the applicant or the Commission determines that a potentially significant environmental effect may exist.

• Regardless of when in the process it is filed, the EA will be placed on notice on the Commission's Web site, thus commencing a 30-day period for public comment.

○ If the EA is filed with the initial Form 854 submission, it must also be placed on local notice in the same manner as an environmental notification filing without an attached EA.

○ If the EA is added to a Form 854 submission that has already gone on local notice, additional local notice is not required in most instances.

▪ The prospective applicant must serve the EA on any party that has filed a Request in response to the earlier notice.

▪ A second publication in a local newspaper of general circulation or equivalent local notice will be required if there has been a change in the proposed structure's geographic location, height, configuration, or lighting, other than a reduction in height or a change to a more preferred or equally preferred lighting style.

• After considering the EA and any Requests, the Bureau will either issue a Finding of No Significant Impact (FONSI), require amendments to the EA, or determine that an Environmental Impact Statement is needed.

• Upon issuance of a FONSI, the applicant may complete the Form 854 filing to certify that the tower will have no significant environmental impact.

V. Procedural Matters

A. Regulatory Flexibility Analysis

87. The Commission has determined that the environmental notification rules and the implementation of interim processing standards, pursuant to Section 1.1307(d), do not require the publication of a general notice of proposed rulemaking so as to require the preparation of a Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. 603, 604 (RFA).

B. Paperwork Reduction Act of 1995 Analysis

88. This document contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It 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 or modified information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might further reduce the information collection burden for small business concerns with fewer than 25 employees.

C. Congressional Review Act

89. The Commission will send a copy of this Order on Remand to Congress and the Government Accountability Office, pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

D. Accessible Formats

90. 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 & Government Affairs Bureau at (201) 418–0530 (voice) or (202) 418–0432 (TTY).

VI. Ordering Clauses

91. Accordingly, *it is ordered* that, pursuant to Sections 1, 2, 4(i), 303(q), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 303(q), 303(r), and 309(j), Section 102(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4332(C), and Section 1506.6 of the regulations of the Council on Environmental Quality, 40 CFR 1506.6, the environmental notification procedures *are adopted.*

92. *It is further ordered* that the rules adopted herein *will become effective* upon Commission publication of a notice in the **Federal Register** announcing such approval. The rules and procedures adopted in this Order contain new or modified information collections that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act.

93. *It is further ordered* that, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 154(j), and Section 1.1307(d) of the Commission's rules, 47 CFR 1.1307(d), the Wireless Telecommunications Bureau *shall* apply the interim antenna structure registration standards set forth in this Order.

94. *It is further ordered* that the Wireless Telecommunications Bureau is delegated authority to make all necessary changes to its procedures, processing standards, electronic database systems, and forms to apply the procedures and interim standards adopted in this Order.

95. *It is further ordered* that, pursuant to Sections 4(i), 4(j), 303(r), and 309 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(r), and 309, the Petitions for Expedited Rulemaking filed on May 2, 2008, by the Infrastructure Coalition and on April 14, 2009 by the Conservation Groups *are granted* to the extent reflected herein and otherwise *are dismissed* without prejudice.

96. *It is further ordered* that, pursuant to Sections 4(i), 4(j), 303(r), 309, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(r), 309, and 405, the Petition for Reconsideration filed on April 25, 2011, by Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP *is dismissed.*

97. *It is further ordered* that the Commission *shall send* a copy of this Order in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A).

List of Subjects

47 CFR Part 1

Administrative practice and procedure, Environmental impact statements, and Reporting and recordkeeping requirements.

47 CFR Part 17

Aviation safety, Communications equipment, and Reporting and recordkeeping requirements.

47 CFR Parts 22, 25, 80 and 87

Communications equipment, and Reporting and recordkeeping requirements.

47 CFR Parts 24 and 90

Administrative practice and procedure, Communications equipment, and Reporting and recordkeeping requirements.

47 CFR Part 27

Reporting and recordkeeping requirements.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1, 7, 22, 24, 25, 27, 80, 87 and 90 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 15 U.S.C. 79 *et seq.;* 47 U.S.C. 151, 154(i),154(j), 160, 201, 225, 303.

■ 2. Section 1.61 is amended by revising paragraph (a)(2) to read as follows:

§ 1.61 Procedures for handling applications requiring special aeronautical study.

(a) * * *

(2) In accordance with § 1.1307 and § 17.4(c) of this chapter, the Bureau will address any environmental concerns prior to processing the registration.

* * * * *

■ 3. Section 1.923 is amended by revising paragraphs (d) and (e) to read as follows:

§ 1.923 Content of applications.

* * * * *

(d) *Antenna structure registration.* Owners of certain antenna structures must notify the Federal Aviation Administration and register with the Commission as required by part 17 of this chapter. Applications proposing the use of one or more new or existing antenna structures must contain the FCC Antenna Structure Registration Number(s) of each structure for which registration is required. To facilitate frequency coordination or for other purposes, the Bureau shall accept for filing an application that does not contain the FCC Antenna Structure Registration Number so long as;

(1) The antenna structure owner has filed an antenna structure registration application (FCC Form 854);

(2) The antenna structure owner has provided local notice and the Commission has posted notification of the proposed construction on its Web site pursuant to § 17.4(c)(3) and (4) of this chapter; and

(3) The antenna structure owner has obtained a Determination of No Hazard to Aircraft Navigation from the Federal Aviation Administration. In such instances, the applicant shall provide the FCC Form 854 File Number on its application. Once the antenna structure owner has obtained the Antenna Structure Registration Number, the applicant shall amend its application to provide the Antenna Structure Registration Number, and the Commission shall not grant the application before the Antenna Structure Registration Number has been provided. If registration is not required, the applicant must provide information in its application sufficient for the Commission to verify this fact.

(e) *Environmental concerns.* (1) Environmental processing shall be completed pursuant to the process set forth in § 17.4(c) of this chapter for any facilities that use one or more new or existing antenna structures for which a new or amended registration is required by part 17 of this chapter. Environmental review by the Commission must be completed prior to construction.

(2) For applications that propose any facilities that are not subject to the process set forth in § 17.4(c) of this chapter, the applicant is required to indicate at the time its application is filed whether or not a Commission grant of the application for those facilities may have a significant environmental effect as defined by § 1.1307. If the applicant answers affirmatively, an Environmental Assessment, required by § 1.1311 must be filed with the application and environmental review by the Commission must be completed prior to construction.

* * * * *

■ 4. Section 1.929 is amended by revising paragraph (a)(4) to read as follows:

§ 1.929 Classification of filings as major or minor.

* * * * *

(a) * * *

(4) Application or amendment requesting authorization for a facility that may have a significant environmental effect as defined in § 1.1307, unless the facility has been determined not to have a significant environmental effect through the process set forth in § 17.4(c) of this chapter.

* * * * *

■ 5. Section 1.934 is amended by adding paragraph (g) to read as follows:

§ 1.934 Defective applications and dismissal.

* * * * *

(g) *Dismissal for failure to pursue environmental review.* The Commission may dismiss license applications (FCC Form 601) associated with proposed antenna structure(s) subject to § 17.4(c) of this chapter, if pending more than 60 days and awaiting submission of an Environmental Assessment or other environmental information from the applicant, unless the applicant has provided an affirmative statement reflecting active pursuit during the previous 60 days of environmental review for the proposed antenna structure(s). To avoid potential dismissal of its license application, the license applicant must provide updates every 60 days unless or until the applicant has submitted the material requested by the Bureau.

■ 6. Section 1.1306 is amended by revising Note 2 following paragraph (b) to read as follows:

§ 1.1306 Actions which are categorically excluded from environmental processing.

* * * * *

(b) * * *

Note 2: The specific height of an antenna tower or supporting structure, as well as the specific diameter of a satellite earth station, in and of itself, will not be deemed sufficient to warrant environmental processing, *see* § 1.1307 and § 1.1308, except as required by the Bureau pursuant to the Note to § 1.1307(d).

* * * * *

■ 7. Section 1.1307 is amended by adding a note to paragraph (d) to read as follows:

§ 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

* * * * *

(d) * * *

Note to paragraph (d): Pending a final determination as to what, if any, permanent measures should be adopted specifically for the protection of migratory birds, the Bureau shall require an Environmental Assessment for an otherwise categorically excluded action involving a new or existing antenna structure, for which an antenna structure registration application (FCC Form 854) is required under part 17 of this chapter, if the proposed antenna structure will be over 450 feet in height above ground level (AGL) and involves either:

1. Construction of a new antenna structure;

2. Modification or replacement of an existing antenna structure involving a substantial increase in size as defined in paragraph I(C)(1)(3) of Appendix B to part 1 of this chapter; or

3. Addition of lighting or adoption of a less preferred lighting style as defined in § 17.4(c)(1)(iii) of this chapter. The Bureau shall consider whether to require an EA for other antenna structures subject to § 17.4(c) of this chapter in accordance with § 17.4(c)(8) of this chapter. An Environmental Assessment required pursuant to this note will be subject to the same procedures that apply to any Environmental Assessment required for a proposed tower or modification of an existing tower for which an antenna structure registration application (FCC Form 854) is required, as set forth in § 17.4(c) of this chapter.

* * * * *

PART 17—CONSTRUCTION, MARKING, AND LIGHTING OF ANTENNA STRUCTURES

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

Authority: §§ 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, Interpret or apply 301, 309, 48 Stat. 1081, 1085, as amended; 47 U.S.C. 301, 309.

■ 9. Section 17.4 is amended by revising paragraph (c) to read as follows:

§ 17.4 Antenna structure registration.

* * * * *

(c) Each prospective applicant must complete the environmental notification process described in this paragraph, except as specified in paragraph (c)(1) of this section.

(1) *Exceptions from the environmental notification process.* Completion of the environmental notification process is not required when FCC Form 854 is submitted solely for the following purposes:

(i) For notification only, such as to report a change in ownership or contact information, or the dismantlement of an antenna structure;

(ii) For a reduction in height of an antenna structure or an increase in height that does not constitute a substantial increase in size as defined in paragraph I(C)(1)–(3) of Appendix B to part 1 of this chapter, provided that there is no construction or excavation more than 30 feet beyond the existing antenna structure property;

(iii) For removal of lighting from an antenna structure or adoption of a more preferred or equally preferred lighting style. For this purpose lighting styles are ranked as follows (with the most preferred lighting style listed first and the least preferred listed last): no lights; FAA Lighting Styles that do not involve use of red steady lights; and FAA Lighting Styles that involve use of red steady lights. A complete description of each FAA Lighting Style and the manner in which it is to be deployed can be found in the current version of FAA, U.S. Dept. of Transportation, Advisory Circular: Obstruction Marking and Lighting, AC 70/7460;

(iv) For replacement of an existing antenna structure at the same geographic location that does not require an Environmental Assessment (EA) under § 1.1307(a) through (d) of this chapter, provided the new structure will not use a less preferred lighting style, there will be no substantial increase in size as defined in paragraph I(C)(1)–(3) of Appendix B to part 1 of this chapter, and there will be no construction or excavation more than 30 feet beyond the existing antenna structure property;

(v) For any other change that does not alter the physical structure, lighting, or geographic location of an existing structure; or

(vi) For construction, modification, or replacement of an antenna structure on Federal land where another Federal agency has assumed responsibility for evaluating the potentially significant environmental effect of the proposed antenna structure on the quality of the human environment and for invoking any required environmental impact statement process, or for any other structure where another Federal agency has assumed such responsibilities pursuant to a written agreement with the Commission. *See* § 1.1311(e) of this chapter.

(2) *Commencement of the environmental notification process.* The prospective applicant shall commence the environmental notification process by filing information about the proposed antenna structure with the Commission. This information shall include, at a minimum, all of the information required on FCC Form 854 regarding ownership and contact information, geographic location, and height, as well as the type of structure and anticipated lighting. The Wireless Telecommunications Bureau may utilize a partially completed FCC Form 854 to collect this information.

(3) *Local notice.* The prospective applicant must provide local notice of the proposed new antenna structure or modification of an existing antenna structure through publication in a newspaper of general circulation or other appropriate means, such as through the public notification provisions of the relevant local zoning process. The local notice shall contain all of the descriptive information as to geographic location, configuration, height and anticipated lighting specifications reflected in the submission required pursuant to paragraph (c)(2) of this section. It must also provide information as to the procedure for interested persons to file Requests for environmental processing pursuant to §§ 1.1307(c) and 1.1313(b) of this chapter, including any assigned file number, and state that such Requests may only raise environmental concerns.

(4) *National notice.* On or after the local notice date provided by the prospective applicant, the Commission shall post notification of the proposed construction on its Web site. This posting shall include the information contained in the initial filing with the Commission or a link to such information. The posting shall remain on the Commission's Web site for a period of 30 days.

(5) *Requests for environmental processing.* Any Request filed by an interested person pursuant to §§ 1.1307(c) and 1.1313(b) of this chapter must be received by the Commission no later than 30 days after the proposed antenna structure goes on notice pursuant to paragraph (c)(4) of this section. The Wireless Telecommunications Bureau shall establish by public notice the process for filing Requests for environmental processing and responsive pleadings consistent with the following provisions.

(i) *Service and pleading cycle.* The interested person or entity shall serve a copy of its Request on the prospective ASR applicant pursuant to § 1.47 of this chapter. Oppositions may be filed no later than 10 days after the time for filing Requests has expired. Replies to oppositions may be filed no later than 5 days after the time for filing oppositions has expired. Oppositions shall be served upon the Requester, and replies shall be served upon the prospective applicant.

(ii) *Content.* An Environmental Request must state why the interested person or entity believes that the proposed antenna structure or physical modification of an existing antenna structure may have a significant impact on the quality of the human environment for which an Environmental Assessment must be considered by the Commission as required by § 1.1307 of this chapter, or why an Environmental Assessment submitted by the prospective ASR applicant does not adequately evaluate the potentially significant environmental effects of the proposal. The Request must be submitted as a

written petition filed either electronically or by hard copy setting forth in detail the reasons supporting Requester's contentions.

(6) *Amendments.* The prospective applicant must file an amendment to report any substantial change in the information provided to the Commission. An amendment will not require further local or national notice if the only reported change is a reduction in the height of the proposed new or modified antenna structure; if proposed lighting is removed or changed to a more preferred or equally preferred lighting style as set forth in paragraph (c)(1)(iii) of this section; or if the amendment reports only administrative changes that are not subject to the requirements specified in this paragraph. All other changes to the physical structure, lighting, or geographic location data for a proposed registered antenna structure require additional local and national notice and a new period for filing Requests pursuant to paragraphs (c)(3), (c)(4), and (c)(5) of this section.

(7) *Environmental Assessments.* If an Environmental Assessment (EA) is required under § 1.1307 of this chapter, the antenna structure registration applicant shall attach the EA to its environmental submission, regardless of any requirement that the EA also be attached to an associated service-specific license or construction permit application. The contents of an EA are described in §§ 1.1308 and 1.1311 of this chapter. The EA may be provided either with the initial environmental submission or as an amendment. If the EA is submitted as an amendment, the Commission shall post notification on its Web site for another 30 days pursuant to paragraph (c)(4) of this section and accept additional Requests pursuant to paragraph (c)(5) of this section. However, additional local notice pursuant to paragraph (c)(3) of this section shall not be required unless information has changed pursuant to paragraph (c)(6) of this section. The applicant shall serve a copy of the EA upon any party that has previously filed a Request pursuant to paragraph (c)(5) of this section.

(8) *Disposition.* The processing Bureau shall resolve all environmental issues, in accordance with the environmental regulations (47 CFR 1.1301 through 1.1319) specified in part 1 of this chapter, before the tower owner, or the first tenant licensee acting on behalf of the owner, may complete the antenna structure registration application. In a case where no EA is submitted, the Bureau shall notify the applicant whether an EA is required under § 1.1307(c) or (d) of this chapter. In a case where an EA is submitted, the Bureau shall either grant a Finding of No Significant Impact (FONSI) or notify the applicant that further environmental processing is required pursuant to § 1.1308 of this chapter. Upon filing the completed antenna structure registration application, the applicant shall certify that the construction will not have a significant environmental impact, unless an Environmental Impact Statement is prepared pursuant to § 1.1314 of this chapter.

(9) *Transition rule.* An antenna structure registration application that is pending with the Commission as of the effective date of this paragraph (c) shall not be required to complete the environmental notification process set forth in this paragraph. The Commission will publish a document in the **Federal Register** announcing the effective date. However, if such an application is amended in a manner that would require additional notice pursuant to paragraph (c)(6) of this section, then such notice shall be required.

* * * * *

PART 22—PUBLIC MOBILE SERVICES

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

Authority: 47 U.S.C. 154, 222, 303, 309, 332.

■ 11. Section 22.143 is amended by revising paragraph (d)(4) to read as follows:

§ 22.143 Construction prior to grant of application.

* * * * *

(d) * * *

(4) For any construction or alteration that would exceed the requirements of § 17.7 of this chapter, the licensee has notified the appropriate Regional Office of the Federal Aviation Administration (FAA Form 7460–1), secured a valid FAA determination of ''no hazard,'' and received antenna height clearance and obstruction marking and lighting specifications (FCC Form 854R) from the FCC for the proposed construction or alteration.

* * * * *

PART 24—PERSONAL COMMUNICATION SERVICES

■ 12. The authority citation for part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309, 332.

■ 13. Section 24.2 is amended by revising paragraphs (b) and (f) to read as follows:

§ 24.2 Other applicable rule parts.

* * * * *

(b) *Part 1.* This part includes rules of practice and procedure for license applications, adjudicatory proceedings, procedures for reconsideration and review of the Commission's actions; provisions concerning violation notices and forfeiture proceedings; and the environmental requirements that, together with the procedures specified in § 17.4(c) of this chapter, if applicable, must be complied with prior to the initiation of construction. Subpart F includes the rules for the Wireless Telecommunications Services and the procedures for filing electronically via the ULS.

* * * * *

(f) *Part 17.* This part contains requirements for the construction, marking and lighting of antenna towers, and the environmental notification process that must be completed before filing certain antenna structure registration applications.

* * * * *

PART 25—SATELLITE COMMUNICATIONS

■ 14. The authority citation for part 25 continues to read as follows:

Authority: 47 U.S.C. 701–744. Interprets or applies Sections 4, 301, 302, 303, 307, 309, and 332 of the Communications Act, as amended, 47 U.S.C. 154, 301, 302, 303, 307, 309, 332.

■ 15. Section 25.113 is amended by revising paragraph (a) to read as follows:

§ 25.113 Station licenses and launch authority

(a) Construction permits are not required for satellite earth stations. Construction of such stations may commence prior to grant of a license at the applicant's own risk. Applicants must comply with the provisions of 47 CFR 1.1312 relating to environmental processing prior to commencing construction. Applicants filing applications that propose the use of one or more new or existing antenna structures requiring registration under part 17 of this chapter must also comply with any applicable environmental notification process specified in § 17.4(c) of this chapter.

* * * * *

■ 16. Section 25.115 is amended by revising paragraph (c)(2)(vi)(A)(*4*) to read as follows:

§ 25.115 Applications for earth station authorizations.

* * * * *

(c) * * *

(2) * * *

(vi) * * *

(A) * * *

(*4*) The applicant has determined that the facility(ies) will not significantly affect the environment as defined in § 1.1307 of this chapter after complying with any applicable environmental notification procedures specified in § 17.4(c) of this chapter.

* * * * *

PART 27—MISCELLANEOUS WIRELESS COMMUNICATION SERVICES

■ 17. The authority citation for part 27 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 307, 309, 332, 336, 337.

■ 18. Section 27.3 is amended by revising paragraphs (b) and (f) to read as follows:

§ 27.3 Other applicable rule parts.

* * * * *

(b) *Part 1.* This part includes rules of practice and procedure for license applications, adjudicatory proceedings, procedures for reconsideration and review of the Commission's actions; provisions concerning violation notices and forfeiture proceedings; competitive bidding procedures; and the environmental requirements that, together with the procedures specified in § 17.4(c) of this chapter, if applicable, must be complied with prior to the initiation of construction. Subpart F includes the rules for the Wireless Telecommunications Services and the procedures for filing electronically via the ULS.

* * * * *

(f) *Part 17.* This part contains requirements for the construction, marking and lighting of antenna towers, and the environmental notification process that must be completed before filing certain antenna structure registration applications.

* * * * *

PART 80—STATIONS IN THE MARITIME SERVICES

■ 19. The authority citation for part 80 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307(e), 309, 332.

■ 20. Section 80.3 is amended by revising paragraphs (b) and (e) to read as follows:

§ 80.3 Other applicable rule parts of this chapter.

* * * * *

(b) *Part 1.* This part includes rules of practice and procedure for license applications, adjudicatory proceedings, procedures for reconsideration and review of the Commission's actions; provisions concerning violation notices and forfeiture proceedings; and the environmental processing requirements that, together with the procedures specified in § 17.4(c) of this chapter, if applicable, must be complied with prior to the initiation of construction. Subpart Q of part 1 contains rules governing competitive bidding procedures for resolving mutually exclusive applications for certain initial licenses.

* * * * *

(e) *Part 17.* This part contains requirements for the construction, marking and lighting of antenna towers, and the environmental notification process that must be completed before filing certain antenna structure registration applications.

* * * * *

PART 87—AVIATION SERVICES

■ 21. The authority citation for part 87 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307(e).

■ 22. Section 87.3 is amended by revising paragraphs (b) and (e) to read as follows:

§ 87.3 Other applicable rule parts.

* * * * *

(b) *Part 1* contains rules of practice and procedure for license applications, adjudicatory proceedings, rule making proceedings, procedures for reconsideration and review of the Commission's actions; provisions concerning violation notices and forfeiture proceedings; and the environmental processing requirements that, together with the procedures specified in § 17.4(c) of this chapter, if applicable, must be complied with prior to the initiation of construction.

* * * * *

(e) *Part 17* contains requirements for construction, marking and lighting of antenna towers, and the environmental notification process that must be completed before filing certain antenna structure registration applications.

* * * * *

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ 23. The authority citation for part 90 continues to read as follows:

Authority: 47 U.S.C. 154(i), 11, 303(g), 303(r), 332(c)(7).

■ 24. Section 90.5 is amended by revising paragraphs (b) and (f) to read as follows:

§ 90.5 Other applicable rule parts.

* * * * *

(b) *Part 1* includes rules of practice and procedure for the filing of applications for stations to operate in the Wireless Telecommunications Services, adjudicatory proceedings including hearing proceedings, and rule making proceedings; procedures for reconsideration and review of the Commission's actions; provisions concerning violation notices and forfeiture proceedings; and the environmental processing requirements that, together with the procedures specified in § 17.4(c) of this chapter, if applicable, must be complied with prior to initiating construction.

* * * * *

(f) *Part 17* contains requirements for construction, marking and lighting of antenna towers, and the environmental notification process that must be completed before filing certain antenna structure registration applications.

* * * * *

■ 25. Section 90.129 is amended by revising paragraph (g) to read as follows:

§ 90.129 Supplemental information to be routinely submitted with applications.

* * * * *

(g) The environmental assessment required by §§ 1.1307 and 1.1311 of this chapter, if applicable. If an application filed under this part proposes the use of one or more new or existing antenna structures that require registration under part 17 of this chapter, any required environmental assessment should be submitted pursuant to the process set forth in § 17.4(c) of this chapter rather than with the application filed under this part.

* * * * *

[FR Doc. 2012–1535 Filed 1–25–12; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126522–0640–02]

RIN 0648–XA956

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Non-American Fisheries Act Crab Vessels Operating as Catcher/Processors Using Pot Gear in the Western Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; modification of a closure.

SUMMARY: NMFS is opening directed fishing for Pacific cod by non-American Fisheries Act (AFA) crab vessels operating as catcher/processors using pot gear in the Western Regulatory Area of the Gulf of Alaska (GOA) for seven days. This action is necessary to fully use the A season allowance of the 2012 Pacific cod sideboard limit established for non-AFA crab vessels operating as catcher/processors using pot gear in the Western Regulatory Area of the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), January 23, 2012 through 1200 hrs, A.l.t., January 30, 2012. Comments must be received at the following address no later than 4:30 p.m., A.l.t., February 10, 2012.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2012–0010, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal *www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2012–0010 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on that line.
- *Mail:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.
- *Fax:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Fax comments to (907) 586–7557.
- *Hand delivery to the Federal Building:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Deliver comments to 709 West 9th Street, Room 420A, Juneau, AK.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, (907) 586–7228.

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

The A season allowance of the 2012 Pacific cod sideboard limit established for non-AFA crab vessels operating as catcher/processors using pot gear in the Western Regulatory Area of the GOA is 98 metric tons as established by the final 2011 and 2012 harvest specifications for groundfish in the GOA (76 FR 11111, March 1, 2011) and inseason adjustment (77 FR 438, January 5, 2012).

NMFS closed directed fishing for Pacific cod by non-AFA crab vessels operating as catcher/processors using pot gear in the Western Regulatory Area of the GOA under § 680.22(e)(3) on January 1, 2012 (76 FR 81860, December 29, 2011).

As of January 17, 2012, NMFS has determined that approximately 98 metric tons remains in the A season allowance of the 2012 Pacific cod sideboard limit established for non-AFA crab vessels operating as catcher/processors using pot gear in the Western Regulatory Area of the GOA. Furthermore, NMFS has determined that this remaining amount of Pacific cod is sufficient to support a directed fishery. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C), and (a)(2)(iii)(D), and to fully utilize the 2012 Pacific cod sideboard limit established for non-AFA crab vessels operating as catcher/processors using pot gear in the Western Regulatory Area of the GOA, NMFS is terminating the previous closure and is reopening directed fishing of Pacific cod by non-AFA crab vessels operating as catcher/processors using pot gear in the Western Regulatory Area of the GOA. The Administrator, Alaska Region (Regional Administrator) considered the following factors in reaching this decision: (1) The current catch of Pacific cod by non-AFA crab vessels operating as catcher/processors using pot gear in the Western Regulatory Area of the GOA and, (2) the harvest capacity and stated intent on future harvesting patterns of vessels in participating in this fishery.

In accordance with § 680.22(e)(2)(i), the Administrator, Alaska Region, NMFS (Regional Administrator) has determined that the A season allowance of the 2012 Pacific cod sideboard limit established for non-AFA crab vessels operating as catcher/processors using pot gear in the Western Regulatory Area of the GOA will be reached after seven days. Therefore, the Regional Administrator is establishing a sideboard directed fishing allowance of 88 mt, and is setting aside the remaining 10 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 680.22(e)(3), the Regional Administrator finds that this sideboard directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by non-AFA crab vessels operating as catcher/processors using pot gear in the Western Regulatory Area of the GOA.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is

impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening in the Pacific cod by non-AFA crab vessels operating as catcher/processors using pot gear in the Western Regulatory Area of the GOA. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet and processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of January 17, 2012.

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

Without this inseason adjustment, NMFS could not allow of Pacific cod by non-AFA crab vessels operating as catcher/processors using pot gear in the Western Regulatory Area of the GOA to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until February 10, 2012.

This action is required by § 679.25 and is exempt from review under Executive Order 12866.

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

Dated: January 23, 2012.

Steven Thur,

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

[FR Doc. 2012–1618 Filed 1–23–12; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 77, No. 17
Thursday, January 26, 2012

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

DEPARTMENT OF ENERGY

10 CFR Part 900

RIN 1901–AB18

Coordination of Federal Authorizations for Electric Transmission Facilities

AGENCY: Office of Electricity Delivery and Energy Reliability, Department of Energy.

ACTION: Notice of extension of public comment period.

SUMMARY: This document announces that the period for submitting comments on the proposed rule for the coordination of Federal Authorizations for Electric Transmission Facilities has been extended until February 27, 2012.

DATES: DOE will accept comments, data, and information regarding the proposed coordination rule published December 13, 2011 (76 FR 77432) until February 27, 2012.

ADDRESSES: Any comments submitted must be identified as comments on the ''Proposed 216(h) Regulations''. Comments may be submitted using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: Brian.Mills@hq.doe.gov.* Include ''Proposed 216(h) Regulations'' in the subject line of the message.
- *Mail:* Brian Mills, Office of Electricity Delivery and Energy Reliability (OE–20), U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Brian Mills, Office of Electricity Delivery and Energy Reliability (OE–20), U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, Phone (202) 586–8267, email *Brian.Mills@hq.doe.gov,* or Lot Cooke, Attorney-Advisor, U.S. Department of Energy, Office of the General Counsel, GC–76, 1000 Independence Avenue SW., Washington, DC 20585, Phone (202) 586–0503, email *Lot.Cooke@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: On December 13, 2011, DOE published a proposed rule in the **Federal Register** (76 FR 77432) to amend its regulations for the timely coordination of Federal authorizations for proposed interstate electric transmission facilities pursuant to section 216(h) of the Federal Power Act (FPA). The proposed rule provided for the submission of comments by January 27, 2012. A commenter noted the significant interest of its members in the rulemaking and requested an extension of the comment period given the holidays and the need for its members to complete projects and reports for calendar year 2011.

DOE has determined that an extension of the public comment period is appropriate based on the foregoing reasons and is hereby extending the comment period. DOE will consider any comments received by February 27, 2012.

Issued in Washington, DC, on January 20, 2012.

Patricia A. Hoffman,

Assistant Secretary, Office of Electricity Delivery and Energy Reliability.

[FR Doc. 2012–1662 Filed 1–25–12; 8:45 am]

BILLING CODE 6450–01–P

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1254

RIN 2590–AA53

Mortgage Assets Affected by PACE Programs

AGENCY: Federal Housing Finance Agency.

ACTION: Advance notice of proposed rulemaking; request for comments; Notice of intent to prepare environmental impact statement; request for scoping comments.

SUMMARY: The Federal Housing Finance Agency (''FHFA'') hereby issues this Advance Notice of Proposed Rulemaking (''ANPR'') concerning mortgage assets affected by Property Assessed Clean Energy (''PACE'') programs and Notice of Intent (''NOI'') to prepare an environmental impact statement (''EIS'') under the National Environmental Policy Act (''NEPA'') to address the potential environmental impacts of FHFA's proposed action.

The United States District Court for the Northern District of California issued a preliminary injunction ordering FHFA ''to proceed with the notice and comment process'' in adopting guidance concerning mortgages that are or could be affected by PACE programs. Specifically, the California District Court ordered FHFA to ''cause to be published in the **Federal Register** an Advance Notice of Proposed Rulemaking relating to the statement issued by FHFA on July 6, 2010, and the letter directive issued by FHFA on February 28, 2011, that deal with property assessed clean energy (PACE) programs.''

In response to and compliance with the California District Court's order, FHFA is seeking comment on whether the restrictions and conditions set forth in the July 6, 2010 Statement and the February 28, 2011 Directive should be maintained, changed, or eliminated, and whether other restrictions or conditions should be imposed. FHFA has appealed the California District Court's order to the U.S. Court of Appeals for the Ninth Circuit (the ''Ninth Circuit''). Inasmuch as the California District Court's order remains in effect pending the outcome of the appeal, FHFA is proceeding with the publication of this ANPR and NOI pursuant to that order. The Ninth Circuit has stayed, pending the outcome of FHFA's appeal, the portion of the California District Court's Order requiring publication of a final rule. FHFA reserves the right to withdraw this ANPR and NOI should FHFA prevail in its appeal, and may in that situation continue to address the financial risks FHFA believes PACE programs pose to safety and soundness through means other than notice-and-comment rulemaking.

DATES: Written comments must be received on or before March 26, 2012.

ADDRESSES: You may submit your comments, identified by regulatory information number (RIN) 2590–AA53, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov:* Follow the instructions for submitting comments. If you submit your comment to the *Federal eRulemaking Portal,* please also send it by email to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by FHFA. Please include ''RIN 2590–AA53'' in the subject line of the message.

• *Email:* Comments to Alfred M. Pollard, General Counsel may be sent by email to *RegComments@fhfa.gov.* Please include ''RIN 2590–AA53'' in the subject line of the message.

• *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA53, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024.

• *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA53, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. The package should be logged at the Seventh Street entrance Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Alfred M. Pollard, General Counsel, (202) 649–3050 (not a toll-free number), Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA invites comments on all aspects of this ANPR and NOI. Commenters should identify by number, the question each of their comments addresses. Copies of all comments will be posted without change, including any personal information you provide, such as your name and address, on the FHFA Web site at *https://www.fhfa.gov.* In addition, copies of all comments received will be available for examination by the public on business days between the hours of 10 a.m. and 3 p.m. at the Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 649–3804.

II. Background

A. FHFA's Statutory Role and Authority as Regulator

FHFA is an independent federal agency created by the Housing and Economic Recovery Act of 2008 (HERA) to supervise and regulate the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), (together, the Enterprises), and the Federal Home Loan Banks (the ''Banks''). FHFA is the exclusive supervisory regulator of the Enterprises and the Banks. Both Enterprises are presently in conservatorship under the direction of FHFA as Conservator. 12 U.S.C. 4501 *et seq.* Congress established FHFA in the wake of a national crisis in the housing market. A key purpose of HERA was to create a single federal regulator with all of the authority necessary to oversee Fannie Mae, Freddie Mac, and the Banks. 12 U.S.C. 4511(b)(2).

Fannie Mae and Freddie Mac operate in the secondary mortgage market. Accordingly, they do not directly lend funds to home purchasers, but instead buy mortgage loans from original lenders, thereby providing funds those entities can use to make additional loans. The Enterprises hold in their own portfolios a fraction of the mortgage loans they purchase. The Enterprises also securitize a substantial fraction of the mortgage loans they purchase, packaging them into pools and selling interests in the pools as mortgage-backed securities. Traditionally, the Enterprises guarantee nearly all of the mortgage loans they securitize. Together, the Enterprises own or guarantee more than $5 trillion in residential mortgages.

FHFA's ''Director shall have general regulatory authority over each [Enterprise] * * *, and shall exercise such general regulatory authority * * * to ensure that the purposes of this Act, the authorizing statutes, and any other applicable law are carried out.'' 12 U.S.C. 4511(b)(2). As regulator, FHFA is charged with ensuring that the Enterprises operate in a ''safe and sound manner.'' 12 U.S.C. 4513(a). FHFA is statutorily authorized ''to exercise such incidental powers as may be necessary or appropriate to fulfill the duties and responsibilities of the Director in the supervision and regulation'' of the Enterprises. 12 U.S.C. 4513(a)(2). FHFA's Director is authorized to ''issue any regulations or guidelines or orders as necessary to carry out the duties of the Director * * *.'' *Id.* 4526(a). FHFA's regulations are subject to notice-and-comment rulemaking under the Administrative Procedure Act.

B. FHFA's Statutory Role and Authority as Conservator

HERA also authorizes the Director of FHFA to ''appoint the Agency as conservator or receiver for a regulated entity * * * for the purpose of reorganizing, rehabilitating or winding up [its] affairs.'' *Id.* 4617(a)(1), (2). On September 6, 2008, FHFA placed Fannie Mae and Freddie Mac into conservatorships. FHFA thus ''immediately succeed[ed] to all rights, titles, powers, and privileges of the shareholders, directors, and officers of the [Enterprises].'' *Id.* 4617(b)(2)(B).

In its role as Conservator, FHFA may take any action ''necessary to put the regulated entity into sound and solvent condition'' or ''appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.'' *Id.* 4617(b)(2)(D). The Conservator also may ''take over the assets of and operate the regulated entity in the name of the regulated entity,'' ''perform all functions of the entity'' consistent with the Conservator's appointment, and ''preserve and conserve the assets and property of the regulated entity.'' *Id.* 4617(b)(2)(A), (B). The Conservator may take any authorized action ''which the Agency determines is in the best interests of the regulated entity or the Agency.'' *Id.* 4617(b)(2)(J). ''The authority of the Director to take actions [as Conservator] shall not in any way limit the general supervisory and regulatory authority granted'' by HERA. 12 U.S.C. 4511(c).

C. Issues Relating to PACE Programs That Are Relevant to FHFA's Supervision and Direction of the Enterprises

PACE programs provide a means of financing certain kinds of home-improvement projects. Specifically, PACE programs permit local governments to provide financing to property owners for the purchase of energy-related home-improvement projects, such as solar panels, insulation, energy-efficient windows, and other products. Homeowners repay the amount borrowed, with interest, over a period of years through ''contractual assessments'' added to their property tax bill. Over the last three years, more than 25 states have passed legislation authorizing local governments to set up PACE-type programs. Such legislation leaves most program implementation and standards to local governmental bodies and provides no uniform requirements or enforcement mechanisms.

In most, but not all, states that have implemented PACE programs, the liens that result from PACE program loans have priority over mortgages, including pre-existing first mortgages.[1] In such programs, the PACE lender ''steps ahead'' of the mortgage holder (*e.g.,* a Bank, Fannie Mae, or Freddie Mac) in

[1] In at least four states—Maine, New Hampshire, Oklahoma, and Vermont—legislation provides that the PACE lien does not subordinate a first mortgage on the subject property. FHFA understands that under legislation now pending in Connecticut, PACE programs in that state also would not subordinate first mortgages.

priority of its claim against the collateral, and such liens ''run'' with the property. As a result, a mortgagee foreclosing on a property subject to a PACE lien must pay off any accumulated unpaid PACE assessments (*i.e.,* past-due payments) and remains responsible for the principal and interest payments that are not yet due (*i.e.,* future payments) on the PACE obligation. Likewise, if a home is sold before the homeowner repays the city or county, the purchaser of the home assumes the obligation to pay the remainder. The mortgage holder is also at risk in the event of foreclosure for any diminution in the value of the property caused by the outstanding lien or the retrofit project, which may or may not be attractive to potential purchasers. Also, the homeowner's assumption of this new obligation may itself increase the risk that the homeowner will become delinquent or default on other financial obligations, including any mortgage obligations.[2]

Typically, PACE programs serve as a channel through which private-sector capital flows through the local government to the homeowner-borrower (or the homeowner-borrower's contractors). While PACE programs vary in the particular mechanisms they use to raise capital, in many instances private investors provide the capital by purchasing bonds secured by the payments that homeowner-borrowers make on their PACE obligations. From the capital provider's perspective, one advantage of channeling the funding through a local government, rather than lending directly to the homeowner-borrower or channeling the funds through a private enterprise, is that the local government is able to use the property-tax assessment system as the vehicle for repayment. Because of the ''lien-priming'' feature of most PACE programs, the capital provider effectively ''steps ahead'' of all other private land-secured lenders (including mortgage lenders) in priority, thereby minimizing the financial risk to the capital provider while downgrading the priority of first and second mortgages, and of any other property-secured financial obligation.

Proponents of PACE programs have analogized the obligations to repay PACE loans to traditional tax assessments. However, unlike traditional tax assessments, PACE loans are voluntary—homeowners opt in, submit applications, and contract with the city or county's PACE program to obtain the loan. Each participating property owner controls the use of the funds, selects the contractor who will perform the energy retrofit, owns the energy retrofit fixtures and must repair the fixtures should they become inoperable, including during the time the PACE loan remains outstanding. Each locality sets its own terms and requirements for homeowner and project eligibility for PACE loans; no uniform national standards exist. Nothing in PACE requires that local governments adopt and implement nationally uniform financial underwriting standards, such as minimum total loan-to-value ratios that take into account either: (i) Total debt or other liens on the property; or (ii) the possibility of subsequent declines in the value of the property. Many PACE programs also do not employ standard personal creditworthiness requirements, such as limits on FICO score or total debt-to-income ratio, although some include narrower requirements, such as that the homeowner-borrower be current on the mortgage and property taxes and not have a recent bankruptcy history.

Some local PACE programs communicate to homeowners that incurring a PACE obligation may violate the terms of their mortgage documents.[3] Similarly, some cities and counties provide forms that participants can use to obtain the lender's consent or acknowledgment prior to participation.[4]

State legislation authorizing PACE programs gained notoriety in 2008. As PACE programs were being considered by more states, FHFA began to evaluate their implementations and potential impact on the portfolios of FHFA-regulated entities. On June 18, 2009, FHFA issued a letter and background paper raising concerns about PACE programs that retroactively created first liens. To discuss the risks to lenders and the Enterprises as well as borrowers, FHFA met over the next year with PACE stakeholders, other federal agencies, and state and local authorities around the country.

On May 5, 2010, in response to continuing questions about PACE programs, Fannie Mae and Freddie Mac issued advisories (''Advisories'') to lenders and servicers of mortgages owned or guaranteed by the Enterprises.[5] The May 5, 2010 Advisories referred to Fannie Mae's and Freddie Mac's jointly developed master uniform security instruments (''USIs''), which prohibit liens senior to that of the mortgage.[6]

Shortly after the May 5, 2010 Advisories were issued, FHFA received a number of inquiries seeking FHFA's position.[7] On July 6, 2010, FHFA issued the Statement, which provides:

> [T]he Federal Housing Finance Agency (FHFA) has determined that certain energy retrofit lending programs present significant safety and soundness concerns that must be addressed by Fannie Mae, Freddie Mac and the Federal Home Loan Banks. * * *
>
> First liens established by PACE loans are unlike routine tax assessments and pose unusual and difficult risk management challenges for lenders, servicers and mortgage securities investors. * * *
>
> They present significant risk to lenders and secondary market entities, may alter valuations for mortgage-backed securities and are not essential for successful programs to spur energy conservation.[8]

The Statement directed that the May 5, 2010 Advisories ''remain in effect'' and that the Enterprises ''should undertake prudential actions to protect their operations,'' including: (i) Adjusting loan-to-value ratios; (ii) ensuring that loan covenants require approval/consent for any PACE loans; (iii) tightening borrower debt-to-income ratios; and, (iv) ensuring that mortgages on properties with PACE liens satisfy all applicable federal and state lending regulations. However, FHFA directed these actions on a prospective basis only, directing in the Statement that any prohibition against such liens in the Enterprises' USIs be waived as to PACE obligations already in existence as of July 6, 2010.

On February 28, 2011, the Conservator issued a directive stating the Agency's view that PACE liens

[2] In many PACE programs, the allowable amount of a loan is based on assessed property value and may not consider the borrower's ability to repay. States have considered permitting loan levels of 10% to 40% of the assessed value of the underlying property.

[3] *See, e.g.,* Yucaipa Loan Application at 2–3, 10, *http://www.yucaipa.org/cityPrograms/EIP/PDF_Files/Application.pdf* (last visited Jan. 12, 2012); Sonoma Application at 2, *http://www.sonomacountyenergy.org/lower.php?url=reference-forms-new&catid=603* (document at ''Application'' link) (last visited Jan. 12, 2012).

[4] Sonoma Lender Acknowledgement, *http://www.sonomacountyenergy.org/lower.php?url=* reference-forms-new&catid=606 (pages 4–7 of document at ''Lender Info and Acknowledgement'' link) (last visited Jan. 12, 2012).

[5] Fannie Mae Lender Letter LL–2010–06 (May 5, 2010), *available at https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/ll1006.pdf;* Freddie Mac Industry Letter (May 5, 2010), *available at http://www.freddiemac.com/sell/guide/bulletins/pdf/iltr050510.pdf.*

[6] The relevant provision appears in Section 4. *See, e.g.,* Freddie Mac Form 3005, California Deed of Trust, *available at http://www.freddiemac.com/uniform/doc/3005-CaliforniaDeedofTrust.doc;* Fannie Mae Form 3005, California Deed of Trust, *available at https://www.efanniemae.com/sf/formsdocs/documents/secinstruments/doc/3005w.doc.*

[7] Letter from Edmund G. Brown, Jr. to Edward DeMarco (May 17, 2010); Letter from Edmund G. Brown, Jr. to Edward DeMarco (June 22, 2010).

[8] FHFA Statement on Certain Energy Retrofit Loan Programs (July 6, 2010), *available at http://www.fhfa.gov/webfiles/15884/PACESTMT7610.pdf.*

''present significant risks to certain assets and property of the Enterprises—mortgages and mortgage-related assets—and pose unusual and difficult risk management challenges.'' FHFA thus directed the Enterprises to ''continue to refrain from purchasing mortgage loans secured by properties with outstanding first-lien PACE obligations.'' *Id.* In all its statutory capacities, FHFA is empowered to act decisively to avoid risk to the Enterprises. In conservatorship, with taxpayer support, this obligation is emphasized by express Congressional directions on conservator duties.

Several parties brought legal challenges to the process by which FHFA issued the July 6, 2010 Statement and the February 28, 2011 Directive, as well as to their substance. The United States District Courts for the Northern District of Florida, the Southern District of New York, and the Eastern District of New York all dismissed lawsuits presenting such challenges. The United States District Court for the Northern District of California (the ''California District Court''), however, has allowed such a lawsuit to proceed and has issued a preliminary injunction ordering FHFA ''to proceed with the notice and comment process'' in adopting guidance concerning mortgages that are or could be affected by PACE programs. Specifically, the California District Court ordered FHFA to ''cause to be published in the **Federal Register** an Advance Notice of Proposed Rulemaking relating to the statement issued by FHFA on July 6, 2010, and the letter directive issued by FHFA on February 28, 2011, that deal with property assessed clean energy (PACE) programs.'' The California District Court further ordered that ''[i]n the Advance Notice of Proposed Rulemaking, FHFA shall seek comments on, among other things, whether conditions and restrictions relating to the regulated entities' dealing in mortgages on properties participating in PACE are necessary; and, if so, what specific conditions and/or restrictions may be appropriate.'' The California District Court also ordered that ''[t]he comment period shall not be less than 60 days.'' The California District Court neither invalidated nor required FHFA to withdraw the July 6, 2010 Statement or the February 28, 2011 Directive, both of which remain in effect.

In response to and compliance with the California District Court's order, FHFA is seeking comment on whether the restrictions and conditions set forth in the July 6, 2010 Statement and the February 28, 2011 Directive should be maintained, changed, or eliminated, and whether other restrictions or conditions should be imposed. FHFA has appealed the California District Court's order to the U.S. Court of Appeals for the Ninth Circuit (the ''Ninth Circuit''). Inasmuch as the California District Court's order remains in effect pending the outcome of the appeal, FHFA is proceeding with the publication of this ANPR and NOI pursuant to that order. The Ninth Circuit has stayed, pending the outcome of FHFA's appeal, the portion of the California District Court's Order requiring publication of a final rule. FHFA reserves the right to withdraw this ANPR and NOI should FHFA prevail in its appeal, and may in that situation continue to address the financial risks FHFA believes PACE programs pose to safety and soundness through means other than notice-and-comment rulemaking.

This ANPR and NOI reviews FHFA's statutory authority as the federal supervisory regulator of the Enterprises, reviews FHFA's statutory role and authority as the Conservator of each Enterprise, summarizes issues relating to PACE that are relevant to FHFA's supervision and direction of the Enterprises, suggests subjects relating to PACE on which FHFA might issue a proposed rule or otherwise provide guidance to the Enterprises within the governing statutory framework, and invites comments from the public.

III. Issues as to Which FHFA Seeks Comment

In light of the California District Court's order and the background information provided above, FHFA seeks comments on the following issues regarding the Enterprises' dealing in mortgages on properties that participate in PACE programs or that could participate in PACE programs.

A. Conditions and Restrictions Relating to PACE

The California District Court called upon FHFA to seek comments on whether conditions and restrictions relating to the regulated entities' dealing in mortgages on properties participating in PACE programs are necessary; and, if so, what specific conditions and/or restrictions may be appropriate. In the July 6, 2010 Statement and the February 28, 2011 Directive, FHFA imposed certain conditions and restrictions relating to the Enterprises' dealing in mortgages on properties participating in PACE programs. FHFA thus will take comments on whether those restrictions and conditions should be maintained, changed, or eliminated, and whether other restrictions or conditions should be imposed. Accordingly, FHFA requests comment on the following question:

Question 1: Are conditions and restrictions relating to FHFA-regulated entities' dealings in mortgages on properties participating in PACE programs necessary? If so, what specific conditions and/or restrictions may be appropriate?

B. Financial Risk to the Enterprises Resulting From Subordination of Mortgage Security Interests to PACE Liens

FHFA is concerned that PACE programs that involve subordination of any mortgage holder's security interest in the underlying property to that of the provider of PACE financing may increase the financial risk borne by the Enterprises as holders of mortgages on properties subject to PACE obligations, as well as mortgage-backed securities based on such mortgages. FHFA believes that any such increase in the financial risk on mortgages and mortgage-backed securities already in the Enterprise portfolios, especially if imposed without Enterprise consent, may present significant safety and soundness concerns. In light of that concern, FHFA requests comment on the following three questions regarding financial risks to the Enterprises relating to the subordination of mortgage security interests to PACE liens:

Question 2: How does the lien-priming feature of first-lien PACE obligations affect the financial risks borne by holders of mortgages affected by PACE obligations or investors in mortgage-backed securities based on such mortgages? To the extent that the lien-priming feature of first-lien PACE obligations increases any financial risk borne by holders of mortgages affected by PACE obligations or investors in mortgage-backed securities based on such mortgages, how and at what cost could such parties insulate themselves from such increased risk?

Question 3: How does the lien-priming feature of first-lien PACE obligations affect any financial risk that is borne by holders of mortgages affected by PACE obligations or investors in mortgage-backed securities based on such mortgages and that relates to any of the following:

- The total amount of debt secured by the subject property relative to the value of the subject property (*i.e.,* Combined Loan to Value Ratio for the property or other measures of leverage);
- The amount of funds available to pay for energy-related home-improvement projects after the subtraction of administrative fees or any other program expenses charged or

deducted before funds become available to pay for an actual PACE-funded project (FHFA understands such fees and expenses can consume up to 10% or more of the funds a borrower could be obligated to repay under some PACE programs);

- The timing and nature of advancements in energy-efficiency technology;
- The timing and nature of changes in potential homebuyers' preferences regarding particular kinds of energy-efficiency projects;
- The timing, direction, and magnitude of changes in energy prices; and,
- The timing, direction, and magnitude of changes of property values, including the possibility of downward adjustments in value?

Question 4: To the extent that the lien-priming feature of first-lien PACE obligations increases any financial risk that is borne by holders of mortgages affected by PACE obligations or investors in mortgage-backed securities based on such mortgages and that relates to any of the following, how and at what cost could such parties insulate themselves from that increase in risk:

- The total amount of debt secured by the subject property relative to the value of the subject property (*i.e.,* Combined Loan to Value Ratio for the property or other measures of leverage);
- The amount of funds available to pay for energy-related home-improvement projects after the subtraction of administrative fees or any other programs expenses charged deducted before funds become available to pay for an actual PACE funded project (FHFA understands such fees and expenses can consume up to 10% or more of the funds a borrower could be obligated to repay under some PACE programs);
- The timing and nature of advancements in energy-efficiency technology;
- The timing and nature of changes in potential homebuyer preferences regarding particular kinds of energy-efficiency projects;
- The timing, direction, and magnitude of changes in energy prices; and,
- The timing, direction, and magnitude of changes of property values, including the possibility of downward adjustments in value?

C. PACE and the Market for Home-Improvement Financing

FHFA is concerned that the risks first-lien PACE programs present to mortgage holders may be unnecessary or unreasonable in light of other market options for financing home-improvement projects relating to energy efficiency that do not subordinate mortgage holders' security interests. In light of that concern, FHFA requests comment on the following four questions relating to PACE programs and the market for home-improvement financing:

Question 5: What alternatives to first-lien PACE loans (*e.g.,* self-financing, bank financing, leasing, contractor financing, utility company ''on-bill'' financing, grants, and other government benefits) are available for financing home-improvement projects relating to energy efficiency? On what terms? Which do and which do not share the lien-priming feature of first-lien PACE obligations? What are the relative advantages and disadvantages of each, from the perspective of (i) The current and any future homeowner-borrower, (ii) the holder of an interest in any mortgage on the subject property, and (iii) the environment?

Question 6: How does the effect on the value of the underlying property of an energy-related home-improvement project financed through a first-lien PACE program compare to the effect on the value of the underlying property that would flow from the same project if financed in any other manner?

Question 7: How does the effect on the environment of an energy-related home-improvement project financed through a first-lien PACE program compare to the effect on the environment that would flow from the same project if financed in any other manner?

Question 8: Do first-lien PACE programs cause the completion of energy-related home improvement projects that would not otherwise have been completed, as opposed to changing the method of financing for projects that would have been completed anyway? What, if any, objective evidence exists on this point?

D. PACE and Protections for the Homeowner-Borrower

FHFA is concerned that PACE programs may not incorporate features that adequately protect the interests of the homeowner-borrower, and that the lack of adequate protection could result in homeowner-borrowers undertaking PACE projects or selecting PACE financing terms that increase the financial risks borne by mortgage holders such as the Enterprises. In light of that concern, FHFA requests comment on the following five questions relating to PACE and protections for the homeowner-borrower:

Question 9: What consumer protections and disclosures do first-lien PACE programs mandate for participating homeowners? When and how were those protections put into place? How, if at all, do the consumer protections and disclosures that local first-lien PACE programs provide to participating homeowners differ from the consumer protections and disclosures that non-PACE providers of home-improvement financing provide to borrowers? What consumer protection enforcement mechanisms do first-lien PACE programs have?

Question 10: What, if any, protections or disclosures do first-lien PACE programs provide to homeowner-borrowers concerning the possibility that a PACE-financed project will cause the value of their home, net of the PACE obligation, to decline? What is the effect on the financial risk borne by the holder of any mortgage interest in a subject property if PACE programs do not provide any such protections or disclosures?

Question 11: What, if any, protections or disclosures do first-lien PACE programs provide to homeowner-borrowers concerning the possibility that the utility-cost savings resulting from a PACE-financed project will be less than the cost of servicing the PACE obligation? What is the effect on the financial risk borne by the holder of any mortgage interest in a subject property if first-lien PACE programs do not provide any such protections or disclosures?

Question 12: What, if any, protections or disclosures do first-lien PACE programs provide to homeowner-borrowers concerning the possibility that over the service life of a PACE-financed project, the homeowner-borrower may face additional costs (such as costs of insuring, maintaining, and repairing equipment) beyond the direct cost of the PACE obligation? What is the effect on the financial risk borne by the holder of any mortgage interest in a subject property if first-lien PACE programs do not provide any such protections or disclosures?

Question 13: What, if any, protections or disclosures do first-lien PACE programs provide to homeowner-borrowers concerning the possibility that subsequent purchasers of the subject property will reduce the amount they would pay to purchase the property by some or all of the amount of any outstanding PACE obligation? What is the effect on the financial risk borne by the holder of any mortgage interest in a subject property if first-lien PACE programs do not provide any such protections or disclosures?

E. PACE and Underwriting Standards

FHFA is concerned that first-lien PACE programs may not incorporate underwriting standards that adequately ensure that the homeowner-borrower will be able to repay the obligation, and that as a result homeowner-borrowers may undertake PACE projects, or select PACE financing terms, that adversely affect the homeowner-borrower's ability to repay other debt, including mortgage debt. In light of that concern, FHFA requests comment on the following three questions relating to PACE and underwriting standards:

Question 14: How do the credit underwriting standards and processes of PACE programs compare to that of other providers of Home-improvement financing, such as banks? Do they consider, for example: (i) Borrower creditworthiness, including an assessment of total indebtedness in relation to borrower income, consistent with national standards; (ii) total loan-to-value ratio of all secured loans on the property combined, consistent with national standards; and (iii) appraisals of property value, consistent with national standards?

Question 15: What factors do first-lien PACE programs consider in determining whether to provide PACE financing to a particular homeowner-borrower seeking funding for a particular project eligible for PACE financing? What analytic tools presently exist to make that determination? How, if at all, have the methodologies, metrics, and assumptions incorporated into such tools been tested and validated?

Question 16: What factors and information do first-lien PACE programs gather and consider in determining whether a homeowner-borrower will have sufficient income or cash flow to service the PACE obligation in addition to the homeowner-borrower's pre-existing financial obligation? What analytic tools presently exist to make that determination? How, if at all, have the methodologies, metrics, and assumptions incorporated into such tools been tested and validated?

F. Considerations Relating to FHFA's Intent To Prepare an EIS

FHFA intends to prepare an EIS to address the potential environmental impacts of any proposed rule that FHFA may issue following its consideration of the comments submitted in response to this ANPR and NOI. To that end, this ANPR and NOI initiates the NEPA scoping process to identify the environmental issues and reasonable alternatives to be examined in the EIS, and requests comments regarding those and other matters related to the scope of the EIS (''EIS Scoping Comments'').

To ensure that all relevant environmental issues and reasonable alternatives are addressed, FHFA invites and encourages EIS Scoping Comments. Interested parties are encouraged to submit their EIS Scoping Comments within a 60-day scoping period, which begins with publication of this notice. EIS Scoping Comments received after the end of the scoping period will be considered to the extent practicable. You may submit EIS Scoping Comments, identified by regulatory information number (RIN) 2590–AA53 and marked ''EIS Scoping Comments,'' by any of the methods identified in the **ADDRESSES** section above. Submissions may include both EIS Scoping Comments and other comments, but the EIS Scoping Comments must be separately identified.

1. Proposed Action

FHFA's Proposed Action would direct the Enterprises not to purchase any mortgage that is subject to a first-lien PACE obligation or that could become subject to first-lien PACE obligations without the consent of the mortgage holder. FHFA believes that the Proposed Action is reasonable and necessary to limit, in the interest of safety and soundness, the financial risks that could be involuntarily borne by the Enterprises, thereby preserving and conserving the Enterprises' assets and property while protecting American taxpayers from further loss.

2. No Action Alternative

As required by the Council on Environmental Quality regulations that implement NEPA, the EIS will analyze and present the potential environmental impacts associated with reasonable alternatives, including the No Action Alternative.

The No Action Alternative is to withdraw the July 6, 2010 Statement and the February 28, 2011 Directive. This would allow the Enterprises to purchase mortgage loans secured by properties with outstanding first-lien PACE and PACE-like obligations.

3. Other Alternatives

In addition to the Proposed Action and No Action alternatives described above, FHFA invites comments on reasonable alternatives that would reduce or avoid known or potential adverse environmental impacts associated with the proposed action while ensuring that the Enterprises operate in a safe and sound manner. Accordingly, FHFA requests that for each reasonable alternative suggested, the commenter explain the positive, neutral or negative environmental impacts, as well as potential changes in the level of financial risk borne by holders of any interest in a mortgage on PACE-affected properties, associated with the suggested alternative. Accordingly, FHFA specifically requests comment on the following question:

Question 17: What specific alternatives to FHFA's existing statements about PACE should FHFA consider? For each alternative, as compared to the Proposed Action, what positive or negative environmental effects would result and how would the level of financial risk borne by holders of any interest in a mortgage on PACE-affected properties change?

4. Issues and Environmental Resources To Be Examined

To facilitate the scoping process, FHFA has identified a preliminary approach and list of issues and environmental resources that it may consider in the EIS. This list is not intended to be all-inclusive or to predetermine the scope of the EIS, but is intended to serve as a starting point for public comment.

- FHFA intends to develop scenarios (high, medium, and low) that describe three potential levels of uptake of PACE program loans by homeowners (irrespective of the Agency's action). These scenarios would be developed at the regional level and would make assumptions on the types of home improvement projects (*e.g.,* home insulation, solar panels, geothermal energy units, etc.) that could be installed. The ''high'' scenario would assume the potential for a high level of uptake of PACE projects by homeowners. The ''medium'' and ''low'' scenarios would assume medium and low levels of uptake. FHFA invites comment on how these scenarios should be developed.
- Potential effects of the Proposed Action and alternatives on the uptake of PACE home improvement projects will be considered. For each alternative analyzed in detail in the EIS, FHFA would estimate PACE project implementation for each of the scenarios listed above and then compare these estimates across the alternatives.
- Using assumptions on the types of home improvement projects that could be implemented, FHFA would estimate the potential energy and water consumption savings associated with each scenario at the regional level for each alternative.
- FHFA proposes to analyze the potential direct, indirect, and cumulative environmental impacts of

the proposed action and alternatives for the following resource areas: Greenhouse gas emissions; climate change; air pollutant emissions (including Clean Air Act criteria pollutant emissions); human health; water conservation; cultural and historic resources; and disproportionately high and adverse impacts to low-income and minority populations (environmental justice).

IV. Request for Comments

FHFA invites comments on all of the issues and questions discussed above, and will consider all comments in developing any proposed rule that FHFA may issue concerning the Enterprises' dealing in mortgages on properties participating in PACE programs. As to all questions enumerated above, commenters should provide supporting data and documentation for each of their responses, as these will assist FHFA in its consideration of comments.

Studies addressing relevant aspects of PACE programs may be submitted for the agency's consideration. FHFA is interested in studies analyzing:

- The effect of PACE-funded improvements on the value of the underlying property, including differential effects over time and across markets;
- The comparative costs of PACE programs with other means of financing such as home equity loans, refinance transactions, and leasing programs;
- Payback periods for projects eligible for PACE funding, considering costs, energy savings, and risks (including risk of changes in energy pricing or in the level of subsidies or tax credits available);
- The economic life of PACE-funded improvements, particularly in relation to the term of the PACE loan;
- Default rates of PACE and non-PACE loans based on populations with comparable borrower, loan and property characteristics; and
- Other subjects relating to PACE and the financial risks PACE programs pose to mortgage holders such as the Enterprises.

All study-related submissions should provide the complete study protocol; the date(s) the study was proposed, initiated, completed, and published or otherwise reported; all key assumptions; the sample size; the data; the results (including sensitivity of reported results to key assumptions); and any published report of the study. Study-related submissions should also identify the persons who developed, implemented, and published or otherwise reported the study, as well as the principal sources of funding for the study. All data should be provided in a reasonably accessible computer-readable format, such as Microsoft Excel files.

Dated: January 19, 2012.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

[FR Doc. 2012–1345 Filed 1–25–12; 8:45 am]

BILLING CODE 8070–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG–208274–86]

RIN 1545–AJ93

Information Reporting by Passport Applicants

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Withdrawal of notice of proposed rulemaking; notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide information reporting rules for certain passport applicants. These regulations do not provide information reporting rules for individuals applying to become permanent residents (green card holders). This document also withdraws the notice of proposed rulemaking (57 FR 61373) published in the **Federal Register** on December 24, 1992.

DATES: Comments and requests for a public hearing must be received by April 25, 2012.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–208274–86), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–208274–86), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–208274–86).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Lynn Dayan or Quyen Huynh at (202) 622–3880; concerning submissions of comments and requests for public hearing, Oluwafunmilayo Taylor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) and, pending receipt and evaluation of public comments approved by the Office of Management and Budget under control number 1545–1359. Comments on the collections of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by March 26, 2012. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the duties of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in these proposed regulation is in § 301.6039E–1(b). The information is required to be provided by individuals who apply for a United States passport or a renewal of a United States passport. The information provided by passport applicants will be used by the IRS for tax compliance purposes.

Estimated total annual reporting burden: 1,213,354 hours.

Estimated average annual burden hours per respondent: four to ten minutes.

Estimated number of respondents: 12,133,537.

Estimated annual frequency of responses: one.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control

number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains proposed amendments to 26 CFR part 301 under section 6039E of the Internal Revenue Code. Section 6039E provides rules concerning information reporting by U.S. passport and permanent resident applicants, and requires specified Federal agencies to provide certain information to the IRS.

On December 24, 1992, the Treasury Department and the IRS published a notice of proposed rulemaking (REG–208274–86, 1993–1 CB 822) in the **Federal Register** (57 FR 61373) under section 6039E (the 1992 proposed regulations). The 1992 proposed regulations provided guidance for both passport and permanent resident applicants to comply with information reporting rules under section 6039E, and indicated the responsibilities of specified Federal agencies to provide certain information to the IRS. No requests were received to testify on the 1992 proposed regulations and, accordingly, no public hearing was held. One written comment letter responding to the 1992 proposed regulations was received, which recommended modifications to Form 9003, ''Additional Questions to be Completed by All Applicants for Permanent Residence in the United States.'' Because Form 9003 is no longer in use and these proposed regulations do not address information reporting rules for permanent resident applicants, the comment was not considered in drafting these regulations. The proposed regulations do not provide rules concerning information reporting by individuals applying to become permanent residents; therefore such individuals are not within the scope of the proposed regulations.

The information required to be provided by passport applicants under section 6039E is collected on the U.S. passport application form submitted by such applicants to the Department of State.

The proposed regulations also withdraw the 1992 proposed regulations.

Explanation of Provisions

The proposed regulations set forth rules concerning information reporting by passport applicants under section 6039E. Section 301.6039E–1(a) requires an individual applying for a U.S. passport (passport applicant), other than an individual who applies for an official passport, diplomatic passport or passport for use on other official U.S. government business, to provide certain information with his or her passport application.

Section 301.6039E–1(b)(1) describes the required information to be provided by passport applicants: The applicant's full name and, if applicable, previous name; address of regular or principal place of residence within the country of residence and, if different, mailing address; taxpayer identifying number (TIN); and date of birth. Section 301.6039E–1(b)(2) provides that the required information must be submitted with the passport application, regardless of where the applicant resides at the time it is submitted.

Section 301.6039E–1(c) provides guidance on the circumstances under which the IRS may impose a $500 penalty amount on any passport applicant who fails to provide the required information.

Section 301.6039E–1 is proposed to be applicable to passport applications submitted after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Special Analyses

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

Comments and Request for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. The IRS and the Treasury Department request comments on all aspects of the proposed rules. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Quyen P. Huynh of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

Administrative practice and procedure, Alimony, Bankruptcy, Child support, Continental shelf, Courts, Crime, Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Investigations, Law enforcement, Oil pollution, Penalties, Pensions, Reporting and recordkeeping requirements, Seals and insignia, Statistics, Taxes.

Withdrawal of Proposed Regulations

Accordingly, under the authority of 26 U.S.C. 7805, the notice of proposed rulemaking (INTL–978–86; REG–208274–86) that was published in the **Federal Register** on December 24, 1992 (57 FR 61373) is withdrawn.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding an entry in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
Section 301.6039E–1 also issued under 26 U.S.C. 6039E.

Par. 2. Section 301.6039E–1 is added to read as follows:

§ 301.6039E–1 Information reporting by passport applicants.

(a) *In general.* Every individual who applies for a U.S. passport (passport applicant), other than an individual who applies for a U.S. passport for use in diplomatic, military, or other official U.S. government business, shall include with his or her passport application the

information described in paragraph (b) of this section.

(b) *Required information*—(1) *In general.* The information required under paragraph (a) of this section shall include the following information:

(i) The passport applicant's full name and, if applicable, previous name;

(ii) Address of the passport applicant's regular or principal place of residence within the country of residence and, if different, mailing address;

(iii) The passport applicant's taxpayer identifying number (TIN), if such a number has been issued to the passport applicant. A TIN means the individual's social security number (SSN) issued by the Social Security Administration. A passport applicant who does not have an SSN must enter zeros in the appropriate space on the passport application; and

(iv) The passport applicant's date of birth.

(2) *Time for furnishing information.* A passport applicant must provide the information required by this section at the time of submitting his or her passport application, whether by personal appearance or mail, to the Department of State (including United States Embassies and Consular posts abroad).

(c) *Penalties*—(1) *In general.* If the information required by paragraph (b)(1) of this section is incomplete or incorrect, or the information is not timely filed, then the passport applicant shall be subject to a penalty equal to $500 per application. Before assessing a penalty under this section, the IRS will ordinarily provide to the passport applicant written notice of the potential assessment of the $500 penalty, requesting the information being sought, and offering the applicant an opportunity to explain why such information was not provided at the time the passport application was submitted. A passport applicant has 60 days (90 days if the notice is addressed to an applicant outside the United States) to respond to the notice. If, after considering all the surrounding circumstances, the passport applicant demonstrates to the satisfaction of the Commissioner or his delegate that the failure is due to reasonable cause and not due to willful neglect, then the IRS will not assess the penalty.

(2) *Example.* The following example illustrates the provisions of paragraph (c) this section.

Example. C, a citizen of the United States, makes an error in supplying information on his passport application. Based on the nature of the error and C's timely response to correct the error after being contacted by the IRS, and considering all the surrounding circumstances, the Commissioner concludes that the mistake is due to reasonable cause and not due to willful neglect. Accordingly, no penalty is assessed.

(d) *Effective/applicability date.* The rules of this section apply to passport applications submitted after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2012–1567 Filed 1–25–12; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2011–0598; FRL–9622–6]

Approval and Promulgation of Air Quality Implementation Plans; Illinois; Regional Haze

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Illinois State Implementation Plan (SIP) addressing regional haze for the first implementation period. Illinois submitted its regional haze plan on June 24, 2011. The Illinois regional haze plan addresses Clean Air Act (CAA) section 169B and Regional Haze Rule requirements for states to remedy any existing and prevent future anthropogenic impairment of visibility at mandatory Class I areas. EPA is also proposing to approve two state rules and incorporating two permits into the SIP.

DATES: Comments must be received on or before February 27, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2011–0598, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. *Email: blakley.pamela@epa.gov.*

3. *Fax:* (312) 692–2450.

4. *Mail:* Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

5. *Hand Delivery:* Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2011–0598. 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 instructions on submitting comments, go to Section I of this document.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through

Friday, excluding Federal holidays. We recommend that you telephone Matt Rau, Environmental Engineer, at (312) 886–6524 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Matt Rau, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6524, *rau.matthew@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

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

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
2. Follow directions—EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

II. What is the background for EPA's proposed action?

A. The Regional Haze Problem

Regional haze is visibility impairment that is produced by a multitude of sources and activities located across a broad geographic area that emit fine particles ($PM_{2.5}$) (*e.g.,* sulfates, nitrates, organic carbon, elemental carbon, and soil dust) and its precursors—sulfur dioxide (SO_2), nitrogen oxides (NO_X), and in some cases ammonia (NH_3) and volatile organic compound (VOCs). Fine particle precursors react in the atmosphere to form fine particulate matter. Aerosol $PM_{2.5}$ impairs visibility by scattering and absorbing light. Visibility impairment reduces the clarity and distance one can see. $PM_{2.5}$ can also cause serious health effects and mortality in humans and contributes to detrimental environmental effects such as acid deposition and eutrophication.

Data from the existing visibility monitoring network, the ''Interagency Monitoring of Protected Visual Environments'' (IMPROVE) monitoring network, show that visibility impairment caused by air pollution occurs virtually all of the time at most national park and wilderness areas. The average visual range, the distance at which an object is barely discernable, in many Class I areas [1] in the western United States is 100–150 kilometers. That is about one-half to two-thirds of the visual range that would exist without anthropogenic air pollution. In the eastern and midwestern Class I areas of the United States, the average visual range is generally less than 30 kilometers, or about one-fifth of the visual range that would exist under estimated natural conditions. 64 FR 35715 (July 1, 1999).

B. Requirements of the Clean Air Act and EPA's Regional Haze Rule

In section 169A of the 1977 Amendments to the CAA, Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section of the CAA establishes as a national goal the ''prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I Federal areas which impairment results from manmade air pollution.'' On December 2, 1980, EPA promulgated regulations to address visibility impairment in Class I areas that is ''reasonably attributable'' to a single source or small group of sources known as, ''reasonably attributable visibility impairment'' (RAVI). 45 FR 80084. These regulations represented the first phase in addressing visibility impairment. EPA deferred action on regional haze that emanates from a variety of sources until monitoring, modeling, and scientific knowledge about the relationships between pollutants and visibility impairment were improved.

Congress added section 169B to the CAA in 1990 to address regional haze issues. EPA promulgated the Regional Haze Rule (RHR) on July 1, 1999 (64 FR 35713). The RHR revised the existing visibility regulations to integrate into the regulations provisions addressing regional haze impairment and established a comprehensive visibility protection program for Class I areas. The requirements for regional haze, found at 40 CFR 51.308 and 51.309, are included in EPA's visibility protection regulations at 40 CFR 51.300–309. Some of the main elements of the regional haze requirements are summarized in section III. The requirement to submit a regional haze SIP applies to all 50 states, the District of Columbia, and the Virgin Islands.[2]

C. Roles of Agencies in Addressing Regional Haze

Successful implementation of the regional haze program will require long-term regional coordination among states, tribal governments, and Federal agencies. Pollution affecting the air quality in Class I areas can be transported over long distances, even hundreds of kilometers. Therefore, effectively addressing the problem of visibility impairment in Class I areas means that states need to develop coordinated strategies that take into account the effect of emissions from one jurisdiction on the air quality of another state.

EPA has encouraged the states and tribes to address visibility impairment from a regional perspective because the pollutants that lead to regional haze can originate from sources located across broad geographic areas. Five regional planning organizations (RPOs) were developed to address regional haze and

[1] Areas designated as mandatory Class I Federal areas consist of national parks exceeding 6000 acres, wilderness areas, and national memorial parks exceeding 5000 acres and all international parks that were in existence on August 7, 1977. 42 U.S.C. 7472(a). In accordance with section 169A of the CAA, EPA, in consultation with the Department of Interior, promulgated a list of 156 areas where visibility is identified as an important value. 44 FR 69122 (November 30, 1979). The extent of a mandatory Class I area includes subsequent changes in boundaries, such as park expansions. 42 U.S.C. 7472(a). Although states and tribes may designate as Class I additional areas which they consider to have visibility as an important value, the requirements of the visibility program set forth in section 169A of the CAA apply only to ''mandatory Class I Federal areas.'' Each mandatory Class I Federal area is the responsibility of a ''Federal Land Manager.'' 42 U.S.C. 7602(i). When we use the term ''Class I area,'' we mean ''mandatory Class I Federal area.''

[2] Albuquerque/Bernalillo County, New Mexico must also submit a regional haze SIP to satisfy the section 110(a)(2)(D) requirements of the CAA for the entire state under the New Mexico Air Quality Control Act (section 74–2–4).

related issues. The RPOs first evaluated technical information to better understand how their states and tribes impact Class I areas across the country and then pursued the development of regional strategies to reduce $PM_{2.5}$ emissions and other pollutants leading to regional haze.

The Midwest RPO (MRPO) is a collaborative effort of state governments and various Federal agencies established to initiate and coordinate activities associated with the management of regional haze, visibility, and other air quality issues in the Midwest. The member states are Illinois, Indiana, Michigan, Ohio, and Wisconsin.

III. What are the requirements for regional haze SIPs?

Regional haze SIPs must assure reasonable progress toward the national goal of achieving natural visibility conditions in Class I areas. Section 169A of the CAA and EPA's implementing regulations require states to establish long-term strategies for making reasonable progress toward meeting this goal. Plans must also give specific attention to certain stationary sources that were in existence on August 7, 1977, but were not in operation before August 7, 1962, and must require those sources to install emission controls reducing visibility impairment if appropriate. The specific regional haze SIP requirements are discussed in further detail below.

A. Determination of Baseline, Natural, and Current Visibility Conditions

The RHR establishes the deciview [3] (dv) as the principal metric or unit for expressing visibility impairment. This visibility metric expresses uniform proportional changes in haziness in terms of common increments across the entire range of visibility conditions, from pristine to extremely hazy conditions. Visibility expressed in deciviews is determined by using air quality measurements to estimate light extinction and then transforming the value of light extinction using a logarithm function. The deciview is a more useful measure for tracking progress in improving visibility than light extinction itself because each deciview change is an equal incremental change in visibility perceived by the human eye. Most people can detect a change in visibility at one deciview.

The deciview is used in expressing RPGs, defining baseline, current, and natural conditions, and tracking changes in visibility. The regional haze SIPs must contain measures that ensure ''reasonable progress'' toward the national goal of preventing and remedying visibility impairment in Class I areas caused by anthropogenic air pollution. The national goal is a return to natural conditions such that anthropogenic sources of air pollution would no longer impair visibility in Class I areas.

To track changes in visibility over time at each of the 156 Class I areas covered by the visibility program (40 CFR 81.401–437) and as part of the process for determining reasonable progress, states must calculate the degree of existing visibility impairment at each Class I area at the time of each regional haze SIP submission and at the progress review every five years, midway through each 10-year implementation period. The RHR requires states with Class I areas (Class I states) to determine the degree of impairment in deciviews for the average of the 20 percent least impaired (best) and 20 percent most impaired (worst) visibility days over a specified time period at each of its Class I areas. Each state must also develop an estimate of natural visibility conditions for the purpose of comparing progress toward the national goal. Natural visibility is determined by estimating the natural concentrations of pollutants that cause visibility impairment and then calculating total light extinction based on those estimates. EPA has provided guidance to states regarding how to calculate baseline, natural, and current visibility conditions in documents titled, EPA's *Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Rule,* September 2003, (EPA–454/B–03–005 located at *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_envcurhr_gd.pdf*) (hereinafter referred to as ''EPA's 2003 Natural Visibility Guidance'') and *Guidance for Tracking Progress Under the Regional Haze Rule* (EPA–454/B–03–004 September 2003 located at *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_tpurhr_gd.pdf*) (EPA's 2003 Tracking Progress Guidance).

For the first regional haze SIP, the ''baseline visibility conditions'' are the starting points for assessing ''current'' visibility impairment. Baseline visibility conditions represent the degree of visibility impairment for the 20 percent best days and 20 percent worst days for each calendar year from 2000 to 2004. Using monitoring data for 2000 through 2004, states calculate the average degree of visibility impairment for each Class I area, based on the average of annual values over the five-year period. The comparison of initial baseline visibility conditions to natural visibility conditions indicates the amount of improvement necessary to attain natural visibility, while the future comparison of baseline conditions to the then current conditions will indicate the amount of progress made. In general, the 2000 to 2004 baseline period is considered the time from which improvement in visibility is measured.

B. Determination of Reasonable Progress Goals (RPGs)

The vehicle for ensuring continuing progress towards achieving the natural visibility goal is the submission of a series of regional haze SIPs from the states that establish two distinct RPGs, one for the best days and one for the worst days for every Class I area for each approximately 10-year implementation period. The RHR does not mandate specific milestones or rates of progress, but instead calls for states to establish goals that provide for ''reasonable progress'' toward achieving natural visibility conditions. In setting RPGs, Class I states must provide for an improvement in visibility for the worst days over the approximately 10-year period of the SIP and ensure no degradation in visibility for the best days.

Class I states have significant discretion in establishing RPGs, but are required to consider the following factors established in section 169A of the CAA and in EPA's RHR at 40 CFR 51.308(d)(1)(i)(A): (1) The costs of compliance; (2) the time necessary for compliance; (3) the energy and non-air quality environmental impacts of compliance; and, (4) the remaining useful life of any potentially affected sources. The state must demonstrate in its SIP how these factors are considered when selecting the RPGs for the best and worst days for each applicable Class I area. States have considerable flexibility in how they take these factors into consideration, as noted in EPA's *Guidance for Setting Reasonable Progress Goals Under the Regional Haze Program,* (''EPA's Reasonable Progress Guidance''), July 1, 2007, memorandum from William L. Wehrum, Acting Assistant Administrator for Air and Radiation, to EPA Regional Administrators, EPA Regions 1–10 (pp. 4–2, 5–1). In setting the RPGs, states must also consider the rate of progress needed to reach natural visibility conditions by 2064 (''uniform rate of progress'' or ''glide path'') and the emissions reduction needed to achieve that rate of progress over the approximately 10-year period of the SIP.

[3] The preamble to the RHR provides additional details about the deciview. 64 FR 35714, 35725 (July 1, 1999).

In setting RPGs, each Class I state must also consult with potentially contributing states, *i.e.* those states that may affect visibility impairment at the Class I state's areas. 40 CFR 51.308(d)(1)(iv).

C. Best Available Retrofit Technology (BART)

Section 169A of the CAA directs states to evaluate the use of retrofit controls at certain older large stationary sources to address visibility impacts from these sources. Specifically, CAA section 169A(b)(2)(A) requires states to revise their SIPs to contain such measures as may be necessary to make reasonable progress towards the natural visibility goal including a requirement that certain categories of existing major stationary sources built between 1962 and 1977 procure, install, and operate BART as determined by the state. The set of ''major stationary sources'' potentially subject to BART is listed in CAA section 169A(g)(7). The state can require source-specific BART controls, but it also has the flexibility to adopt an alternative such as a trading program as long as the alternative provides greater progress towards improving visibility than BART.

On July 6, 2005, EPA published the *Guidelines for BART Determinations Under the Regional Haze Rule* at Appendix Y to 40 CFR Part 51 (BART Guidelines) to assist states in determining which of their sources should be subject to the BART requirements and in determining appropriate emission limits for each applicable source. A state must use the approach in the BART Guidelines in making a BART determination for fossil fuel-fired electric generating units (EGUs) with total generating capacity in excess of 750 megawatts. States are encouraged, but not required, to follow the BART Guidelines in making BART determinations for other sources.

States must address all visibility-impairing pollutants emitted by a source in the BART determination process. The most significant visibility impairing pollutants are SO_2, NO_X, and PM. EPA has stated that states should use their best judgment in determining whether VOC or NH_3 compounds impair visibility in Class I areas.

States may select an exemption threshold value for their BART modeling under the BART Guidelines, below which a BART-eligible source would not be expected to cause or contribute to visibility impairment in any Class I area. The state must document this exemption threshold value in the SIP and must state the basis for its selection of that value. The exemption threshold set by the state should not be higher than 0.5 dv. Any source with emissions that model above the threshold value would be subject to a BART determination review. The BART Guidelines acknowledge varying circumstances affecting different Class I areas. States should consider the number of emission sources affecting the Class I areas at issue and the magnitude of the individual source's impact.

The state must identify potential BART sources in its SIP, described as ''BART-eligible sources'' in the RHR, and document its BART control determination analyses. In making BART determinations, section 169A(g)(2) of the CAA requires the state to consider the following factors: (1) The costs 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) the remaining useful life of the source; and, (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. A regional haze SIP must include source-specific BART emission limits and compliance schedules for each source subject to BART. The BART controls must be installed and in operation as expeditiously as practicable, but no later than five years after the date of EPA's approval of the state's regional haze SIP. CAA section 169(g)(4); 40 CFR 51.308(e)(1)(iv). In addition to what is required by the RHR, general SIP requirements mandate that the SIP must also include all regulatory requirements related to monitoring, recordkeeping, and reporting for the BART controls on the source.

D. Long-Term Strategy

Consistent with the requirement in section 169A(b) of the CAA that states include in their regional haze SIP a 10 to 15 year strategy for making reasonable progress, section 51.308(d)(3) of the RHR requires that states include a long-term strategy (LTS) in their regional haze SIPs. The LTS is the compilation of all control measures a state will use during the implementation period of the specific SIP submittal to meet applicable RPGs. The LTS must include enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the RPGs for all Class I areas within or affected by emissions from the state. 40 CFR 51.308(d)(3).

When a state's emissions are reasonably anticipated to cause or contribute to visibility impairment in a Class I area located in another state, the RHR requires the impacted state to coordinate with the contributing states in order to develop coordinated emissions management strategies. 40 CFR 51.308(d)(3)(i). In such cases, the contributing state must demonstrate that it has included in its SIP all measures necessary to obtain its share of the emission reductions needed to meet the RPGs for the Class I area. The RPOs have provided forums for significant interstate consultation, but additional consultations between states may be required to address interstate visibility issues sufficiently.

States should consider all types of anthropogenic sources of visibility impairment in developing their LTS, including stationary, minor, mobile, and area sources. At a minimum, states must describe how each of the following seven factors are taken into account in developing their LTS: (1) Emission reductions due to ongoing air pollution control programs, including measures to address RAVI; (2) measures to mitigate the impacts of construction activities; (3) emissions limitations and schedules for compliance to achieve the RPG; (4) source retirement and replacement schedules; (5) smoke management techniques for agricultural and forestry management purposes including plans as currently exist within the state for these purposes; (6) enforceability of emissions limitations and control measures; and, (7) the anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the period addressed by the LTS. 40 CFR 51.308(d)(3)(v).

E. Coordinating Regional Haze and Reasonably Attributable Visibility Impairment Long-Term Strategy

EPA revised 40 CFR 51.306(c) as part of the RHR regarding the LTS for RAVI to require that the RAVI plan must provide for a periodic review and SIP revision not less frequently than every three years until the date of submission of the state's first plan addressing regional haze visibility impairment in accordance with 40 CFR 51.308(b) and (c). The state must revise its plan to provide for review and revision of a coordinated LTS for addressing RAVI and regional haze on or before this date. It must also submit the first such coordinated LTS with its first regional haze SIP. Future coordinated LTSs, and periodic progress reports evaluating progress towards RPGs, must be submitted consistent with the schedule for SIP submission and periodic progress reports set forth in 40 CFR 51.308(f) and 51.308(g), respectively.

The periodic review of a state's LTS must report on both regional haze and RAVI impairment and be submitted to EPA as a SIP revision.

F. Monitoring Strategy and Other Implementation Plan Requirements

Section 51.308(d)(4) of the RHR includes the requirement for a monitoring strategy for measuring, characterizing, and reporting of regional haze visibility impairment that is representative of all mandatory Class I Federal areas within the state. The strategy must be coordinated with the monitoring strategy required in section 51.305 for RAVI. Compliance with this requirement may be met through participation in the IMPROVE network, meaning that the state reviews and uses monitoring data from the network. The monitoring strategy must also provide for additional monitoring sites if the IMPROVE network is not sufficient to determine whether RPGs will be met. The monitoring strategy is due with the first regional haze SIP and must be reviewed every five years.

The SIP must also provide for the following:

- Procedures for using monitoring data and other information in a state with mandatory Class I areas to determine the contribution of emissions from within the state to regional haze visibility impairment at Class I areas both within and outside of the state;
- Procedures for using monitoring data and other information in a state with no mandatory Class I areas to determine the contribution of emissions from within the state to regional haze visibility impairment at Class I areas in other states.
- Reporting of all visibility monitoring data to the Administrator at least annually for each Class I area in the state, and where possible in electronic format;
- A statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in any Class I area. The inventory must include emissions for a baseline year, emissions for the most recent year with available data, and future projected emissions. A state must also make a commitment to update the inventory periodically; and
- Other elements including reporting, recordkeeping, and other measures necessary to assess and report on visibility;

The RHR requires control strategies to cover an initial implementation period extending to the year 2018 with a comprehensive reassessment and revision of those strategies, as appropriate, every 10 years thereafter. Periodic SIP revisions must meet the core requirements of section 51.308(d) with the exception of BART. The requirement to evaluate sources for BART applies only to the first regional haze SIP. Facilities subject to BART must continue to comply with the BART provisions of section 51.308(e), as noted above. Periodic SIP revisions will assure that the statutory requirement of reasonable progress will continue to be met.

G. Consultation With States and Federal Land Managers

The RHR requires that states consult with Federal Land Managers (FLMs) before adopting and submitting their SIPs. 40 CFR 51.308(i). States must provide FLMs an opportunity for consultation, in person and at least 60 days prior to holding any public hearing on the SIP. This consultation must include the opportunity for the FLMs to discuss their assessment of impairment of visibility in any Class I area and to offer recommendations on the development of the RPGs and on the development and implementation of strategies to address visibility impairment. Further, a state must include in its SIP a description of how it addressed any comments provided by the FLMs. Finally, a SIP must provide procedures for continuing consultation between the state and FLMs regarding the state's visibility protection program, including development and review of SIP revisions, five-year progress reports, and the implementation of other programs having the potential to contribute to impairment of visibility in Class I areas.

IV. What is EPA's analysis of Illinois' regional haze plan?

Illinois submitted its regional haze plan on June 24, 2011, which included revisions to the Illinois SIP to address regional haze.

A. Class I Areas

States are required to address regional haze affecting Class I areas within a state and in Class I areas outside the state that may be affected by the state's emissions. 40 CFR 51.308(d). Illinois does not have any Class I areas within the state. Illinois reviewed technical analyses conducted by MRPO to determine what Class I areas outside the state are affected by Illinois emission sources. MRPO conducted both a back trajectory analysis and modeling to determine the affects of its states' emissions. The conclusion from the technical analysis is that emissions from Illinois sources affect 19 Class I areas. The affected Class I areas are: Sipsey Wilderness Area in Alabama; Caney Creek and Upper Buffalo Wilderness Areas in Arkansas; Mammoth Cave in Kentucky; Acadia National Park and Moosehorn Wilderness Area in Maine; Isle Royale National Park and Seney Wilderness Area in Michigan; Boundary Waters Canoe Wilderness Area in Minnesota; Hercules-Glades and Mingo Wilderness Areas in Missouri; Great Gulf Wilderness Area in New Hampshire; Brigantine Wilderness Area in New Jersey; Great Smoky Mountains National Park in North Carolina and Tennessee; Lye Brook Wilderness Area in Vermont; James River Face Wilderness Area and Shenandoah National Park in Virginia; and, Dolly Sods/Otter Creek Wilderness Area in West Virginia.

B. Baseline, Current, and Natural Conditions

The RHR requires states with Class I areas to calculate the baseline and natural conditions for their Class I areas. Because Illinois does not have any Class I areas, it was not required to address the requirements for calculating baseline and natural conditions.

C. Reasonable Progress Goals

Class I states must set RPGs that achieve reasonable progress toward achieving natural visibility conditions. Because Illinois does not have any Class I areas, it is not required to establish RPGs. Illinois consulted with affected Class I states to ensure that it achieves its share of the overall emission reductions necessary to achieve the RPGs of Class I areas that it impacts. Illinois's coordination with affected Class I states is discussed under Illinois Long Term Strategy, in Section IV. E.

Illinois included the MRPO technical support document (TSD) in its submission. In Section 5 of the TSD, MRPO assessed the reasonable progress for regional haze. It first assessed potential control measures using the four factors required to be considered by Class I states when selecting the RPGs: the cost of compliance, time needed, energy and non-air impacts, and remaining useful life of any potentially affected sources. The cost of compliance factor includes calculating the average cost effectiveness and can include costs to health and industry vitality as well as considering the different visibility effects of different pollutants. The time necessary for compliance factor considers whether control measures can be implemented by 2018. The third factor, energy and non-air quality impacts, considers additional energy consumed by or because of the control measure as well as effects due to waste

generated or water consumption. The final factor, remaining useful life, allows states to consider planned source retirements in calculating costs.

MRPO also assessed the visibility benefits of existing programs. MRPO considered existing on-highway mobile source, off-highway mobile source, area source, power plant, and other point source programs. MRPO also included reductions from the Clean Air Interstate Rule (CAIR) in its analysis, as well from rules adopted by Illinois and included in its regional haze SIP requiring the control of emissions from EGUs.

Illinois has a distinctive situation regarding CAIR, insofar as it has adopted state rules that require EGUs to control NO_X and SO_2 emissions beyond the control expected from CAIR, even in the absence of CAIR, particularly by 2018 and beyond. Further discussion of these Illinois rules is provided below. The RPGs that pertinent Class I states have adopted are predicated on other contributing states achieving the EGU emission reductions anticipated under CAIR. Since Illinois is mandating a greater degree of control than is expected from other states, EPA concludes that Illinois's regional haze plan is expected to provide emission reductions representing an appropriate contribution toward meeting the RPGs for the affected Class I areas, irrespective of the status of CAIR and irrespective of the associated issues regarding the adequacy of other state's plans. For similar reasons, EPA believes that the approvability of the Illinois plan is also not affected by the status of the Transport Rule, which was promulgated on August 8, 2011 at 76 FR 48208 and stayed on December 30, 2011.

D. Best Available Retrofit Technology

States are required to submit an implementation plan containing emission limitations representing BART and schedules for compliance with BART for each BART-eligible source that may reasonably be anticipated to cause or contribute to any impairment in a Class I area, unless the State demonstrates that an emissions trading program or other alternative will achieve greater reasonable progress toward natural visibility conditions. 40 CFR 51.308(e).

Using the criteria in the BART Guidance at 40 CFR 51.308(e) and Appendix Y, Illinois first identified all of the BART-eligible sources and assessed whether the BART-eligible sources were subject to BART. Illinois initially identified 26 potential BART facilities—11 EGUs, four petroleum refineries, three chemical process plants, two Portland cement plants, two glass fiber processing plants, one lime plant, and one iron and steel plant. The state further analyzed these facilities to identify those sources subject to BART. Illinois relied on modeling conducted by MRPO using a modeling protocol MRPO developed. MRPO conferred with its states, EPA, and the FLMs in developing its BART modeling protocol. EPA guidance says that, ''any threshold that you use for determining whether a source 'contributes' to visibility impairment should not be higher than 0.5 dv.'' The Guidelines affirm that states are free to use a lower threshold if the location of a large number of BART-eligible sources in proximity of a Class I area justifies this approach. Illinois used a contribution threshold of 0.5 dv for determining which sources warrant being subject to BART. Illinois concluded that the threshold of 0.5 dv was appropriate since its BART-eligible sources are located state-wide and no Class I areas are nearby causing Illinois to correctly conclude that a stricter contribution threshold is not justified. The modeled impact of these facilities indicated that 11 sources have at least 0.5 dv impact (98th percentile) and thus are subject to BART. The 11 sources determined to be subject to BART are nine EGUs and two petroleum refineries. The other 15 potential BART sources were determined not to be subject to BART because the analysis showed impacts well below the 0.5 dv contribution threshold.

The EGUs subject to BART are:

- Dynegy Midwest Generating—Baldwin Boilers 1, 2, and 3.
- Dominion Kincaid Generation—Boilers 1 and 2.
- Ameren Energy Generating—Coffeen Boilers CB–1 and CB–2.
- Ameren Energy Generating—E.D. Edwards Boilers 2 and 3.
- Ameren Energy Generating—Duck Creek Boiler 1.
- Midwest Generation—Powerton Boilers 51, 52, 61, and 62.
- Midwest Generation—Joliet Boilers 71, 72, 81, and 82.
- Midwest Generation—Will County Boiler 4.
- City Water, Light, and Power—Dallman Boiler 1 and 2.
- City Water, Light, and Power—Lakeside Boiler 8.

To address mercury emissions from EGUs, Illinois adopted Part 225 of Illinois's air pollution regulations, entitled ''Control of Emissions from Large Combustion Sources.'' In this rule, Illinois offered affected utilities two options, one of which imposes stringent limits on mercury emissions alone and the other of which mandates implementation of specific mercury control technology in conjunction with satisfaction of stringent emission limits for SO_2 and NO_X. Part 225 includes section 225.233, entitled ''Multi-Pollutant Standards,'' addressing emissions from facilities owned by Ameren and Dynegy, and sections 225.293 to 225.299, collectively referred to as the Combined Pollutant Standards (CPS), addressing emissions from facilities owned by Midwest Generation. In all cases, the utilities have selected the option including mercury control technology and applicability of the SO_2 and NO_X limits. The emission limits are in the earlier noted sections of the state rules, so these SO_2 and NO_X limits are now fully enforceable by the state.

The SO_2 and NO_X emission limits in Part 225 rules reflect substantial averaging across units and across facilities. For example, the collective set of facilities in Illinois owned by Midwest Generation (as listed in the Part 225 rules) are subject to NO_X and SO_2 limits based on annual average emissions across all facilities. The limit for NO_X emissions is 0.11 pounds per million British Thermal Units (lb/MMBTU) starting in 2012 and the limits for SO_2 are 0.15 lb/MMBTU in 2017 and 0.11 lb/MMBTU starting in 2019. The collective set of Ameren facilities in Illinois, under the Multi-Pollutant Standards (MPS), must meet an annual average emission limit for NO_X of 0.11 lb/MMBTU starting in 2012 and for SO_2 of 0.23 lb/MMBTU starting in 2017. Similar limits under the MPS apply to the Dynegy facilities in Illinois.

EPA believes this degree of averaging is acceptable in this context. The limits that Illinois has imposed are sufficiently stringent that the companies have only limited latitude to over control at some facilities in trade for having elevated emissions at other facilities. The facilities owned by each company are sufficiently close to each other, relative to their distances from the nearest Class I areas, that modest shifts in emissions from one facility to another should have minimal impact on the combined impact on regional haze at the Class I areas. Furthermore, regional haze is evaluated across a considerable number of days, *e.g.,* the 20 percent of days with the worst visibility. Therefore, a limit that allows elevated emissions on individual days, so long as other days have lower emissions, should suffice to address the pertinent measures of regional haze. Illinois's limits should also be adequately enforceable since the sources at issue are required to conduct continuous emission monitoring of both SO_2 and NO_X.

Dynegy has five facilities with 10 units covered by MPS, including the three Dynegy Baldwin units that are subject to BART. Emission reductions required for seven other Dynegy units not subject to BART will allow it meet the MPS reduction requirements. MPS will reduce emissions from all Dynegy facilities by 23,831 tons per year (TPY) of NO_X and 47,347 TPY of SO_2, as compared to emissions in the 2002 base year.

Ameren has seven facilities with 21 units covered by MPS. This includes the subject to BART units: Coffeen units 1 and 2, Duck Creek unit 1, and Edwards units 2 and 3. Ameren has installed selective catalytic reduction (SCR) for NO_X control and wet scrubbers to limit SO_2 emissions from both Coffeen units. Duck Creek unit 1 is controlled by low NO_X burners, SCR, and wet scrubbers. Edwards unit 2 will receive an upgraded low NO_X burner and overfire air (OFA) to reduce NO_X emissions. Edwards unit 3 is already controlled for NO_X with low NO_X burners, OFA, and SCR. Ameren plans to install a new scrubber and fabric filter at Edwards unit 3. Company-wide reductions from Ameren EGUs are projected to be 27,896 TPY NO_X and 131,367 TPY SO_2 by 2015 and 134,464 TPY of SO_2 by 2017.

Midwest Generating operates six facilities with 19 total units that must comply with CPS, including the Midwest Generation units subject to BART: Powerton units 51, 52, 61, and 62; Joliet units 71, 72, 81, and 82; and Will County unit 4. The four Powerton units currently have low NO_X burners and OFA. Midwest Generation plans to add selective non-catalytic reduction (SNCR) in 2012 to reduce NO_X emissions and flue gas desulfurization (FGD) in 2013 to cut SO_2 emissions. Both control improvements will be added to all four units. Midwest Generating's Joliet facility currently has low NO_X burners and OFA on its four BART units. SNCR is expected to be added in 2012 to all four BART units. Midwest Generating is also planning to add FGD on units 71, 72, 81, and 82 by 2019. Will County unit 4 is currently controlled with low NO_X burners and OFA. Midwest Generating plans to upgrade the NO_X control to SNCR in 2012 and to add FGD control by 2019. CPS will reduce NO_X emissions from all Midwest Generating facilities by 38,155 TPY, while SO_2 emissions will decrease by 35,465 TPY in 2015, increasing to a 61,194 TPY reduction in 2019.

A state may opt to implement an alternate measure rather than requiring each subject to BART unit to install, operate, and maintain BART if it demonstrates that the alternate measure will achieve greater reasonable progress. The criteria for the assessment if an alternative measure demonstrates greater reasonable progress are provided in 40 CFR 51.308(e)(2). MPS will reduce emissions from both subject to BART and non-BART units at the Ameren and Dynegy facilities. Similarly, CPS will require emission reductions from Midwest Generation's subject to BART and non-BART units. Illinois elected to use MPS and CPS participation as alternative to requiring BART control on each of the Ameren, Dynegy, and Midwest Generation units subject to BART. Illinois stated that implementation of the MPS and CPS emission limits will provide much deeper NO_X and SO_2 reductions than implementing BART on the subject to BART units and thus the alternate will provide greater reasonable progress. However, Illinois did not provide an analysis comparing BART for each subject unit to the alternative. Illinois compared the emission reductions from MPS and CPS to the presumptive BART emission levels suggested in EPA's guidance. EPA generally requires states to compare the alternative strategy to a fully analyzed set of BART limits for the BART-subject units. However, in this case, the results of such a comparison are clear even without Illinois conducting a full BART analysis for these units. The total NO_X emission reductions due to MPS on Dynegy EGUs are greater than the base year NO_X emissions from Dynegy's subject to BART units. Therefore, the emission reductions from MPS are greater than the maximum possible reductions from the BART units. The same is true for SO_2 emissions for the Dynegy EGUs, the NO_X emissions from the Ameren EGUs, and the SO_2 emissions from the Ameren EGUs. Similarly, the total NO_X emission reductions from all Midwest Generating are greater than the NO_X emissions from the BART units and the same for its SO_2 emissions. Therefore, even without a full analysis of the precise emission levels that would constitute BART for the BART-subject units, EPA finds that the Illinois rules, MPS and CPS, are an acceptable BART alternative because the emission reductions are greater than the reductions that could possibly be obtained by only requiring BART at the BART-subject units.

Three other EGUs, owned by two other utilities Dominion Energy and the City of Springfield's City Water, Light, and Power (CWLP), are not covered by MPS and CPS but have units subject to BART. CWLP is a smaller utility with a total generating capacity of less than 750 MW and Dominion Energy has only one electric generating facility in Illinois such that these utilities do not have the opportunities for multi-plant averaging of emission limits that the larger utilities have. Rather than adopting an alternative program to address the BART requirements for these two utilities, Illinois is requiring these utilities to meet the BART requirements for the units subject to BART and establish enforceable emission limits for SO_2 and NO_X. CWLP's Dallman and Lakeside plants, along with Dominion's Kincaid plant, have units subject to BART. Both utilities must reduce emissions to meet the BART limits. The emission limits for Dallman units 31 and 32, Lakeside unit 8, and Kincaid units 1 and 2 are contained in Joint Construction and Operating permits. Illinois evaluated potential controls and what control level the current emission controls can achieve in setting the BART emission limits for the CWLP Dallman and Dominion Kincaid units.

CWLP currently has SCRs and FGD on Dallman units 31 and 32. As of 2010, CWLP has been operating the SCRs to achieve an annual average NO_X emission rate of 0.14 lb/MMBTU on both Dallman units, combined. The annual average NO_X emission rate will be limited to 0.12 lb/MMBTU by 2015 and then further decreased to 0.11 lb/MMBTU by 2017 for both units, combined. CWLP will operate the controls to achieve an annual average SO_2 emissions rate on both Dallman units, combined, of 0.29 lb/MMBTU by 2012, then reduced to 0.25 lb/MMBTU by 2015, and finally to 0.23 lb/MMBTU by 2017. Illinois has determined these emission limits satisfy BART for both units. CWLP permanently shut down Lakeside unit 8 in 2009, which is reflected in the permit.

Dominion's Kincaid facility operates SCRs on its units 1 and 2. The permit for the Kincaid facility limits NO_X emissions to an annual average of 0.07 lb/MMBTU by March 1, 2013, on both units, combined. Illinois determined the appropriate SO_2 control system for Kincaid is a dry sorbent injection system along with using low sulfur coal. Illinois initially gave the Kincaid facility a SO_2 emission limit of 0.20 lb/MMBTU on both units, but found that a stricter limit of 0.15 lb/MMBTU can be achieved with the control system. Illinois thus set the SO_2 emission limits for both Kincaid units, combined, at an annual average emission rate of 0.20 lb/MMBTU by January 1, 2014, and reduced the limit further to an annual average emission rate of 0.15 lb/MMBTU beginning on January 1, 2017.

Illinois issued the Joint Construction and Operating permits pursuant to its

authority in the SIP and submitted the two permits as part of its Regional Haze plan to be incorporated into the SIP. The permits set Federally enforceable NO_X and SO_2 limits as necessary to meet the Regional Haze requirements of the CAA and effectively mandate that the utilities to run the SCRs year round and for CWLP to shut down its Lakeside unit 8.

Two petroleum refineries, the CITGO and Exxon Mobil refineries, also have units subject to BART: the CITGO refinery in Lemont, Illinois and the Exxon Mobil refinery south of Joliet, Illinois. Both refineries will be required to reduce emissions by a Federal consent decree resolving an enforcement action brought by EPA against a number of refineries. The consent decrees require the CITGO, Exxon Mobil, and the other refineries to operate controls at the Best Available Control Technology level. Illinois evaluated the subject-to-BART units at the CITGO and Exxon Mobil refineries. It found that the NO_X and SO_2 emission limits on the subject-to-BART units in the consent decrees satisfy BART.

A consent decree between the United States and CITGO Petroleum Corporation was entered in the U.S. District Court for the Southern District of Texas on October 6, 2004 (No. H–04–3883). The consent decree requires the company to operate SCR and a wet scrubbing system at its Fluid Catalytic Cracking Unit (FCCU) that will reduce NO_X emissions by more than 90 percent and SO_2 emissions by 85 percent. The controls on the FCCU will result in a reduction of NO_X emissions from 1,065.7 to 106.6 TPY and SO_2 emissions from 10,982.5 to 107.9 TPY by 2013. CITGO has also added a tail gas recovery unit that reduces SO_2 emissions from its sulfur train units from 4340.0 to 91.2 TPY, a 98 percent reduction. The emission controls on all units at CITGO's Lemont refinery will reduce NO_X emissions by 1,268 TPY and SO_2 emissions by 15,123 TPY.

A consent decree between the United States and Exxon Mobil Corporation was entered in the U.S. District Court for the Northern District of Illinois on October 11, 2005 (No. O5–C–5809). The consent decree for Exxon Mobil requires SCR operation on its FCCU in addition to maintenance of the existing wet scrubbing system. The controls on the FCCU result in a 1,636.2 TPY decrease in NO_X emissions from 1,818.0 to 181.8 TPY and a 9,667.7 TPY decrease in SO_2 emissions from 9,865.0 to 197.3 TPY. Exxon Mobil also has added a tail gas recovery unit on its south sulfur recovery unit. That reduces SO_2 emissions by 9,153.8 TPY to 186.8 TPY. The emission controls at Exxon Mobil's Joliet refinery will reduce 1,695 TPY NO_X and 18,821 TPY SO_2.

These two consent decrees are Federally enforceable and also require that the refineries submit permit applications to Illinois to incorporate the required emission limits into Federally enforceable air permits (other than Title V). Therefore, emission limits established by the consent decrees may be relied upon by Illinois for addressing the BART requirement for these facilities.

Based on modeling, MRPO determined that the visibility impact of directly emitted particulate matter from the facilities with subject to BART units is minimal. In particular, MRPO assessed the impact of the directly emitted particulate matter from all facilities potentially subject to BART in the five MRPO states, and found the impact to be less than 0.5 dv at any Class I area as compared to natural background conditions. Illinois therefore concludes that PM emissions from its subset of these BART sources have a negligible visibility impact. Furthermore, these facilities are already subject to federally enforceable PM emission control requirements mandated by SIP-approved state particulate matter regulations, so that there is minimal potential for further PM emission reductions. Therefore, based particularly on the substantial existing controls on these facilities-fabric filters, electrostatic precipitators, and cyclones; and the minimal benefits of further control, Illinois concluded that BART did not include further control of PM emissions from these facilities.

EPA is satisfied with the state's BART determinations. The emission limits that Illinois adopted generally will require state-of-the-art emission controls, not just at the units subject to BART requirements but also at numerous units that are not subject to BART. The Illinois facilities subject to BART are a long distance from any Class I area such that, so the geographical redistributions of emissions within Illinois do not significantly affect visibility and the benefits of alternate control strategies may be judged simply by comparing the net emission reductions. The MPS and CPS provide emission reduction well in excess of simply implementing BART on subject units. The reduction in NO_X emissions from the Ameren, Dynegy, and Midwest Generation units by 2015 from MPS and CPS is expected to be 89,882 TPY. Illinois estimated that simply implementing BART on the subject units from these entities would yield 32,992 TPY of NO_X emission reductions, which is 56,890 TPY less that from MPS and CPS. Illinois estimated that implementing BART on the subject units at Ameren, Dynegy, and Midwest Generation facilities would require an 117,252 TPY reduction in SO_2 emission, but MPS and CPS will require a 214,179 TPY SO_2 reduction by 2015. Thus, Illinois estimated that its plan will require 96,927 TPY lower SO_2 emissions than simply requiring BART. EPA believes that Illinois has thereby demonstrated the emission limits on the subject to BART units covered by MPS and CPS satisfy the BART requirements.

Illinois did not rely on the Clean Air Interstate Rule (CAIR) for its BART determinations. Illinois is in the CAIR region. However, it used its state rules, permits, and consent decrees to achieve emission reductions that satisfy BART. This means that Illinois is not reliant on CAIR and, thus, it has avoided the issues of other CAIR region states that relied on CAIR. For similar reasons, Illinois' satisfaction of regional haze rule requirements is not contingent on the Transport Rule and thus is not affected by the stay of that rule.

E. Long-Term Strategy

Under section 169A(b)(2) of the CAA and 40 CFR 51.308(d), states' regional haze programs must include an LTS for making reasonable progress toward meeting the national visibility goal. Illinois's LTS must address visibility improvement for the Class I areas impacted by Illinois sources. Section 51.308(d)(3) requires that Illinois consult with the affected states in order to develop a coordinated emission management strategy. A contributing state, such as Illinois, must demonstrate that it has included, in its SIP, all measures necessary to obtain its share of the emissions reductions needed to meet the RPGs for the Class I areas affected by Illinois sources. As described in section III.D. of this proposed rule, the LTS is the compilation of all control measures Illinois will use to meet applicable RPGs. The LTS must include enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the RPGs for all Class I areas affected by Illinois emissions.

Illinois complied with the consulting requirements by participating in meetings and conference calls with affected Class I states and RPOs to discuss the states' assessments of visibility conditions, analyses of culpability, and possible measures that could be taken to meet visibility goals. Illinois engaged in extensive

consultations with other MRPO states, including Indiana, Michigan, Ohio, and Wisconsin. Illinois also consulted with Arkansas, Kentucky, Minnesota, Missouri, New Hampshire, New Jersey, and Vermont. As part of the MRPO, Illinois participated in inter-RPO consultation on regional haze. This consultation is detailed in Chapter 9 of the state's plan. EPA finds that the state's consultation with Class I states satisfies applicable consultation requirements.

Illinois's LTS includes the modeling and monitoring results on which it relied to determine its share of emission reductions necessary to meet the reasonable progress goals of impacted Class I areas. This information is provided in Chapter 9 of the Illinois regional haze plan. Portions of this technical work were provided by MRPO as it worked with other RPOs to provide this information on Class I areas outside the Midwest.

At 40 CFR 51.308(d)(3)(v), the RHR identifies seven factors that a state must consider in developing its LTS: (A) Emission reductions due to ongoing programs; (B) measures to mitigate impact from construction; (C) emission limits to achieve the RPG; (D) replacement and retirement of sources; (E) smoke management techniques; (F) Federally enforceable emission limits and control measures; and (G) the net effect on visibility due to projected emission changes over the LTS period. Illinois considered the seven factors in developing its LTS. Chapter 8 of the Illinois regional haze plan provides a full analysis of each factor.

Illinois relied on MRPO's modeling and analysis along with its emission information in developing a LTS. Illinois considered the factors set out in 51.308(d)(3)(v) in developing its LTS. Based on these factors and the MRPO's technical analysis, in conjunction with RPGs that were set by the pertinent Class I states in consultation with Illinois and other contributing states, Illinois concludes that existing control programs, together with the BART controls described above, address Illinois's impact on Class I areas. This is because the combination of the existing controls and the BART controls suffice to meet the impacted Class I areas' RPGs by 2018. These existing control programs include Federal motor vehicle emission control program, reformulated gasoline, emission limits for area sources of VOCs, Title IV, the NO_X SIP Call, NO_X Reasonable Achievable Control Technology, Maximum Achievable Control Technology standards, and Federal non-road standards for construction equipment and vehicles. As discussed in prior sections, implementation of the existing control programs, supplemented by the control measures in the submission that require power plant and petroleum refinery emission reductions, will satisfy the LTS requirements because, for reasons discussed above, the expected emission reductions will meet requirements both to provide for BART and to provide emission reductions in Illinois that, in combination with emission reductions elsewhere, should improve visibility sufficiently for the pertinent Class I areas to meet their RPGs.

Illinois assessed all point sources in the state that emit at least 1,000 TPY of NO_X and SO_2 combined and are more than 100 km from a Class I area to determine if the sources could potentially affect visibility in a Class I area. The assessment followed EPA guidance in calculating the ratio of emission rate in TPY (Q) to the distance to the nearest Class I area (d). The exclusions also followed guidance. Illinois found 15 facilities with a Q/d ratio equal to and greater than 10, EPA's recommended threshold. The results of the Q/d assessment are found in Table 8.1 in the Illinois TSD. Illinois found that it expects the implementation of existing control measures will result in emission reductions from the 15 facilities. As such, Illinois believes that the expected emission reductions will ensure reasonable progress.

F. Monitoring Strategy

Illinois maintains a monitoring network that provides data to analyze air quality problems including regional haze. Illinois's monitoring network includes State and Local Air Monitoring Sites (SLAMS), Special Purpose Monitors (SPM), Photochemical Assessment Monitoring Sites (PAMS), and $PM_{2.5}$ speciation sites. Illinois does not operate any sites under the IMPROVE program, but does have a site in Bondville, Illinois that monitors using the IMPROVE procedure method. Illinois is required under 40 CFR 51.308(d)(4) to have procedures for using the monitoring data to determine the contribution of emissions from within the state to affected Class I areas. Illinois developed procedures in conjunction with the MRPO. The procedures are detailed in the MRPO TSD. EPA finds that Illinois's regional haze plan meets the monitoring requirements for the RHR and that Illinois's network of monitoring sites is satisfactory to measure air quality and assess its contribution to regional haze.

G. Federal Land Manager Consultation

Illinois was required to consult with the FLMs under 40 CFR 51.308(i). Illinois consulted with the FLMs electronically and by telephone. The FLMs were also included in discussions with Illinois during MRPO conference calls and meetings. A draft regional haze plan was submitted for FLMs comments on August 6, 2009. Illinois then provided the FLMs a revised regional haze plan on October 7, 2010 for review. That provided the FLMs enough time to comment prior to the December 6, 2010, public hearing on the regional haze plan. Illinois has included comments from the FLMs in Attachment 9 to its regional haze plan, a document providing the comments Illinois received and its responses. The state has committed to consulting the FLMs on future SIP revisions and progress reports.

H. Comments

Illinois took comments on its proposed regional haze plan. It held a public hearing on December 6, 2010. The public comment period ended on January 5, 2011. Evidence of the public notice and evidence of the public hearing were submitted to EPA.

Illinois's submission includes a document, Attachment 9, which summarized the comments it received from both the FLMs and from the public and provides its responses to the comments. The state revised portions of its plan based on the comments to correct errors and clarify portions that caused confusion. Illinois responded to other comments without revising its plan. EPA concludes that Illinois has satisfied the requirements from 40 CFR Part 51, Appendix V to provide evidence that it gave public notice, took comments, and that it compiled and responded to comments.

V. What action is EPA taking?

EPA is proposing to approve revisions to the Illinois SIP, submitted on June 24, 2011, addressing regional haze for the first implementation period. The revisions address CAA and regional haze rule requirements for states to remedy any existing anthropogenic and prevent future impairment of visibility at Class I areas. EPA finds that Illinois has satisfied all the requirements and, thus, is proposing approval of the regional haze plan. EPA is also proposing to approve two state rules, MPS and CPS, and incorporating two permits, issued to City Water, Light, & Power and to Dominion Energy, into the SIP.

VI. Statutory and Executive Order Reviews

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

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

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: January 17, 2012.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2012–1606 Filed 1–25–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2011–0080; FRL–9622–7]

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Regional Haze

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing a limited approval of revisions to the Indiana State Implementation Plan (SIP) addressing regional haze for the first implementation period. Indiana submitted its regional haze plan on January 14, 2011, and supplemented it on March 10, 2011. The Indiana regional haze plan addresses the requirements of the Clean Air Act (CAA or Act) and Regional Haze Rule (RHR) requirements for states to remedy any existing and prevent future anthropogenic impairment of visibility in mandatory Class I areas caused by emissions of air pollutants from numerous sources located over a wide geographic area (also referred to as the ''regional haze program''). States are required to assure reasonable progress toward the national goal of achieving natural visibility conditions in Class I areas. EPA is proposing a limited approval of these SIP revisions to implement the regional haze requirements for Indiana on the basis that the revisions, as a whole, strengthen the Indiana SIP. In a separate action, EPA has previously proposed a limited disapproval of the Indiana regional haze SIP because of the deficiencies in Indiana's regional haze SIP submittal arising from the remand by the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) to EPA of the Clean Air Interstate Rule (CAIR). Consequently, we are not proposing to take action in this notice to address the state's reliance on CAIR to meet certain regional haze requirements.

DATES: Comments must be received on or before February 27, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2011–0080, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: blakley.pamela@epa.gov.*
3. *Fax:* (312) 692–2450.
4. *Mail:* Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2011–0080. 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 instructions on submitting comments, go to Section I of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Charles Hatten, Environmental Engineer, at (312) 886–6031 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT:

Charles Hatten, Environmental Engineer, Control Strategy Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6031, *hatten.charles@epa.gov.*

SUPPLEMENTARY INFORMATION:

Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. What should I consider as I prepare my comments for EPA?
II. What is the background for EPA's proposed action?
A. The Regional Haze Problem
B. Requirements of the CAA and EPA's RHR
C. Roles of Agencies in Addressing Regional Haze
III. What are the requirements for regional haze SIPs?
A. The CAA and the RHR
B. Determination of Baseline, Natural, and Current Visibility Conditions
C. Determination of RPGs
D. BART
E. LTS
F. Coordinating Regional Haze and RAVI LTS
G. Monitoring Strategy and Other Implementation Plan Requirements
H. Consultation With States and Federal Land Managers (FLMs)
IV. What is the relationship of the CAIR and the transport rule to the regional haze requirements?
A. Overview of EPA's CAIR
B. Remand of the CAIR
C. Regional Haze SIP Elements Potentially Affected by the CAIR Remand and Promulgation of Transport Rule
V. What is EPA's analysis of Indiana's regional haze plan?
A. Rationale and Scope of Proposed Limited Approval
VI. Statutory and Executive Order Reviews

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

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
2. Follow directions—EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

II. What is the background for EPA's proposed action?

A. The Regional Haze Problem

Regional haze is visibility impairment that is produced by a multitude of sources and activities that are located across a broad geographic area and emit fine particles ($PM_{2.5}$) (e.g., sulfates, nitrates, organic particles, elemental carbon, and soil dust) and its precursors—sulfur dioxide (SO_2), nitrogen oxides (NO_X), and in some cases ammonia (NH_3) and volatile organic compound (VOCs). Fine particle precursors react in the atmosphere to form fine particulate matter. Aerosol $PM_{2.5}$ impairs visibility by scattering and absorbing light. Visibility impairment reduces the clarity and distance one can see. $PM_{2.5}$ can also cause serious health effects and mortality in humans and contributes to environmental effects such as acid deposition and eutrophication.

Data from the existing visibility monitoring network, the ''Interagency Monitoring of Protected Visual Environments'' (IMPROVE) monitoring network, show that visibility impairment caused by air pollution occurs virtually all the time at most national park and wilderness areas. The average visual range, the distance at which an object is barely discernable, in many Class I areas [1] in the western United States is 100–150 kilometers. That is about one-half to two-thirds of the visual range that would exist without anthropogenic air pollution. In the eastern and Midwestern Class I areas of the United States, the average visual range is generally less than 30 kilometers, or about one-fifth of the visual range that would exist under estimated natural conditions. See 64 FR 35715 (July 1, 1999).

B. Requirements of the CAA and EPA's RHR

In section 169A of the 1977 Amendments to the CAA, Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section of the CAA establishes as a national goal the ''prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I areas which impairment results from manmade air pollution.'' On December 2, 1980, EPA promulgated regulations to address visibility impairment in Class I areas that is ''reasonably attributable'' to a single source or small group of sources known as, ''reasonably attributable visibility impairment'' (RAVI). See 45 FR 80084. These regulations, codified at 40 CFR part 50, subpart P, represented the first phase in addressing visibility impairment. EPA deferred action on regional haze that emanates from a variety of sources until monitoring, modeling, and scientific knowledge about the relationships between pollutants and visibility impairment were improved.

Congress added section 169B to the CAA in 1990 to address regional haze issues. EPA promulgated a rule to address regional haze, the RHR, on July

[1] Areas designated as mandatory Class I Federal areas consist of national parks exceeding 6000 acres, wilderness areas and national memorial parks exceeding 5000 acres, and all international parks that were in existence on August 7, 1977. 42 U.S.C. 7472(a). In accordance with section 169A of the CAA, EPA, in consultation with the Department of Interior, promulgated a list of 156 areas where visibility is identified as an important value. 44 FR 69122 (November 30, 1979). The extent of a mandatory Class I area includes subsequent changes in boundaries, such as park expansions. 42 U.S.C. 7472(a). Although states and tribes may designate as Class I additional areas which they consider to have visibility as an important value, the requirements of the visibility program set forth in section 169A of the CAA apply only to ''mandatory Class I Federal areas.'' Each mandatory Class I Federal area is the responsibility of a ''Federal Land Manager.'' 42 U.S.C. 7602(i). When we use the term ''Class I area'' in this action, we mean a ''mandatory Class I Federal area.''

1, 1999 (64 FR 35713). The RHR, which amends 40 CFR part 50, subpart P, revised the existing visibility regulations to integrate provisions addressing regional haze impairment and established a comprehensive visibility protection program for Class I areas. The subpart P requirements for regional haze, found at 40 CFR 51.308 and 51.309, are included in EPA's visibility protection regulations at 40 CFR 51.300–309. Some of the main elements of the regional haze requirements are summarized in section III. The requirement to submit a regional haze SIP applies to all 50 states, the District of Columbia, and the Virgin Islands.[2]

C. Roles of Agencies in Addressing Regional Haze

Successful implementation of the regional haze program will require long-term regional coordination among states, tribal governments, and various Federal agencies. Pollution affecting the air quality in Class I areas can be transported over long distances, even hundreds of kilometers. Therefore, to effectively address the problem of visibility impairment in Class I areas, states need to develop strategies in coordination with one another, taking into account the effect of emissions from one jurisdiction on the air quality in another state.

EPA has encouraged the states and tribes to address visibility impairment from a regional perspective because the pollutants that lead to regional haze can originate from sources located across broad geographic areas. Five regional planning organizations (RPOs) were developed to address regional haze and related issues in their geographical area. The five RPOs are the Mid-Atlantic and Northeastern Visibility Union (MANE–VU) for the Northeastern states, the Visibility Improvement State and Tribal Association of the Southeast (VISTAS), the Midwest Regional Planning Organization (MRPO), the Central Regional Air Planning Association (CENRAP), and Western Regional Air Partnership (WRAP). The RPOs first evaluated technical information to better understand how their states and tribes impact Class I areas across the country and then pursued the development of regional strategies to reduce $PM_{2.5}$ emissions and other pollutants leading to regional haze.

The State of Indiana participated in the planning efforts of the MRPO. The MRPO is a collaborative effort of state governments, tribal governments, and various Federal agencies established to initiate and coordinate activities associated with the management of regional haze, visibility and other air quality issues inside the borders of the five States of Illinois, Indiana, Michigan, Ohio, and Wisconsin. Members of MRPO include the five states, the Federal Land Managers (U.S. National Park Service, U.S. Fish & Wildlife Service, and U.S. Forest Service), and EPA.

III. What are the requirements for regional haze SIPs?

A. The CAA and the RHR

Regional haze SIPs must assure reasonable progress toward the national goal of achieving natural visibility conditions in Class I areas. Section 169A of the CAA and EPA's implementing regulations require states to establish long-term strategies (LTS) for making reasonable progress toward meeting this goal. Plans must also give specific attention to certain stationary sources that were in existence on August 7, 1977, but were not in operation before August 7, 1962, and require these sources, where appropriate, to install best available retrofit technology (BART) for the purpose of reducing visibility impairment. The specific regional haze SIP requirements are discussed in further detail below.

B. Determination of Baseline, Natural, and Current Visibility Conditions

The RHR establishes the deciview[3] (dv) as the principal metric or unit for expressing visibility impairment. This visibility metric expresses uniform changes in haziness in terms of common increments across the entire range of visibility conditions, from pristine to extremely hazy conditions. Visibility expressed in deciviews is determined by using air quality measurements to estimate light extinction and then transforming the value of light extinction using a logarithm function. The deciview is a more useful measure for tracking progress in improving visibility than light extinction itself because each deciview change is an equal incremental change in visibility perceived by the human eye. Most people can detect a change in visibility at one deciview.

The deciview is used in expressing reasonable progress goals (RPGs), defining baseline, current, and natural conditions, and tracking changes in visibility. The regional haze SIPs must contain measures that ensure ''reasonable progress'' toward the national goal of preventing and remedying visibility impairment in Class I areas caused by anthropogenic air pollution. The national goal is a return to natural conditions such that anthropogenic sources of air pollution would no longer impair visibility in Class I areas.

To track changes in visibility over time at each of the 156 Class I areas covered by the visibility program (40 CFR 81.401–437) and as part of the process for determining reasonable progress, states must calculate the degree of existing visibility impairment at each Class I area at the time of each regional haze SIP is submitted and at the progress review every five years, midway through each 10-year implementation period. The RHR requires states with Class I areas (Class I states) to determine the degree of impairment in deciview for the average of the 20 percent least impaired (best) and 20 percent most impaired (worst) visibility days over a specified time period at each of its Class I areas. Each state must also develop an estimate of natural visibility conditions for the purpose of comparing progress toward the national goal. Natural visibility is determined by estimating the natural concentrations of pollutants that cause visibility impairment and then calculating total light extinction based on those estimates. EPA has provided guidance to states regarding how to calculate baseline, natural, and current visibility conditions in documents titled, EPA's *Guidance for Estimating Natural Visibility conditions under the Regional Haze Rule,* September 2003, (EPA–454/B–03–005 located at *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_envcurhr_gd.pdf*) (hereinafter referred to as ''EPA's 2003 Natural Visibility Guidance'') and *Guidance for Tracking Progress Under the Regional Haze Rule* (EPA–454/B–03–004 September 2003 located at *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_tpurhr_gd.pdf*)) (hereinafter referred to as ''EPA's 2003 Tracking Progress Guidance'').

For the first regional haze SIP, the ''baseline visibility conditions'' are the starting points for assessing ''current'' visibility impairment. Baseline visibility conditions represent the degree of visibility impairment for the 20 percent best days and 20 percent worst days for each calendar year from 2000 to 2004.

[2] Albuquerque/Bernalillo County in New Mexico must also submit a regional haze SIP to completely satisfy the requirements of section 110(a)(2)(D) of the CAA for the entire State of New Mexico under the New Mexico Air Quality Control Act (section 74–2–4).

[3] The preamble to the RHR provides additional details about the deciview. 64 FR 35714, 35725 (July 1, 1999.)

Using monitoring data for 2000 through 2004, states are required to calculate the average degree of visibility impairment for each Class I area, based on the average of annual values over the five-year period. The comparison of initial baseline visibility conditions to natural visibility conditions indicates the amount of improvement necessary to attain natural visibility, while comparisons of future conditions against baseline conditions will indicate the amount of progress made. In general, the 2000 to 2004 baseline period is considered the time from which improvement in visibility is measured.

C. Determination of RPGs

The vehicle for ensuring continuing progress towards achieving the natural visibility goal is the submission of a series of regional haze SIPs from the states that establish two distinct RPGs, one for the best days and one for the worst days for every Class I area for each approximately 10-year implementation period. The RHR does not mandate specific milestones or rates of progress, but instead calls for states to establish goals that provide for ''reasonable progress'' toward achieving natural visibility conditions. In setting RPGs, states must provide for an improvement in visibility for the worst days over the approximately 10-year period of the SIP and ensure no degradation in visibility for the best days.

States have significant discretion in establishing RPGs, but are required to consider the following factors established in section 169A of the CAA and in EPA's RHR at 40 CFR 51.308(d)(1)(i)(A): (1) The costs of compliance; (2) the time necessary for compliance; (3) the energy and non-air quality environmental impacts of compliance; and (4) the remaining useful life of any potentially affected sources. The state must demonstrate in its SIP how these factors are considered when selecting the RPGs for the best and worst days for each applicable Class I area. States have considerable flexibility in how they take these factors into consideration, as noted in EPA's *Guidance for Setting Reasonable Progress Goals under the Regional Haze Program,* (''EPA's Reasonable Progress Guidance''), July 1, 2007, memorandum from William L. Wehrum, Acting Assistant Administrator for Air and Radiation, to EPA Regional Administrators, EPA Regions 1–10 (pp. 4–2, 5–1). In setting the RPGs, states must also consider the rate of progress needed to reach natural visibility conditions by 2064 (''uniform rate of progress'' or ''glide path'') and the emissions reduction needed to achieve that rate of progress over the 10-year period of the SIP. In setting RPGs each state with a Class I areas (Class I state) must also consult with potentially contributing states that may affect visibility impairment at the Class I areas. See 40 CFR 51.308(d)(1)(iv).

D. BART

Section 169A of the CAA directs states to evaluate the use of retrofit controls at certain older large stationary sources to address visibility impacts from these sources. Specifically, CAA section 169A(b)(2)(A) requires states to revise their SIPs to contain such measures as may be necessary to make reasonable progress towards the natural visibility goal including a requirement that certain categories of existing major stationary sources [4] built between 1962 and 1977 procure, install, and operate BART as determined by the state. Under the RHR, the state can require source-specific BART controls, but it also has the flexibility to adopt an alternative such as an emissions trading program or alternate control providing greater progress towards improving visibility than BART.

On July 6, 2005, EPA published the *Guidelines for BART Determinations Under the Regional Haze Rule* at Appendix Y to 40 CFR part 51 (BART Guidelines) to assist states in determining which of their sources should be subject to the BART requirements and in determining appropriate emission limits for each applicable source. (70 FR 39104) A state must use the approach in the BART Guidelines in making a BART determination for a fossil fuel-fired electric generating unit (EGUs) with total generating capacity in excess of 750 megawatts. States are encouraged, but not required, to follow the BART Guidelines in making BART determinations for other sources.

States must address all visibility-impairing pollutants emitted by a source in the BART determination process. The most significant visibility impairing pollutants are SO_2, NO_X, and PM. EPA has stated that states should use their best judgment in determining whether VOC and NH_3 emissions impair visibility in Class I areas.

Under the BART Guidelines, states may select an exemption threshold value for their BART modeling, below which a BART-eligible source would not be expected to cause or contribute to visibility impairment in any Class I area. The state must document this exemption threshold value in the SIP and must state the basis for its selection of that value. The exemption threshold set by the state should not be higher than 0.50 dv. Any source with emissions that model above the threshold value would be subject to a BART determination review. The BART Guidelines acknowledge varying circumstances affecting different Class I areas. States should consider the number of emission sources affecting the Class I areas at issue and the magnitude of the individual source's impact.

The state must identify potential BART sources in its SIP, described as ''BART-eligible sources'' in the RHR, and document its BART control determination analyses. In making BART determinations, section 169A(g)(2) of the CAA requires the state to consider the following factors: (1) The costs 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) the remaining useful life of the source, and (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

A regional haze SIP must include source-specific BART emission limits and compliance schedules for each source subject to BART. The BART controls must be installed and in operation as expeditiously as practicable, but no later than five years after the date of EPA approval of the state's regional haze SIP. See CAA section 169(g)(4); 40 CFR 51.308(e)(1)(iv). In addition to what is required by the RHR, general SIP requirements mandate that the SIP must also include all regulatory requirements related to monitoring, recordkeeping, and reporting for the BART controls on the source.

The RHR also allows states to implement an alternative program in lieu of BART if desired so long as the alternative program can be demonstrated to achieve greater progress toward the national visibility goal than implementing BART controls. EPA made such a demonstration for CAIR under regulations issued in 2005 revising the regional haze program. 70 FR 39104 (July 6, 2005). EPA's regulations provide that states participating in the CAIR cap-and trade program under 40 CFR part 96 pursuant to an EPA-approved CAIR SIP or which remain subject to the CAIR Federal Implementation Plan (FIP) in 40 CFR part 97 need not require affected BART-eligible EGUs to install, operate, and maintain BART for emissions of SO_2 and NO_X. 40 CFR 51.308(e)(4). Since

[4] The set of ''major stationary sources'' potentially subject to BART is listed in CAA section 169A(g)(7).

CAIR is not applicable to emissions of PM, states were still required to conduct a BART analysis for PM emissions from EGUs subject to BART for that pollutant.

CAIR was later found to be inconsistent with the requirements of the CAA and the rule was remanded to EPA. See *North Carolina* v. *EPA,* 550 F.3d 1176 (DC Cir. 2008). The court left CAIR in place until the Agency replaced it. EPA replaced CAIR with the Transport Rule in August 2011.

On December 30, 2011, EPA proposed to find that the trading programs in the Transport Rule would achieve greater reasonable progress towards the national goal than would be obtained by implementing BART for SO_2 and NO_X for BART-subject EGUs in the area subject to the Transport Rule. *76 FR 82219.* Based on that proposed finding, EPA also proposed to revise the RHR to allow states, including Indiana, to meet the requirements of an alternative program in lieu of BART by participation in the trading programs under the Transport Rule. The Transport Rule is not applicable to emissions of PM, so states would still be required to conduct a BART analysis for PM emissions from EGUs subject to BART for that pollutant. EPA has not taken final action on that rule.

E. LTS

Consistent with the requirement in section 169A(b) of the CAA that states include in their regional haze SIP a 10 to 15-year strategy for making reasonable progress, section 51.308(d)(3) of the RHR requires that states include an LTS in their regional haze SIPs. The LTS is the compilation of all control measures a state will use during the implementation period of the specific SIP submittal to meet applicable RPGs. The LTS must include enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the RPGs for all Class I areas within or affected by emissions from the state. 40 CFR 51.308(d)(3).

When a state's emissions are reasonably anticipated to cause or contribute to visibility impairment in a Class I area located in another state, the RHR requires the impacted state to coordinate with the contributing states in order to develop coordinated emissions management strategies. 40 CFR 51.308(d)(3)(i). In such cases, the contributing state must demonstrate that it has included in its SIP all measures necessary to obtain its share of the emission reductions needed to meet the RPGs for the Class I area. The RPOs have provided forums for significant interstate consultation, but additional consultations between states may be required to address interstate visibility issues sufficiently.

States should consider all types of anthropogenic sources of visibility impairment in developing their LTS, including stationary, minor, mobile, and area sources. At a minimum, states must describe how each of the following seven factors listed below are taken into account in developing their LTS. The seven factors are: (1) Emission reductions due to ongoing air pollution control programs, including measures to address RAVI; (2) measures to mitigate the impacts of construction activities; (3) emissions limitations and schedules for compliance to achieve the RPG; (4) source retirement and replacement schedules; (5) smoke management techniques for agricultural and forestry management purposes including plans as currently exist within the state for these purposes; (6) enforceability of emissions limitations and control measures; and (7) the anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the period addressed by the LTS. 40 CFR 51.308(d)(3)(v).

F. Coordinating Regional Haze and RAVI LTS

As part of the RHR, EPA revised 40 CFR 51.306(c), regarding the LTS for RAVI to require that the RAVI plan must provide for a periodic review and SIP revision not less frequently than every three years until the date of submission of the state's first plan addressing regional haze visibility impairment in accordance with 40 CFR 51.308(b) and (c). The state must revise its plan to provide for review and revision of a coordinated LTS for addressing RAVI and regional haze on or before this date. It must also submit the first such coordinated LTS with its first regional haze SIP. Future coordinated LTSs, and periodic progress reports evaluating progress towards RPGs, must be submitted consistent with the schedule for SIP submission and periodic progress reports set forth in 40 CFR 51.308(f) and 51.308(g), respectively. The periodic review of a state's LTS must report on both regional haze and RAVI impairment and be submitted to EPA as a SIP revision.

G. Monitoring Strategy and Other Implementation Plan Requirements

40 CFR 51.308(d)(4) includes the requirement for a monitoring strategy for measuring, characterizing, and reporting of regional haze visibility impairment that is representative of all mandatory Class I areas within the state. The strategy must be coordinated with the monitoring strategy required in 40 CFR 51.305. Compliance with this requirement may be met through participation in the IMPROVE network, meaning that the state reviews and uses monitoring data from the network. The monitoring strategy must also provide for additional monitoring sites if the IMPROVE network is not sufficient to determine whether RPGs will be met. The monitoring strategy is due with the first regional haze SIP and it must be reviewed every five years.

The SIP must also provide for the following:

- Procedures for using monitoring data and other information in a state with mandatory Class I areas to determine the contribution of emissions from within the state to regional haze visibility impairment at Class I areas both within and outside the state;
- Procedures for using monitoring data and other information in a state with no mandatory Class I areas to determine the contribution of emissions from within the state to regional haze visibility impairment at Class I areas in other states;
- Reporting of all visibility monitoring data to the Administrator at least annually for each Class I area in the state, and where possible in electronic format;
- A statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in any Class I area. The inventory must include emissions for a baseline year, emissions for the most recent year with available data, and future projected emissions. A state must also make a commitment to update the inventory periodically; and
- Other elements including reporting, recordkeeping, and other measures necessary to assess and report on visibility.

The RHR requires control strategies to cover an initial implementation period extending to the year 2018 with a comprehensive reassessment and revision of those strategies, as appropriate, every 10 years thereafter. Periodic SIP revisions must meet the core requirements of 40 CFR 51.308(d) with the exception of BART. The requirement to evaluate sources for BART applies only to the first regional haze SIP. Facilities subject to BART must continue to comply with the BART provisions of 40 CFR 51.308(e), as noted above. Periodic SIP revisions will assure that the statutory requirement of reasonable progress will continue to be met.

H. Consultation With States and Federal Land Managers(FLMs)

The RHR requires that states consult with FLMs before adopting and submitting their SIPs. 40 CFR 51.308(i). States must provide FLMs an opportunity for consultation, in person and at least 60 days prior to holding any public hearing on the SIP. This consultation must include the opportunity for the FLMs to discuss their assessment of impairment of visibility in any Class I area and to offer recommendations on the development of the RPGs and on the development and implementation of strategies to address visibility impairment. Further, a state must include in its SIP a description of how it addressed any comments provided by the FLMs. Finally, a SIP must provide procedures for continuing consultation between the state and FLMs regarding the state's visibility protection program, including development and review of SIP revisions, five-year progress reports, and the implementation of other programs having the potential to contribute to impairment of visibility in Class I areas.

IV. What is EPA's analysis of Indiana's regional haze plan?

Indiana submitted its regional haze plan on January 14, 2011, and supplemented it on March 10, 2011.

A. Affected Class I Areas

States are required to address regional haze affecting Class I areas within a state and in Class I areas outside the state that may be affected by that state's emissions. Indiana does not have any Class I areas within its borders, but has been identified as influencing the visibility impairment of Class I areas in other nearby states. Indiana is responsible for developing a regional haze SIP that addresses its visibility impairment on Class I areas it may affect describing its LTS, its role in the consultation processes, and how the SIP meets other elements in EPA's RHR. Since Indiana does not have any Class I areas within its borders, and has no sources that have been identified as causes of RAVI, however, Indiana is not required to address the following Regional Haze SIP elements: (1) Calculation of baseline and natural visibility conditions; (2) establishment of reasonable progress goals; (3) monitoring requirements, and (4) RAVI requirements.

Indiana reviewed technical analyses conducted by MRPO and other RPOs to determine what Class I areas are affected by Indiana's emissions. MPRO conducted both a back trajectory analysis and modeling to determine the affects of its states' emissions. Indiana also used assessments by MANE–VU, VISTAS, and a joint state assessment by Arkansas and Missouri, each of which identified states having non-de minimus impacts on specified Class I areas. The following are Class I areas identified as being affected by Indiana sources:

Southeastern U.S. (VISTAS)—Sipsey Wilderness Area, Alabama; Mammoth Cave National Park, Kentucky; Great Smoky Mountains National Park, North Carolina and Tennessee; James River Face Wilderness Area, Virginia (VA); Shenandoah National Park, VA; and Dolly Sods/Otter Creek Wilderness Areas, West Virginia (WVA)

Eastern U.S. (MANE–VU)—Acadia National Park, Maine; Moosehorn Wilderness Area, Maine; Great Gulf Wilderness Area, New Hampshire; Brigantine Wilderness Area, New Jersey; and Lye Brook Wilderness Area, Vermont

North Central U.S. (MRPO and CENRAP)—Isle Royale National Park, Michigan (MI); Seney National Wildlife Refuge, MI; Boundary Waters Canoe Area Wilderness Area, Minnesota (MN); and Voyageurs National Park, MN

South Central U.S. (CENRAP)—Hercules-Glades Wilderness Area, Missouri (MO); Mingo Wilderness Area, MO; Caney Creek Wilderness Area, Arizona (AR); and Upper Buffalo Wilderness Area, AR

Appendix 1 of Indiana's Regional Haze SIP contains a list of these Class I areas for all the Midwest states, and the analyses performed to assess the impact from Indiana sources compiled by the MRPO. Class I areas outside the areas listed above were not analyzed further, as there were no significant impacts from Indiana sources shown. Further, no impacts were noted in the WRAP states.

B. Determination of Baseline, Current, and Natural Conditions

The RHR requires Class I states to estimate the baseline, natural and current visibility conditions of those Class I areas. See 40 CFR 51.308(d)(2). There are no Class I areas within the State of Indiana. Therefore, this element does not apply to Indiana.

C. RPGs

Class I states must set RPGs that achieve reasonable progress toward achieving natural visibility conditions. Indiana does not have any Class I areas, so it does not need to set any RPGs. 40 CFR 51.308(d)(1). The states with Class I areas took the lead in establishing RPGs. Indiana consulted with Class I states by participating in the discussions (meetings and conference calls) with MRPO and RPOs outside the Midwest to ensure it achieves its share of emission reductions as those Class I states determine RPGs. In Appendix 9c, of Indiana's Regional Haze SIP, the Lake Michigan Air Directors Consortium (LADCO) document ''Reasonable Progress for Class I Areas in the Northern Midwest—Factor Analysis'' (July 18, 2007), addresses factor analysis to establish RPG toward achieving natural visibility conditions in mandatory Class I areas. In addition, Appendix 9b of LADCO'S Technical Support Document ''Regional Air Quality Analyses for Ozone, $PM_{2.5}$, and Regional Haze: Final Technical Support Document,'' provides additional information related to Indiana's emissions and visibility contributions and a detailed discussion of the measures needed to achieve Indiana's share of emission reductions. Indiana has satisfied this requirement.

D. BART

Indiana began the BART rulemaking process in August 2006. Following its rulemaking, which included the notices of hearings and comments, Indiana adopted 326 Indiana Administrative Code (IAC), Article 26, Rule 1, Best Available Retrofit Technology, on October 3, 2007; it became effective February 22, 2008.

Indiana conducted a BART analysis using the criteria in the BART Guidance. Using available source emissions and construction date information, Indiana developed a list of 32 BART-eligible sources within the BART source categories by county.

Indiana then applied the results of the screening modeling conducted by the MRPO to determine which BART-eligible sources have significant impacts on any Class I area and thus warrant being subject to BART requirements. In accordance with EPA's recommendation Indiana defined ''significant impact'' as an impact of at least 0.5 deciviews. By this means, Indiana identified the following non-EGUs as subject to BART: Alcoa Inc., ESSROC Cement Corporation, SABIC Innovative Plastics (formerly GE Plastics), and Mittal Steel USA Inc.-Burns Harbor. Indiana did not consider EGUs in its analysis as it decided to rely on these sources' participation in the CAIR to address the BART requirements for SO_2 and NO_X emissions from these sources, and a modeling analysis demonstrated that particulate matter impacts from EGUs at

Class I areas were insignificant and did not warrant further control.

Indiana further analyzed the four non-EGU facilities to determine which sources are subject to BART. Additional more refined modeling analyses submitted for three of the four non-EGU sources (ESSROC Cement Corporation, SABIC Innovative Plastics, and Mittal Steel USA Inc.—Burns Harbor) showed that they did not contribute significantly to the visibility impairment at any Class I areas, so that these sources may be exempted from the BART requirement under the regional haze rule. Modeling of these facilities indicated that just one source, Alcoa of Warrick County, is subject to BART.

Alcoa, Inc.—BART Determination and Modeling Analysis

Indiana submitted a BART analysis, prepared by Alcoa, which analyzed BART and alternative BART control strategies. Before beginning the five factor case-by-case BART analysis, Alcoa performed a baseline visibility impact analysis for each of the years 2001–2003 using the CALPUFF model with emission rates based on the 24-hour average actual emissions from the highest emitting day. The initial screening model projected the highest visibility impact at Mammoth Cave National Park (MCNP). Other Class I areas screened included Mingo Wilderness Area, Sipsey Wilderness Area, Great Smoky Mountains National Park, Joyce Kilmer—Slick Rock Wilderness Area, Cohutta Wilderness Area, and Shining Rock Wilderness Area. The impact at MCNP exceeded 0.5 dv. Since the visibility impact was highest at MCNP, the BART analysis focused on the impact at MCNP.

Alcoa identified 18 ingot furnaces, three boilers (Boilers #2, #3, and 4), and five aluminum refining furnaces (Potlines 2–6) as meeting BART eligibility criteria. Boilers #2 and #3 are classified as industrial boilers. Boiler #4 is classified as an EGU, and, under Indiana's plan, is addressed by CAIR for SO_2 and NO_X in conjunction with other EGUs in the state. Thus, the BART analysis for boiler #4 will only address PM emissions.

After proposing determinations of BART for its BART-subject units, Alcoa proposed an alternative strategy which compensates for less stringent limits at selected BART-subject units by imposing more restrictive limits at a non-BART-subject unit at the facility. In most respects, Indiana's SIP submittal reflects the BART determinations and the alternative strategy that Alcoa proposed. Tables 1 and 2 show summaries of the BART determinations and the alternative BART control strategy that Alcoa proposed.

TABLE 1—ALCOA'S PROPOSED BART CONTROL STRATEGY

Emission unit	BART	Alternative BART
Boiler 1	Not a BART-subject unit	
PM		Electrostatic Precipitator (ESP).
SO_2		Wet Flue Gas Desulfurization (FGD) with 91% emission reduction efficiency.
NO_X		Low NO_X Burners (LNB) with staged over-fire air (OFA).
Boilers 2 and 3:		
PM	ESP	ESP.
SO_2	Wet FGD with 92% emission reduction efficiency	Wet FGD with 90% emission reduction efficiency.
NO_X	LNB with staged OFA	LNB with staged over-fire air OFA.
Boiler 4–PM	ESP	ESP.
Potlines (2–6):		
—Fugitive emissions:		
PM	No add-on control	No add-on control.
—Primary emissions:		
PM	Gas treatment system followed by fabric filter	Gas treatment system followed by fabric filter.
SO_2	Limit anode grade coke to 3% sulfur	Limit anode grade coke to 3.5% sulfur.
NO_X	No add-on control	No add-on control
	No add-on control	No add-on control.

TABLE 2—ALCOA'S PROPOSED BART EMISSION LIMITS

Emission unit	Emission limit	Compliance demonstration method
Boiler 1	Not a Bart-eligible unit.	
PM (filterable)	0.03 lb/MMBtu, 24-hour daily average	Continuous emission monitoring system (CEMS) at the scrubber outlet according to 40 CFR part 60, following Appendix B, PS–11.
SO_2	91% reduction, 24-hour daily average	CEMS at the scrubber inlet and outlet according to 40 CFR part 60, following Appendix B, PS–2.
NO_X	0.38 lb/MMBtu, 24-hour daily average	CEMS at the scrubber outlet following PS–2.
Boilers 2 and 3:		
PM (filterable)	0.03 lb/MMBtu, 24-hour daily average	CEMS at the scrubber outlet according to 40 CFR part 60, following Appendix B, PS–11.
SO_2	90% reduction, 24-hour daily average	CEMS at the scrubber inlet and outlet according to 40 CFR part 60, following Appendix B, PS–2.
NO_X	0.38 lb/MMBtu, 24-hour daily average	CEMS at the scrubber outlet following PS–2.
Boiler 4:		
PM (filterable and sulfuric acid).	0.1 lb/MMBtu	40 CFR part 60, Appendix A, Method 5.
Potlines (2–6):		
PM (filterable)	0.005 grains/scf, 24-hour daily average	40 CFR part 60, Appendix A, Method 5.

TABLE 2—ALCOA'S PROPOSED BART EMISSION LIMITS—Continued

Emission unit	Emission limit	Compliance demonstration method
SO_2	The sulfur content in each monthly baked anode composite shall not exceed 2.919%, provided however that hourly SO_2 emissions from the potlines shall not exceed 1,456 lbs/hr on a combined basis, and determined on a monthly basis.	ASTM D3177–02, modified by adding saturated bromine water before the pH adjustment. Alternatively, determination of sulfur content by x-ray fluorescence.

As shown in Tables 1 and 2, Alcoa recommended that it be subject to an alternative set of control requirements in lieu of being required to implement BART at each BART-subject unit. This alternative would provide additional control of emissions from boiler #1 beyond that required in the baseline years, sufficient to compensate for allowing more SO_2 emissions from the potlines and from boilers #2 and #3. Thus, Indiana determined SO_2 BART (utilizing wet limestone flue gas desulfurization) for Boilers #2 and #3 as 92 percent reduction, but it adopted requirements to control SO_2 emissions from these boilers by 90% as an alternative. According to the discussion in Chapter 8, and Appendix 5, of the State of Indiana Regional Haze SIP, Indiana determined that BART for the potlines consists of the use of anode grade coke containing 3 percent sulfur, which is higher than the current Indiana rule that limits sulfur in the coke to no more than 2 percent. The alternative strategy recommended by Alcoa allows the use of coke containing 3.5 percent sulfur. To compensate for these less stringent limits, Alcoa's alternative strategy requires that the source control SO_2 emissions from Boiler #1 by 91 percent and control NO_X emissions to meet limit of 0.38 pounds/Million British thermal units (lbs/MMBtu) for boilers #1, i.e., the same limit as applies to boilers #2 and #3 (utilizing low NO_X burners and over-fire air). For particulate emissions, Indiana determined that BART represents use of electrostatic precipitators with an emission limit equal to 0.03 lbs/MMBtu for boilers #2 and #3. Indiana determined that the particulate emission limit representing BART for boiler #4 is 0.015 lbs/MMBtu, with an alternative limit for this boiler as 0.10 lbs/MMBtu.

Indiana's submittal nominally follows Alcoa's recommendation. Nevertheless, Indiana's submittal does not change the SO_2 emission limits that apply to Alcoa's potlines. Therefore, EPA views Indiana's submittal as mandating a BART strategy for Alcoa that in fact includes status quo limits of potline SO_2 emissions.

In any case, EPA does not agree that an increase in sulfur content of coke used in the potlines at Alcoa's Warrick County facility, as opposed to a decrease in the sulfur content and thus in the emissions from these units, represents BART at these units. Furthermore, neither the company nor the state has provided evidence that this relaxation of limits on SO_2 emissions from these units does not interfere with attainment and maintenance of applicable SO_2 air quality standards, in contravention of Clean Air Act section 110(l). On the other hand, Indiana's submittal contains no rule revisions or permit provisions that would in fact implement any relaxation of limits on the SO_2 emissions from these units. Therefore, notwithstanding the discussion suggesting that Indiana supports an increase in these limits, the actual plan reflects continuation of the existing limits without relaxation. That is, EPA considers Indiana's regional haze plan to reflect the current SO_2 emission limits for the potlines, not the relaxed limits discussed in Indiana's submittal. For each potline #2–6 the $S0_2$ emission limit is 195.2 pounds/hour at the stack, and 21.7 pounds/hour for each roof monitor associated with the potline.

Viewing Indiana's plan in that manner, EPA is satisfied with Indiana's alternative strategy for Alcoa. Modeling conducted by Indiana shows that the alternative achieves greater visibility improvement than BART, equal to 75 percent more reduction in deciviews over the baseline. The alternative BART, though it achieves greater reductions in all pollutants (PM, SO_2, and NO_X); and most notably achieves significantly higher reductions in SO_2 emissions, equal to approximately 21,600 tons more than BART. The resulting emission limits are adopted by Indiana into the Indiana's regional haze SIP submittal, and will be included in the facilities' Part 70 permit for each unit subject to BART.

Under the CAA, BART is required for any BART-eligible source that emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any Class I area. Accordingly, for stationary sources meeting these criteria, states must address the BART requirement when they develop their Regional Haze SIPs. On November 3, 2010, the Indiana Air Pollution Control Board adopted as final Indiana BART Rule, 326 IAC 26–2, to establish BART emission limitations in order to comply with the RHR. Indiana's Regional Haze SIP includes a copy of rule 326 IAC Article 26–2 in Appendix 7.

E. LTS

As described in III. E of this action, the LTS is a compilation of state-specific control measures relied on by the state for achieving its RPGs. The LTS must include enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the RPGs for all Class I areas affected by Indiana emissions.

Indiana consulted with Class I states on the development of RPGs through its participation in MRPO. MRPO facilitated consultations with other Midwest states and with states in other regions through inter-RPO processes. By coordinating with the MRPO and other RPOs, Indiana has worked to ensure that its LTS provides sufficient emission reductions to mitigate impacts of sources from Indiana on affected Class I areas. Indiana believes that existing control programs will adequately address Indiana's impact on Class I areas. Thus, continued implementation of the control programs will satisfy the long-term strategy requirements.

MPRO considered existing on-highway mobile source, off-highway mobile source, area source, power plant, and other point source programs as the existing control programs in its analysis. Indiana included a technical support document (TSD) produced by MRPO in its submission that details the analysis. Overall, emissions from Indiana and the Midwest, as a whole, are reduced significantly over this time, illustrating that Indiana is making appropriate progress toward reducing emissions.

At 40 CFR 51.308(d)(3)(v), the RHR identifies seven factors that each state must consider in developing its LTS. The state must consider: (1) Emission reductions due to ongoing air pollution control programs, including measures to address RAVI; (2) Measures to mitigate impact from construction activities; (3) Emissions limitations and schedules for

compliance to achieve the RPG; (4) Source retirement and replacement schedules; (5) Smoke management techniques for agricultural and forestry management purposes including plans as currently exist within the State for these purposes; (6) Enforceability of emissions limitations and control measures; and (7) The anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the period addressed by the LTS.

Indiana relied on MPRO's modeling and analysis along with its emission information in developing a LTS. Indiana consulted with Class I states through its participation in MRPO. MRPO facilitated consultations with other Midwest states and with states in other regions through inter-RPO processes. Indiana considered the factors set out in 40 CFR 51.308(d)(3)(v) in developing its LTS. Based on these factors and the MRPO's technical analysis, in conjunction with RPGs that were set by the pertinent states in consultation with Indiana and other states, Indiana concludes that existing control programs adequately address Indiana's impact on Class I areas and suffice to meet their RPGs by 2018 by implementing the control programs already in place. These existing control programs include Federal motor vehicle emission control program, reformulated gasoline, emission limits for area sources of VOCs, Title IV, the NO_X SIP Call, new source review permitting program, Maximum Achievable Control Technology standards, and Federal non-road standards for construction equipment and vehicles. Furthermore, Indiana has open burning rules and its Department of Natural Resources has the authority to ban outdoor burning if necessary. Indiana noted in its submission that the state has a smoke management plan that complements its open burning rules, under Indiana Code 13–17–9 and rule 326 IAC Article 4–1. Significantly, Indiana's LTS also relies on CAIR. In rulemaking published on December 30, 2011, at 76 FR 82219, EPA proposed to disapprove the BART plans and LTS's for Indiana and several other states because CAIR cannot be considered to provide permanently enforceable emission reductions.

As noted in EPA's separate notice proposing revisions to the RHR (76 FR 82219, December 30, 2011), a number of states, including Indiana, fully consistent with EPA's regulations at the time, relied on the trading programs of CAIR to satisfy the BART requirement and the requirement for a long-term strategy sufficient to achieve the state-adopted reasonable progress goals. In that notice, we proposed a limited disapproval of Indiana's long-term strategy based on its reliance on CAIR. Comments on that proposed determination may be directed to Docket ID No. EPA–HQ–OAR–2011–0729. We are proposing to find that the remaining elements of Indiana's long-term strategy meet the requirements of the RHR.

F. Comments

Indiana took comments on its proposed regional haze plan. It held a public hearing on January 11, 2011, which concluded the public comment period. As part of the consultation process, Indiana also received comments from the FLMs which were presented at Indiana's public hearing.

Indiana provided the comments it received and its responses with its plan. Indiana revised portions of its plan in response to comments received. EPA considers that Indiana has satisfied this requirement.

IV. What action is EPA taking?

EPA is proposing a limited approval of revisions to the Indiana SIP submitted by IDEM on January 11, 2011, and March 10, 2011, addressing regional haze for the first implementation period. The revisions seek to address CAA and regional haze rule requirements for states to remedy any existing anthropogenic and prevent future impairment of visibility at Class I areas.

Indiana's plan satisfies a number of elements of the regional haze requirements. Indiana's plan identifies the Class I areas that the state's emissions affect. Indiana demonstrates that the state has consulted with other states as appropriate in establishing reasonable progress goals and identifying the reductions need in Indiana to meet those goals. Indiana's plan meets the requirement for BART for non-EGUs and for particulate matter emissions from EGUs. For these reasons, and for the SIP strengthening effect of Indiana's plan, EPA is proposing limited approval of Indiana's plan.

In addition to the above actions, EPA is proposing to approve regulation 326 IAC Article 26, Rule 2 into Indiana's SIP which incorporates BART emission limitations in order for sources to comply with EPA's Regional Haze Rule.

It should be noted that rule 326 IAC Article 26–2 contains an erroneous citation, citing limits in 326 IAC 7–4–10(a)(4) rather than 326 IAC 7–4–10(a)(3). EPA nevertheless finds the rule approvable for several reasons: (1) The pertinent limits are already an approved part of Indiana's SIP and are therefore already enforceable; (2) the State's intent is clear; and (3) Indiana intends to correct this referencing.

In a separate action, EPA has previously proposed a limited disapproval of the Indiana regional haze SIP because of deficiencies in the state's regional haze SIP submittal arising from the remand by the U.S. Court of Appeals for the District of Columbia (DC Circuit) to EPA of the Clean Air Interstate Rule (CAIR). 76 FR 82219, December 30, 2011. Consequently, we are not taking action in this notice to address the state's reliance on CAIR to meet certain regional haze requirements.

VI. Statutory and Executive Order Reviews

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

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

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, and Volatile organic compounds.

Dated: January 17, 2012.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2012–1604 Filed 1–25–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2012–0002, FRL–9622–2]

Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Pennsylvania; Regional Haze State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing limited approval of a revision to the Pennsylvania State Implementation Plan (SIP) submitted by the Commonwealth of Pennsylvania, through the Pennsylvania Department of Environmental Protection (PADEP) on December 20, 2010 that addresses regional haze for the first implementation period. This revision addresses the requirements of the Clean Air Act (CAA) and EPA's rules that require states to prevent any future, and remedy any existing, anthropogenic impairment of visibility in mandatory Class I areas caused by emissions of air pollutants from numerous sources located over a wide geographic area (also referred to as the ''regional haze program''). States are required to assure reasonable progress toward the national goal of achieving natural visibility conditions in Class I areas. EPA is proposing a limited approval of this SIP revision to implement the regional haze requirements for Pennsylvania on the basis that the revisions, as a whole, strengthen the Pennsylvania SIP. EPA is also proposing to approve this revision as meeting the infrastructure requirements relating to visibility protection for the 1997 8-Hour Ozone National Ambient Air Quality Standard (NAAQS) and the 1997 and 2006 fine particulate matter ($PM_{2.5}$) NAAQS. In a separate action, EPA has previously proposed a limited disapproval of the Pennsylvania regional haze SIP because of deficiencies in the Commonwealth's regional haze SIP submittal arising from the remand by the U.S. Court of Appeals for the District of Columbia (DC Circuit) to EPA of the Clean Air Interstate Rule (CAIR), *see* 76 FR 82219, December 30, 2011. Consequently, we are not taking action in this notice to address the Commonwealth's reliance on CAIR to meet certain regional haze requirements.

DATES: Comments must be received on or before February 27, 2012.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2012–0002 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: fernandez.cristina@epa.gov.*

C. *Mail:* EPA–R03–OAR–2012–0002, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. 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–R03–OAR–2012–0002. 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.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the Commonwealth's submittal are available at the Pennsylvania Department of Environmental Protection, Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Melissa Linden, (215) 814–2096, or by email at *mailto:linden.melissa@epa.gov.*

SUPPLEMENTARY INFORMATION: On December 20, 2010, the PADEP submitted a revision to its SIP to address regional haze for the first implementation period.

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Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

I. What is the background for EPA's proposed action?

A. The Regional Haze Problem

Regional haze is visibility impairment that is produced by a multitude of sources and activities which are located across a broad geographic area and emit fine particles ($PM_{2.5}$) (*e.g.,* sulfates, nitrates, organic carbon, elemental carbon, and soil dust) and their precursors (*e.g.,* sulfur dioxide (SO_2), nitrogen oxides (NO_X), and in some cases, ammonia (NH_3) and volatile organic compounds (VOC)). Fine particle precursors react in the atmosphere to form fine particulate matter, which impairs visibility by scattering and absorbing light. Visibility impairment reduces the clarity, color, and visible distance that one can see. $PM_{2.5}$ can also cause serious health effects and mortality in humans and contributes to environmental effects such as acid deposition and eutrophication.

Data from the existing visibility monitoring network, the ''Interagency Monitoring of Protected Visual Environments'' (IMPROVE) monitoring network, show that visibility impairment caused by air pollution occurs virtually all the time at most national park and wilderness areas. The average visual range [1] in many Class I areas (*i.e.,* national parks and memorial parks, wilderness areas, and international parks meeting certain size criteria) in the western United States is 100–150 kilometers or about one-half to two-thirds of the visual range that would exist without anthropogenic air pollution. In most of the eastern Class I areas of the United States, the average visual range is less than 30 kilometers or about one-fifth of the visual range that would exist under estimated natural conditions. *See* 64 FR 35714, July 1, 1999.

B. Background Information

In section 169A of the 1977 Amendments to the CAA, Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section of the CAA establishes as a national goal the ''prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I Federal areas [2] which impairment results from manmade air pollution.'' On December 2, 1980, EPA promulgated regulations to address visibility impairment in Class I areas that is ''reasonably attributable'' to a single source or small group of sources, *i.e.,* ''reasonably attributable visibility impairment.'' *See* 45 FR 80084. These regulations represented the first phase in addressing visibility impairment. EPA deferred action on regional haze that emanates from a variety of sources until monitoring, modeling, and scientific knowledge about the relationships between pollutants and visibility impairment were improved.

Congress added section 169B to the CAA in 1990 to address regional haze issues. EPA promulgated a rule to address regional haze on July 1, 1999 (64 FR 35714), the RHR. The RHR revised the existing visibility regulations to integrate into the regulation provisions addressing regional haze impairment and established a comprehensive visibility protection program for Class I areas. The requirements for regional haze, found at 40 CFR 51.308 and 51.309, are included in EPA's visibility protection regulations at 40 CFR 51.300–309. Some of the main elements of the regional haze requirements are summarized in section II of this notice. The requirement to submit a regional haze SIP applies to all 50 states, the District of Columbia, and the Virgin Islands.[3] Section 51.308(b) requires states to submit the first implementation plan addressing regional haze visibility impairment no later than December 17, 2007.

C. Roles of Agencies in Addressing Regional Haze

Successful implementation of the regional haze program will require long-term regional coordination among states, tribal governments, and various federal agencies. As noted above, pollution affecting the air quality in Class I areas can be transported over long distances, even hundreds of kilometers. Therefore, to effectively address the problem of visibility impairment in Class I areas, states need to develop strategies in coordination with one another, taking into account the effect of emissions from one jurisdiction on the air quality in another.

Because the pollutants that lead to regional haze can originate from sources located across broad geographic areas, EPA has encouraged the states and tribes across the United States to address visibility impairment from a regional perspective. Five regional planning organizations (RPOs) were developed to address regional haze and related issues. The RPOs first evaluated technical information to better understand how their states and tribes impact Class I areas across the country, and then pursued the development of regional strategies to reduce emissions of particulate matter (PM) and other pollutants leading to regional haze.

The Mid-Atlantic Region Air Management Association (MARAMA), the Northeast States for Coordination Air Use Management (NESCAUM), and the Ozone Transport Commission (OTC) established the Mid-Atlantic/Northeast Visibility Union (MANE–VU) regional planning organization. MANE–VU is a collaborative effort of state governments,

[1] Visual range is the greatest distance, in kilometers or miles, at which a dark object can be viewed against the sky.

[2] Areas designated as mandatory Class I Federal areas consist of national parks exceeding 6000 acres, wilderness areas and national memorial parks exceeding 5000 acres, and all international parks that were in existence on August 7, 1977. 42 U.S.C. 7472(a). In accordance with section 169A of the CAA, EPA, in consultation with the Department of the Interior, promulgated a list of 156 areas where visibility is identified as an important value (44 FR 69122, November 30, 1979). The extent of a mandatory Class I area includes subsequent changes in boundaries, such as park expansions. 42 U.S.C. 7472(a). Although states and tribes may designate as Class I additional areas which they consider to have visibility as an important value, the requirements of the visibility program set forth in section 169A of the CAA apply only to ''mandatory Class I Federal areas.'' Each mandatory Class I Federal area is the responsibility of a ''Federal Land Manager.'' 42 U.S.C. 7602(i). When we use the term ''Class I area'' in this action, we mean a ''mandatory Class I Federal area.''

[3] Albuquerque/Bernalillo County in New Mexico must also submit a regional haze SIP to completely satisfy the requirements of section 110(a)(2)(D) of the CAA for the entire State of New Mexico under the New Mexico Air Quality Control Act (section 74–2–4).

tribal governments, and various federal agencies established to initiate and coordinate activities associated with the management of regional haze, visibility, and other air quality issues in the Mid-Atlantic and Northeast corridor of the United States. Member states and tribal governments include: Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Penobscot Indian Nation, Rhode Island, St. Regis Mohawk Tribe, and Vermont.

D. Interstate Transport for Visibility

Sections 110(a)(1) and 110(a)(2)(D)(i)(II) of the CAA require that within three years of promulgation of a National Ambient Air Quality Standard (NAAQS), a state must ensure that its SIP, among other requirements, ''contains adequate provisions prohibiting any source or other types of emission activity within the State from emitting any air pollutant in amounts which will interfere with measures required to be included in the applicable implementation plan for any other State to protect visibility.'' Similarly, section 110(a)(2)(J) requires that such SIP ''meet the applicable requirements of part C of (Subchapter I) (relating to visibility protection).''

EPA's 2006 Guidance, entitled ''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,'' recognized the possibility that a state could potentially meet the visibility portions of section 110(a)(2)(D)(i)(II) through its submission of a Regional Haze SIP, as required by sections 169A and 169B of the CAA. EPA's 2009 guidance, entitled ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particulate ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS),'' recommended that a state could meet such visibility requirements through its regional haze SIP. EPA's rationale supporting this recommendation was that the development of the regional haze SIPs was intended to occur in a collaborative environment among the states, and that through this process states would coordinate on emissions controls to protect visibility on an interstate basis. The common understanding was that, as a result of this collaborative environment, each state would take action to achieve the emissions reductions relied upon by other states in their reasonable progress demonstrations under the RHR. This interpretation is consistent with the requirement in the RHR that a state participating in a regional planning process must include ''all measures needed to achieve its apportionment of emission reduction obligations agreed upon through that process.'' *See* 40 CFR 51.308(d)(3)(ii).

The regional haze program, as reflected in the RHR, recognizes the importance of addressing the long-range transport of pollutants for visibility and encourages states to work together to develop plans to address haze. The regulations explicitly require each state to address its ''share'' of the emission reductions needed to meet the reasonable progress goals for neighboring Class I areas. States working together through a regional planning process, are required to address an agreed upon share of their contribution to visibility impairment in the Class I areas of their neighbors. *See* 40 CFR 51.308(d)(3)(ii). Given these requirements, appropriate regional haze SIPs will contain measures that will achieve these emissions reductions and will meet the applicable visibility related requirements of section 110(a)(2).

As a result of the regional planning efforts in the MANE–VU, all states in the MANE–VU region contributed information to a Technical Support Committee (TSC) which provides an analysis of the causes of haze, and the levels of contribution from all sources within each state to the visibility degradation of each Class I area. The MANE–VU states consulted in the development of reasonable progress goals, using the products of this technical consultation process to co-develop their reasonable progress goals for the MANE–VU Class I areas. The modeling done by MANE–VU relied on assumptions regarding emissions over the relevant planning period and embedded in these assumptions were anticipated emissions reductions in each of the states in MANE–VU, including reductions from BART and other measures to be adopted as part of the state's long term strategy for addressing regional haze. The reasonable progress goals in the regional haze SIPs that have been prepared by the states in the MANE–VU region are based, in part, on the emissions reductions from nearby states that were agreed on through the MANE–VU process.

Pennsylvania submitted a regional haze SIP on December 20, 2010, to address the requirements of the RHR. On December 7, 2007, Pennsylvania submitted its original 1997 8-Hour Ozone and $PM_{2.5}$ NAAQS infrastructure SIP revisions. On June 6, 2008, Pennsylvania submitted amendments for the 1997 8-Hour Ozone and $PM_{2.5}$ NAAQS infrastructure SIP. On April 26, 2010, Pennsylvania submitted the 2006 $PM_{2.5}$ NAAQS infrastructure SIP. On May 24, 2011, Pennsylvania submitted an amendment to the 2006 $PM_{2.5}$ NAAQS infrastructure SIP. In these submittals, Pennsylvania stated that their regional haze SIP would meet the requirements of the CAA, section 110(a)(2)(D)(i)(II), regarding visibility for the 1997 8-Hour Ozone NAAQS and the 1997 and 2006 $PM_{2.5}$ NAAQS. Pennsylvania also indicated it will meet the visibility requirements of 110(a)(2)(J), and specifically references the regional haze SIP submitted on December 20, 2010. EPA has reviewed Pennsylvania's regional haze SIP and, as explained in section IV of this action, proposes to find that Pennsylvania's regional haze submittal meets the portions of the requirements of the CAA sections 110(a)(2) relating to visibility protection for the 1997 8-Hour Ozone NAAQS and the 1997 and 2006 $PM_{2.5}$ NAAQS.

II. What are the requirements for the regional haze SIPs?

A. The CAA and the Regional Haze Rule (RHR)

Regional haze SIPs must assure reasonable progress toward the national goal of achieving natural visibility conditions in Class I areas. Section 169A of the CAA and EPA's implementing regulations require states to establish long-term strategies for making reasonable progress toward meeting this goal. Implementation plans must also give specific attention to certain stationary sources that were in existence on August 7, 1977, but were not in operation before August 7, 1962, and require these sources, where appropriate, to install BART controls for the purpose of eliminating or reducing visibility impairment. The specific regional haze SIP requirements are discussed in further detail below.

B. Determination of Baseline, Natural, and Current Visibility Conditions

The RHR establishes the deciview as the principal metric or unit for expressing visibility. This visibility metric expresses uniform changes in haziness in terms of common increments across the entire range of visibility conditions, from pristine to extremely hazy conditions. Visibility expressed in deciviews is determined by using air quality measurements to estimate light extinction and then transforming the value of light

extinction using a logarithm function. The deciview is a more useful measure for tracking progress in improving visibility than light extinction itself because each deciview change is an equal incremental change in visibility perceived by the human eye. Most people can detect a change in visibility at one deciview.[4]

The deciview is used in expressing RPGs (which are interim visibility goals toward meeting the national visibility goal), defining baseline, current, and natural conditions, and tracking changes in visibility. The regional haze SIPs must contain measures that ensure ''reasonable progress'' toward the national goal of preventing and remedying visibility impairment in Class I areas caused by anthropogenic air pollution by reducing anthropogenic emissions that cause regional haze. The national goal is a return to natural conditions, *i.e.,* anthropogenic sources of air pollution would no longer impair visibility in Class I areas.

To track changes in visibility over time at each of the 156 Class I areas covered by the visibility program (40 CFR 81.401–437), and as part of the process for determining reasonable progress, states must calculate the degree of existing visibility impairment at each Class I area at the time of each regional haze SIP submittal and periodically review progress every five years midway through each 10-year implementation period. To do this, the RHR requires states to determine the degree of impairment (in deciviews) for the average of the 20 percent least impaired (''best'') and 20 percent most impaired (''worst'') visibility days over a specified time period at each of their Class I areas. In addition, states must also develop an estimate of natural visibility conditions for the purpose of comparing progress toward the national goal. Natural visibility is determined by estimating the natural concentrations of pollutants that cause visibility impairment and then calculating total light extinction based on those estimates. EPA has provided guidance to states regarding how to calculate baseline, natural and current visibility conditions in documents titled, EPA's *Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Rule,* September 2003, (EPA–454/B–03–005 located at *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_envcurhr_gd.pdf*), (hereinafter referred to as ''EPA's 2003 Natural Visibility Guidance'') and *Guidance for Tracking Progress Under the Regional Haze Rule,* September 2003, (EPA–454/B–03–004 located at *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_tpurhr_gd.pdf*), (hereinafter referred to as ''EPA's 2003 Tracking Progress Guidance'').

For the first regional haze SIPs that were due by December 17, 2007, ''baseline visibility conditions'' were the starting points for assessing ''current'' visibility impairment. Baseline visibility conditions represent the degree of visibility impairment for the 20 percent least impaired days and 20 percent most impaired days for each calendar year from 2000 to 2004. Using monitoring data for 2000 through 2004, states are required to calculate the average degree of visibility impairment for each Class I area, based on the average of annual values over the five-year period. The comparison of initial baseline visibility conditions to natural visibility conditions indicates the amount of improvement necessary to attain natural visibility, while the future comparison of baseline conditions to the then current conditions will indicate the amount of progress made. In general, the 2000–2004 baseline period is considered the time from which improvement in visibility is measured.

C. Determination of Reasonable Progress Goals (RPGs)

The vehicle for ensuring continuing progress towards achieving the natural visibility goal is the submission of a series of regional haze SIPs from the states that establish two RPGs (*i.e.,* two distinct goals, one for the ''best'' and one for the ''worst'' days) for every Class I area for each (approximately) 10-year implementation period. The RHR does not mandate specific milestones or rates of progress, but instead calls for states to establish goals that provide for ''reasonable progress'' toward achieving natural (*i.e.,* ''background'') visibility conditions. In setting RPGs, states must provide for an improvement in visibility for the most impaired days over the (approximately) 10-year period of the SIP, and ensure no degradation in visibility for the least impaired days over the same period.

States have significant discretion in establishing RPGs, but are required to consider the following factors established in section 169A of the CAA and in EPA's RHR at 40 CFR 51.308(d)(1)(i)(A): (1) The costs of compliance; (2) the time necessary for compliance; (3) the energy and non-air quality environmental impacts of compliance; and (4) the remaining useful life of any potentially affected sources. States must demonstrate in their SIPs how these factors are considered when selecting the RPGs for the best and worst days for each applicable Class I area. States have considerable flexibility in how they take these factors into consideration, as noted in EPA's *Guidance for Setting Reasonable Progress Goals under the Regional Haze Program,* (''EPA's Reasonable Progress Guidance''), July 1, 2007, memorandum from William L. Wehrum, Acting Assistant Administrator for Air and Radiation, to EPA Regional Administrators, EPA Regions 1–10 (pp. 4–2, 5–1). In setting the RPGs, states must also consider the rate of progress needed to reach natural visibility conditions by 2064 (referred to as the ''uniform rate of progress'' or the ''glidepath'') and the emission reduction measures needed to achieve that rate of progress over the 10-year period of the SIP. Uniform progress towards achievement of natural conditions by the year 2064 represents a rate of progress that states are to use for analytical comparison to the amount of progress they expect to achieve. In setting RPGs, each state with one or more Class I areas (''Class I state'') must also consult with potentially ''contributing states,'' *i.e.,* other nearby states with emission sources that may be affecting visibility impairment at the state's Class I areas. *See* 40 CFR 51.308(d)(1)(iv).

D. Best Available Retrofit Technology (BART)

Section 169A of the CAA directs states to evaluate the use of retrofit controls at certain larger, often uncontrolled, older stationary sources in order to address visibility impacts from these sources. Specifically, section 169A(b)(2)(A) of the CAA requires states to revise their SIPs to contain such measures as may be necessary to make reasonable progress towards the natural visibility goal, including a requirement that certain categories of existing major stationary sources[5] built between 1962 and 1977 procure, install, and operate the ''Best Available Retrofit Technology'' as determined by the state. Under the RHR, states are directed to conduct BART determinations for such ''BART-eligible'' sources that may be anticipated to cause or contribute to any visibility impairment in a Class I area. Rather than requiring source-specific BART controls, states also have the flexibility to adopt an emissions trading program or other alternative program as long as the alternative provides greater

[4] The preamble to the RHR provides additional details about the deciview. 64 FR 35714, 35725, July 1, 1999.

[5] The set of ''major stationary sources'' potentially subject to BART is listed in CAA section 169A(g)(7).

reasonable progress towards improving visibility than BART.

On July 6, 2005, EPA published the *Guidelines for BART Determinations Under the Regional Haze Rule* at Appendix Y to 40 CFR part 51 (hereinafter referred to as the ''BART Guidelines'') to assist states in determining which of their sources should be subject to the BART requirements and in determining appropriate emission limits for each applicable source. In making a BART determination for a fossil fuel-fired electric generating plant with a total generating capacity in excess of 750 megawatts (MW), a state must use the approach set forth in the BART Guidelines. A state is encouraged, but not required, to follow the BART Guidelines in making BART determinations for other types of sources.

States must address all visibility-impairing pollutants emitted by a source in the BART determination process. The most significant visibility impairing pollutants are SO_2, NO_X, and PM. EPA has stated that states should use their best judgment in determining whether VOC or NH_3 compounds impair visibility in Class I areas.

Under the BART Guidelines, states may select an exemption threshold value for their BART modeling, below which a BART eligible source would not be expected to cause or contribute to visibility impairment in any Class I area. The state must document this exemption threshold value in the SIP and must state the basis for its selection of that value. Any source with emissions that model above the threshold value would be subject to a BART determination review. The BART Guidelines acknowledge varying circumstances affecting different Class I areas. States should consider the number of emission sources affecting the Class I areas at issue and the magnitude of the individual sources' impacts. Any exemption threshold set by the state should not be higher than 0.5 deciview.

In their SIPs, states must identify potential BART sources, described as ''BART eligible sources'' in the RHR, and document their BART control determination analyses. In making BART determinations, section 169A(g)(2) of the CAA requires that states consider the following factors: (1) The costs 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) the remaining useful life of the source, and (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. States are free to determine the weight and significance to be assigned to each factor.

A regional haze SIP must include source-specific BART emission limits and compliance schedules for each source subject to BART. Once a state has made its BART determination, the BART controls must be installed and in operation as expeditiously as practicable, but no later than five years after the date of EPA approval of the regional haze SIP. *See* CAA section 169(g)(4) and 40 CFR 51.308(e)(1)(iv). In addition to what is required by the RHR, general SIP requirements mandate that the SIP must also include all regulatory requirements related to monitoring, recordkeeping, and reporting for the BART controls on the source.

As noted above, the RHR allows states to implement an alternative program in lieu of BART so long as the alternative program can be demonstrated to achieve greater reasonable progress toward the national visibility goal than would BART. Under regulations issued in 2005 revising the regional haze program, EPA made just such a demonstration for the Clean Air Interstate Rule (CAIR). 70 FR 39104, July 6, 2005. EPA's regulations provide that states participating in the CAIR cap and trade program under 40 CFR part 96 pursuant to an EPA-approved CAIR SIP or which remain subject to the CAIR Federal Implementation Plan (FIP) in 40 CFR part 97, do not require affected BART eligible electric generating units (EGUs) to install, operate, and maintain BART for emissions of SO_2 and NO_X. *See* 40 CFR 51.308(e)(4). Since CAIR is not applicable to emissions of PM, states were still required to conduct a BART analysis for PM emissions from EGUs subject to BART for that pollutant. On December 30, 2011, EPA proposed to find that the trading programs in the Transport Rule would achieve greater reasonable progress towards the national goal than would BART in the states in which the Transport Rule applies. 76 FR 82219. EPA also proposed to revise the RHR to allow states to meet the requirements of an alternative program in lieu of BART by participation in the trading programs under the Transport Rule. EPA has not taken final action on that rule.

E. Long-Term Strategy (LTS)

Consistent with the requirement in section 169A(b) of the CAA that states include in their regional haze SIP a 10 to 15 year strategy for making reasonable progress, section 51.308(d)(3) of the RHR requires that states include a LTS in their regional haze SIPs. The LTS is the compilation of all control measures a state will use during the implementation period of the specific SIP submittal to meet applicable RPGs. The LTS must include ''enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals'' for all Class I areas within, or affected by emissions from, the state. *See* 40 CFR 51.308(d)(3).

When a state's emissions are reasonably anticipated to cause or contribute to visibility impairment in a Class I area located in another state, the RHR requires the impacted state to coordinate with the contributing states in order to develop coordinated emissions management strategies. *See* 40 CFR 51.308(d)(3)(i). In such cases, the contributing state must demonstrate that it has included, in its SIP, all measures necessary to obtain its share of the emission reductions needed to meet the RPGs for the Class I area. The RPOs have provided forums for significant interstate consultation, but additional consultations between states may be required to sufficiently address interstate visibility issues. This is especially true where two states belong to different RPOs.

States should consider all types of anthropogenic sources of visibility impairment in developing their LTS, including stationary, minor, mobile, and area sources. At a minimum, states must describe how each of the following seven factors listed below are taken into account in developing their LTS: (1) Emission reductions due to ongoing air pollution control programs, including measures to address Reasonably Attributable Visibility Impairment; (2) measures to mitigate the impacts of construction activities; (3) emissions limitations and schedules for compliance to achieve the RPG; (4) source retirement and replacement schedules; (5) smoke management techniques for agricultural and forestry management purposes including plans as currently exist within the state for these purposes; (6) enforceability of emissions limitations and control measures; and (7) the anticipated net effect on visibility due to projected changes in point, area, and mobile source emissions over the period addressed by the LTS. *See* 40 CFR 51.308(d)(3)(v).

As noted in EPA's separate notice proposing revisions to the RHR (76 FR 82219, December 30, 2011) a number of states, including Pennsylvania, fully consistent with EPA's regulations at the time, relied on the trading programs of CAIR to satisfy the BART requirement

and the requirement for a long-term strategy sufficient to achieve the state-adopted reasonable progress goals. In that notice, we proposed a limited disapproval of Pennsylvania's long-term strategy and for that reason are not taking action on the long-term strategy in this notice. Comments on that proposed determination may be directed to Docket ID No. EPA–HQ–OAR–2011–0729.

F. Coordinating Regional Haze and Reasonably Attributable Visibility Impairment (RAVI) LTS

As part of the RHR, EPA revised 40 CFR 51.306(c) regarding the LTS for RAVI to require that the RAVI plan must provide for a periodic review and SIP revision not less frequently than every three years until the date of submission of the state's first plan addressing regional haze visibility impairment, which was due December 17, 2007, in accordance with 40 CFR 51.308(b) and (c). On or before this date, the state must revise its plan to provide for review and revision of a coordinated LTS for addressing RAVI and regional haze, and the state must submit the first such coordinated LTS with its first regional haze SIP. Future coordinated LTS's, and periodic progress reports evaluating progress towards RPGs, must be submitted consistent with the schedule for SIP submission and periodic progress reports set forth in 40 CFR 51.308(f) and 51.308(g), respectively. The periodic review of a state's LTS must report on both regional haze and RAVI impairment and must be submitted to EPA as a SIP revision.

G. Monitoring Strategy and Other Implementation Plan Requirements

Section 51.308(d)(4) of the RHR includes the requirement for a monitoring strategy for measuring, characterizing, and reporting of regional haze visibility impairment that is representative of all mandatory Class I Federal areas within the state. The strategy must be coordinated with the monitoring strategy required in section 51.305 for RAVI. Compliance with this requirement may be met through ''participation'' in the IMPROVE network, *i.e.,* review and use of monitoring data from the network. The monitoring strategy is due with the first regional haze SIP and it must be reviewed every five years. The monitoring strategy must also provide for additional monitoring sites if the IMPROVE network is not sufficient to determine whether RPGs will be met. The SIP must also provide for the following:

- Procedures for using monitoring data and other information in a state with mandatory Class I areas to determine the contribution of emissions from within the state to regional haze visibility impairment at Class I areas both within and outside the state;
- Procedures for using monitoring data and other information in a state with no mandatory Class I areas to determine the contribution of emissions from within the state to regional haze visibility impairment at Class I areas in other states;
- Reporting of all visibility monitoring data to the Administrator at least annually for each Class I area in the state, and where possible, in electronic format;
- Developing a statewide inventory of emissions of pollutants that are reasonably anticipated to cause or contribute to visibility impairment in any Class I area. The inventory must include emissions for a baseline year, emissions for the most recent year for which data are available, and estimates of future projected emissions. A state must also make a commitment to update the inventory periodically; and
- Other elements, including reporting, recordkeeping, and other measures necessary to assess and report on visibility.

The RHR requires control strategies to cover an initial implementation period extending to the year 2018, with a comprehensive reassessment and revision of those strategies, as appropriate, every 10 years thereafter. Periodic SIP revisions must meet the core requirements of section 51.308(d) with the exception of BART. The requirement to evaluate sources for BART applies only to the first regional haze SIP. Facilities subject to BART must continue to comply with the BART provisions of section 51.308(e), as noted above. Periodic SIP revisions will assure that the statutory requirement of reasonable progress will continue to be met.

H. Consultation With States and Federal Land Managers (FLMs)

The RHR requires that states consult with FLMs before adopting and submitting their SIPs. *See* 40 CFR 51.308(i). States must provide FLMs an opportunity for consultation, in person and at least 60 days prior to holding any public hearing on the SIP. This consultation must include the opportunity for the FLMs to discuss their assessment of impairment of visibility in any Class I area and to offer recommendations on the development of the RPGs and on the development and implementation of strategies to address visibility impairment. Further, a state must include in its SIP a description of how it addressed any comments provided by the FLMs. Finally, a SIP must provide procedures for continuing consultation between the state and FLMs regarding the state's visibility protection program, including development and review of SIP revisions, five-year progress reports, and the implementation of other programs having the potential to contribute to impairment of visibility in Class I areas.

III. What is EPA's analysis of Pennsylvania's regional haze submittal?

On December 20, 2010, PADEP submitted revisions to the Pennsylvania SIP to address regional haze as required by EPA's RHR.

A. Affected Class I Areas

Pennsylvania has no Class I areas within its borders, but has been identified as influencing the visibility impairment of all MANE–VU Class I areas (Brigantine Wilderness Area in New Jersey; Acadia National Park, Moosehorn Wilderness Area, and Roosevelt/Campobello International Park in Maine; Great Gulf Wilderness Area and Presidential Range/Dry River Wilderness Area in New Hampshire; Lye Brook Wilderness Area in Vermont; Dolly Sods Wilderness and Otter Creek Wilderness Area in West Virginia; and Shenandoah National Park and James River Face Wilderness Area in Virginia). Pennsylvania is responsible for developing a regional haze SIP that addresses these Class I areas, that describes its long-term emission strategy, its role in the consultation processes, and how the SIP meets the other requirements in EPA's regional haze regulations. However, since Pennsylvania has no Class I areas within its borders, Pennsylvania is not required to address the following regional haze SIP elements: (a) Calculation of baseline and natural visibility conditions, (b) establishment of reasonable progress goals, (c) monitoring requirements, and (d) RAVI requirements.

B. Long-Term Strategy/Strategies

As described in section II. E of this action, the LTS is a compilation of state-specific control measures relied on by the state to obtain its share of emission reductions to support the RPGs established by Maine, New Hampshire, Vermont, and New Jersey, the Class I area states. Pennsylvania's LTS for the first implementation period addresses the emissions reductions from federal, state, and local controls that take effect in the Commonwealth from the baseline period starting in 2002 until 2018.

Pennsylvania participated in the MANE–VU regional strategy development process. As a participant, Pennsylvania supported a regional approach towards deciding which control measures to pursue for regional haze, which was based on technical analyses documented in the following reports: (a) Contributions to Regional Haze in the Northeast and Mid-Atlantic United States; (b) Assessment of Reasonable Progress for Regional Haze in MANE–VU Class I Areas; (c) Five-Factor Analysis of BART-Eligible Sources: Survey of Options for Conducting BART Determinations; and (d) Assessment of Control Technology Options for BART-Eligible Sources: Steam Electric Boilers, Industrial Boilers, Cement Plants and Paper, and Pulp Facilities.

The LTS was developed by Pennsylvania, in coordination with MANE–VU, identifying the emissions units within Pennsylvania that likely have the largest impacts currently on visibility at the MANE–VU Class I areas, estimating emissions reductions for 2018, based on all controls required under federal and state regulations for the 2002–2018 period (including BART), and comparing projected visibility improvement with the uniform rate of progress for the MANE–VU Class I areas.

Pennsylvania's LTS includes measures needed to achieve its share of emissions reductions agreed upon through the consultation process with Class I area states and includes enforceable emissions limitations, compliance schedules, and other measures necessary to achieve the reasonable progress goals established by MANE–VU for the Class I areas.

1. Emissions Inventory for 2018 With Federal and State Control Requirements

The emissions inventory used in the regional haze technical analyses was developed by MARAMA for MANE–VU with assistance from Pennsylvania. The 2018 emissions inventory was developed by projecting 2002 emissions and assuming emissions growth due to projected increases in economic activity as well as applying reductions expected from federal and state regulations affecting the emissions of VOC and the visibility-impairing pollutants NO_X, PM_{10}, $PM_{2.5}$, and SO_2. The BART guidelines direct states to exercise judgment in deciding whether VOC and NH_3 impair visibility in their Class I area(s). As discussed further in section III.B.3, below, MANE–VU demonstrated that anthropogenic emissions of sulfates are the major contributor to $PM_{2.5}$ mass and visibility impairment at Class I areas in the Northeast and Mid-Atlantic region and it was also determined that the total ammonia emissions in the MANE–VU region are extremely small.

MANE–VU developed emissions inventories for four inventory source classifications: (1) Stationary point sources, (2) area sources, (3) off-road mobile sources, and (4) on-road mobile sources. The New York Department of Environmental Conservation also developed an inventory of biogenic emissions for the entire MANE–VU region. Stationary point sources are those sources that emit greater than a specified tonnage per year, depending on the pollutant, with data provided at the facility level. Stationary area sources are those sources whose individual emissions are relatively small, but due to the large number of these sources, the collective emissions from the source category could be significant. Off-road mobile sources are equipment that can move but do not use the roadways. On-road mobile source emissions are automobiles, trucks, and motorcycles that use the roadway system. The emissions from these sources are estimated by vehicle type and road type. Biogenic sources are natural sources like trees, crops, grasses, and natural decay of plants. Stationary point sources emission data is tracked at the facility level. For all other source types emissions are summed on the county level.

There are many federal and state control programs being implemented that MANE–VU and Pennsylvania anticipate will reduce emissions between the baseline period and 2018. Emission reductions from these control programs were projected to achieve substantial visibility improvement by 2018 in the MANE–VU Class I areas. To assess emissions reductions from ongoing air pollution control programs, BART, and reasonable progress goals MANE–VU developed 2018 emissions projections called Best and Final. The emissions inventory provided by the Commonwealth of Pennsylvania for the Best and Final 2018 projections is based on adopted and enforceable requirements.

Pennsylvania also relied on emission reductions from various federal Maximum Achievable Control Technology (MACT) rules in the development of the 2018 emission inventory projections. These MACT rules include the combustion turbine and reciprocating internal combustion engines MACT, the industrial boiler and process heaters MACT and the 2, 4, 7, and 10 year MACT standards.

On July 30, 2007, the U.S. District Court of Appeals mandated the vacatur and remand of the Industrial Boiler MACT Rule.[6] This MACT was vacated since it was directly affected by the vacatur and remand of the Commercial and Industrial Solid Waste Incinerator (CISWI) Definition Rule. EPA proposed a new Industrial Boiler MACT rule to address the vacatur on June 4, 2010 (75 FR 32006) and issued a final rule on March 21, 2011 (76 FR 15608). The MANE–VU modeling included emission reductions from the vacated Industrial Boiler MACT rule. Pennsylvania did not redo its modeling analysis when the rule was re-issued. However, the expected reductions in SO_2 and PM are small relative to the Pennsylvania inventory. Therefore, EPA finds the expected reductions of the new rule acceptable since the final rule requires compliance by 2014, it provides Pennsylvania time to assure the required controls are in place prior to the end of the first implementation period in 2018. In addition, the RHR requires that any resulting differences between emissions projections and actual emissions reductions that may occur will be addressed during the five-year review prior to the next 2018 regional haze SIP. Tables 1 and 2 are summaries of the 2002 baseline and 2018 estimated emissions inventories for Pennsylvania. The 2018 estimated emissions include emission growth as well as emission reductions due to ongoing emission control strategies, BART, and reasonable progress goals.

TABLE 1—2002 EMISSION INVENTORY SUMMARY FOR PENNSYLVANIA IN TONS PER YEAR

	VOC	NO_X	$PM_{2.5}$	PM_{10}	NH_3	SO_2
Point	37,323	297,379	20,115	40,587	1,388	995,175
Area	240,785	47,591	74,925	391,897	79,911	63,679
On-Road Mobile	176,090	346,472	5,450	7,468	10,497	10,882

[6] *See NRDC* v. *EPA,* 489 F.3d 1250.

TABLE 1—2002 EMISSION INVENTORY SUMMARY FOR PENNSYLVANIA IN TONS PER YEAR—Continued

	VOC	NO_X	$PM_{2.5}$	PM_{10}	NH_3	SO_2
Off-Road Mobile	102,331	103,824	8,440	9,738	55	7,915
Total	556,529	795,266	108,930	449,690	91,851	1,077,651

TABLE 2—2018 EMISSION SUMMARY FOR PENNSYLVANIA IN TONS PER YEAR

	VOC	NO_X	$PM_{2.5}$	PM_{10}	NH_3	SO_2
Point	46,004	162,067	39,468	60,480	3,381	266,455
Area	230,011	50,829	50,842	195,467	117,400	42,072
On-Road Mobile	78,624	91,516	2,064	2,148	13,933	1,436
Off-Road Mobile	69,956	55,771	5,808	6,949	73	607
Total	424,595	360,183	98,182	265,044	134,787	310,570

2. Modeling To Support the LTS and Determine Visibility Improvement for Uniform Rate of Progress

MANE–VU performed modeling for the regional haze LTS for the 11 Mid-Atlantic and Northeast states and the District of Columbia. The modeling analysis is a complex technical evaluation that began with selection of the modeling system. MANE–VU used the following modeling system:

- *Meteorological Model:* The Fifth-Generation Pennsylvania State University/National Center for Atmospheric Research (NCAR) Mesoscale Meteorological Model (MM5) version 3.6 is a nonhydrostatic, prognostic meteorological model routinely used for urban- and regional-scale photochemical, $PM_{2.5,}$ and regional haze regulatory modeling studies.
- *Emissions Model:* The Sparse Matrix Operator Kernel Emissions (SMOKE) version 2.1 modeling system is an emissions modeling system that generates hourly gridded speciated emission inputs of mobile, non-road mobile, area, point, fire, and biogenic emission sources for photochemical grid models.
- *Air Quality Model:* The EPA's Models-3/Community Multiscale Air Quality (CMAQ) version 4.5.1 is a photochemical grid model capable of addressing ozone, PM, visibility and acid deposition at a regional scale.
- *Air Quality Model:* The Regional Model for Aerosols and Deposition (REMSAD), version 8, is a Eulerian grid model that was primarily used to determine the attribution of sulfate species in the Eastern U.S. via the species-tagging scheme.
- *Air Quality Model:* The California Puff Model (CALPUFF), version 5 is a non-steady-state Lagrangian puff model used to access the contribution of individual states' emissions to sulfate levels at selected Class I receptor sites.

CMAQ modeling of regional haze in the MANE–VU region for 2002 and 2018 was carried out on a grid of 12x12 kilometer (km) cells that covers the 11 MANE–VU states (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont) and the District of Columbia and states adjacent to them. This grid is nested within a larger national CMAQ modeling grid of 36x36 km grid cells that covers the continental United States, portions of Canada and Mexico, and portions of the Atlantic and Pacific Oceans along the east and west coasts. Selection of a representative period of meteorology is crucial for evaluating baseline air quality conditions and projecting future changes in air quality due to changes in emissions of visibility-impairing pollutants. MANE–VU conducted an in-depth analysis which resulted in the selection of the entire year of 2002 (January 1–December 31) as the best period of meteorology available for conducting the CMAQ modeling. The MANE–VU states modeling was developed consistent with EPA's *Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5,}$ and Regional Haze*, located at *http://www.epa.gov/scram001/guidance/guide/final-03-pm-rh-guidance.pdf, (EPA–454/B–07–002), April 2007, and EPA document, Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations,* located at *http://www.epa.gov/ttnchie1/eidocs/eiguid/index.html, EPA–454/R–05–001, August 2005, updated November 2005 (''EPA's Modeling Guidance'').*

MANE–VU examined the model performance of the regional modeling for the areas of interest before determining whether the CMAQ model results were suitable for use in the regional haze assessment of the LTS and for use in the modeling assessment. The modeling assessment predicts future levels of emissions and visibility impairment used to support the LTS and to compare predicted, modeled visibility levels with those on the uniform rate of progress. In keeping with the objective of the CMAQ modeling platform, the air quality model performance was evaluated using graphical and statistical assessments based on measured ozone, fine particles, and acid deposition from various monitoring networks and databases for the 2002 base year. MANE–VU used a diverse set of statistical parameters from the EPA's Modeling Guidance to stress and examine the model and modeling inputs. Once MANE–VU determined the model performance to be acceptable, MANE–VU used the model to assess the 2018 RPGs using the current and future year air quality modeling predictions, and compared the RPGs to the uniform rate of progress.

3. Relative Contributions of Pollutants to Visibility Impairment

An important step toward identifying reasonable progress measures is to identify the key pollutants contributing to visibility impairment at each Class I area. To understand the relative benefit of further reducing emissions from different pollutants, MANE–VU developed emission sensitivity model runs using CMAQ to evaluate visibility and air quality impacts from various groups of emissions and pollutant scenarios in the Class I areas on the 20 percent worst visibility days.

Regarding which pollutants are most significantly impacting visibility in the MANE–VU region, MANE–VU's contribution assessment, demonstrated

that sulfate is the major contributor to $PM_{2.5}$ mass and visibility impairment at Class I areas in the Northeast and Mid-Atlantic Region. Sulfate particles commonly account for more than 50 percent of particle-related light extinction at northeastern Class I areas on the clearest days and for as much as or more than 80 percent on the haziest days. The emissions sensitivity analyses conducted by MANE–VU predict that reductions in SO_2 emissions from EGU and non-EGU industrial point sources will result in the greatest improvements in visibility in the Class I areas in the MANE–VU region, more than any other visibility-impairing pollutant. As a result of the dominant role of sulfate in the formation of regional haze in the Northeast and Mid-Atlantic Region, MANE–VU concluded that an effective emissions management approach would rely heavily on broad-based regional SO_2 control efforts in the eastern United States.

4. Reasonable Progress Goals

Since the Commonwealth of Pennsylvania does not have a Class I area, it is not required to establish RPGs. However, Pennsylvania has been identified as influencing the visibility impairment of MANE–VU Class I Areas; Dolly Sods Wilderness and Otter Creek Wilderness Area in West Virginia; and Shenandoah National Park and James River Face Wilderness Area in Virginia. As such, Pennsylvania participated in consultations to discuss the reasonable progress goals considered by Visibility Improvement State and Tribal Association of the Southeast (VISTAS) Class I area states, West Virginia and Virginia. West Virginia and Virginia wrote emails to Pennsylvania stating no additional reductions were needed from the Commonwealth to meet their RPGs. *See* Appendix D of the Pennsylvania submittal. West Virginia and Virginia determined that Pennsylvania met their RPGs with just the implementation of CAIR. *See* Appendix K of the Pennsylvania submittal. The VISTAS modeling that was done is different from the MANE–VU modeling because they used different assumptions about the efficiency of CAIR. EPA has determined that both RPOs modeling are acceptable. *See* EPA's Technical Support Document (TSD) for the Modeling Portions of Pennsylvania's Regional Haze SIP. As a result, the MANE–VU Class I area states adopted four RPGs that will provide for reasonable progress towards achieving natural visibility (MANE–VU ''Asks''): timely implementation of BART requirements; a 90 percent reduction in SO_2 emissions from each of the EGU stacks identified by MANE–VU comprising a total of 167 stacks (15 of which are located in Pennsylvania); adoption of a low sulfur fuel oil strategy; and continued evaluation of other control measures to reduce SO_2 and NO_X emissions. States were required to reduce SO_2 emissions from the highest emission stacks in the eastern United States by 90 percent or if it was infeasible to achieve that level of reduction, an alternative had to be identified which could include other point sources. Table 3 shows Pennsylvania's 15 stacks identified and the anticipated controls.

TABLE 3—EGU STACKS IN PENNSYLVANIA AND CONTROLS IDENTIFIED FROM THE MANE–VU 167 STACK LIST

Facility name & stack ID in appendix I	Facility ID ORISPL	Unit ID	Unit type	Anticipated controls & permit status	Anticipated reduction in SO_2 emissions (percent)
Armstrong	3178	2	Coal Steam		*90
Brunner Island PA_26	3140	2	Coal Steam	Wet Scrubber in 2009 Plan Approval No. 67–05005D.	95
Brunner Island	3140	3	Coal Steam	Wet Scrubber in 2009 Plan Approval No. 67–05005D.	95
Cheswick AC_04	8226	1	Coal Steam	Wet Scrubber in 2010	95
Hatfields Ferry PA_35	3179	2	Coal Steam	Wet Scrubber in 2009 Plan Approval No. 30–00099F.	95
Homer City PA_37	3122	1	Coal Steam		**95
Homer City PA_37	3122	2	Coal Steam		**95
Keystone PA_39	3136	1	Coal Steam	Wet Scrubber in 2009 Plan Approval No. 03–00027B.	95
Keystone PA_39	3136	2	Coal Steam	Wet Scrubber in 2010 Plan Approval No. 03–00027B.	95
Martins Creek PA_08	3148	2	Coal Steam	N/A.	
Montour PA_07	3149	1	Coal Steam	Wet Scrubber in operation. Plan Approval No.: 47–00001B.	95
Montour PA_07	3149	2	Coal Steam	Wet Scrubber in operation. Plan Approval No.: 47–00001B.	95
Portland PA_09	3113	1	Coal Steam.		
Portland	3113	2	Coal Steam.		
Shawville	3131	1	Coal Steam.		

*The PADEP is currently in litigation with Allegheny Energy, owner of Armstrong, to require SO_2 controls as part of NSR and PSD alleged violations by the Department.

**In June 2008, May and November 2010, EPA issued notices of violation to EME Homer City Generating Facility to require SO_2 controls as part of NSR alleged violations under the Clean Air Act. In addition, the PADEP, together with New York State in July 2010, filed a 60-day notice of intent to sue related to these violations.

Pennsylvania also identified additional EGUs that would be controlled to meet the reductions required in the MANE–VU Asks for the 167 stacks. These additional sources are listed in Table 4. Pennsylvania averaged the EGU emission reductions for the 15 identified stacks and an additional 6 EGU stacks to meet the 90 percent control needed. EPA agrees that Pennsylvania has met the MANE–VU ''Ask'' of 90 percent control on its share of the 167 stacks identified. EPA's analysis of Pennsylvania's averaging can be found in the TSD accompanying this rulemaking.

TABLE 4—ADDITIONAL EGU STACKS AND CONTROLS

Facility name	Facility ID ORISPL	Unit ID	Unit type	Anticipated controls & permit status	Anticipated reduction in SO_2 emissions (percent)
WPS Res. Sunbury Six Boilers (Units 1–4).	3152	1–4	Coal Steam	Wet Scrubber in 2010 with a new stack that will exhaust all six boilers. Plan Approval No. 55–00001C.	95
Reliant Shawville Units 3 & 4	3131	3, 4	Coal Steam	FGD—Dry Scrubber (spray dryer absorber) in 2010. Plan Approval No. 17–00001D.	95

On September 25, 2010, the Pennsylvania Environmental Quality Board (EQB) proposed the Commonwealth's statewide low-sulfur heating and distillate oil regulation, in response to the MANE–VU ''Ask'' that states adopt a low-sulfur fuel oil strategy. The Commonwealth has not finalized this strategy at the time of this proposal. However, following Pennsylvania's SIP submittal on December 20, 2010, additional point sources have become subject to federally enforceable SO_2 emission limits due to facility closures and federal actions. In addition, controls on Pennsylvania's EGUs that are included on the list of 167 stacks have resulted in emissions reductions greater than the 90 percent reduction of the MANE–VU ''Ask.'' These additional point source SO_2 reductions are somewhat less than the reductions projected to result from adoption of a low-sulfur fuel oil strategy. However, this shortfall is not anticipated to interfere with the ability of other states to meet their respective reasonable progress goals. Consequently, EPA is proposing to find that for the first planning period the enforceable emission reductions and potential visibility benefits achieved by reducing SO_2 emissions at additional point sources adequately substitute for the emission reductions and potential visibility benefits that would have been achieved by Pennsylvania's adoption of a low-sulfur fuel oil strategy. A detailed discussion of this aspect of our proposal can be found in the TSD for this notice. We also note that implementation of recent federal measures is expected to result in further SO_2 emission reductions during the first planning period. Although expected emission reductions cannot be relied upon to demonstrate that Pennsylvania has obtained its share of the emission reductions needed to meet the RPGs for the area, once these measures are implemented and the reductions quantified, EPA expects that Pennsylvania's overall SO_2 emission reductions will exceed those agreed to in the RPO process.

5. BART

BART is an element of Pennsylvania's LTS. The BART regional haze requirement consists of three components: (a) Identification of all the BART eligible sources; (b) an assessment of whether the BART eligible sources are subject to BART; and (c) the determination of the BART controls.

The first component of a BART evaluation is to identify all the BART eligible sources. The BART eligible sources were identified by utilizing the criteria in the BART Guidelines as follows:

- Determine whether one or more emissions units at the facility fit within one of the 26 categories listed in the BART Guidelines (70 FR 39158–39159);
- Determine whether the emission unit(s) was in existence on August 7, 1977 and begun operation after August 6, 1962;
- Determine whether potential emissions of SO_2, NO_X, and PM_{10} from subject units are 250 tons or more per year.

The BART Guidelines recommend addressing SO_2, NO_X, and PM_{10} as visibility-impairment pollutants and leave it up to the discretion of states to evaluate VOC or ammonia emissions. Because of the lack of tools available to estimate emissions and subsequently model VOC and ammonia effects on visibility Pennsylvania did not address them for BART. Pennsylvania identified 34 sources as BART-eligible as listed in Table 5. Pennsylvania also identified nine sources that are relatively small emission sources with the potential emissions that exceed the 250 tons per year or more, but have actual emissions well below 250 tons per year to accept federally enforceable limits to make them not BART-eligible which are listed in Table 6. If any of the sources in Table 6 request an increase in NO_X, SO_2 and PM emissions greater than 250 tons per year of any one of these pollutants the facility would become subject to BART.

TABLE 5—PENNSYLVANIA BART-ELIGIBLE SOURCES

Facility	County
EXELON GENERATION CO/EDDYSTONE	Delaware.
ISG PLATE LLC/COATESVILLE	Chester.
SUNOCO INC (R&M)/MARCUS HOOK REFINERY	Delaware.
CONOCOPHILLIPS CO/TRAINER REF	Delaware.
PPL MONTOUR LLC/MONTOUR SES	Montour.
PPL MARTINS CREEK LLC/MARTINS CREEK	Northampton.
RELIANT ENERGY/PORTLAND GENERATING STATION	Northampton.
LAFARGE CORP/WHITEHALL PLT	Lehigh.
KEYSTONE PORTLAND CE/EAST ALLEN	Northampton.
ORION POWER MIDWEST/NEW CASTLE PLT	Lawrence.
CEMEX INC/WAMPUM CEMENT PLT	Lawrence.
ESSROC/BESSEMER	Lawrence.
AK STEEL CORP/BUTLER WORKS	Butler.
UNITED REFINING CO/WARREN PLT	Warren.

TABLE 5—PENNSYLVANIA BART-ELIGIBLE SOURCES—Continued

Facility	County
PPL BRUNNER ISLAND LLC/BRUNNER ISLAND	York.
APPLETON PAPERS INC/SPRING MILL	Blair.
PH GLATFELTER CO/SPRING GROVE	York.
LEHIGH CEMENT CO/EVANSVILLE CEMENT PLT	Berks.
CARMEUSE LIME INC/MILLARD LIME PLT	Lebanon.
LEHIGH CEMENT CO/YORK OPERATIONS	York.
ALLEGHENY ENERGY SUPPLY/HATFIELDS FERRY POWER STA	Greene.
ALLEGHENY ENERGY SUPPLY/MITCHELL POWER STA	Washington.
EME HOMER CITY GEN LP	Indiana.
RELIANT ENERGY NORTHEAST/CONEMAUGH PLT	Indiana.
RELIANT ENERGY NORTHEAST MGMT/KEYSTONE POWER PLT	Armstrong.
FIRSTENERGY GEN CORP/BRUCE MANSFIELD PLT	Beaver.
DYNO NOBEL INC/DONORA	Washington.
RELIANT/CHESWICK	Allegheny.
US STEEL/CLAIRTON WORKS	Allegheny.
ALLEGHENY LUDLUM/BRACKENRIDGE	Allegheny.
SUNOCO CHEMICALS/FRANKFORD PLANT	Philadelphia.
SUNOCO INC (R&M)/PHILADELPHIA REFINERY	Philadelphia.
TRIGEN/EDISON STATION	Philadelphia.
TRIGEN/SCHUYLKILL STATION	Philadelphia.

TABLE 6—PENNSYLVANIA FACILITIES NOT BART-ELIGIBLE DUE TO FEDERALLY ENFORCEABLE PERMIT RESTRICTIONS

Facility	County
VICTAULIC CO AMER/FORKS FACILITY	Northampton.
AMERICAN REFINING GR/BRADFORD	McKean.
MERCER LIME & STONE/BRANCHTON	Butler.
DUFERCO FARRELL CORP/FARRELL PLT	Mercer.
INMETCO/ELLWOOD CITY	Lawrence.
INDSPEC CHEM CORP/PETROLIA	Butler.
LWB REFRACTORIES CO/W MANCHESTER	York.
EXIDE TECH/READING SMELTER	Berks.
HORSEHEAD CORP/MONACA SMELTER	Beaver.

The second component of the BART evaluation is to identify those BART eligible sources that may reasonably be anticipated to cause or contribute to visibility impairment at any Class I area are subject to BART. As discussed in the BART Guidelines, a state may choose to consider all BART eligible sources to be subject to BART (70 FR 39161). Consistent with the MANE–VU Board's decision in June 2004 that because of the collective importance of BART sources, BART determinations should be made by the MANE–VU states for each BART eligible source. Pennsylvania identified each of its BART eligible sources as subject to BART.

The final component of a BART evaluation is making BART determinations for all BART subject sources. In making BART determinations, section 169A(g)(2) of the CAA requires that states consider the following factors: (1) The costs 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) the remaining useful life of the source; and (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. Section (e)(2) of the RHR provides that a state may opt to implement an emissions trading program or other alternative measure rather than to require sources subject to BART to install, operate, and maintain BART. To do so, the state must demonstrate that the emissions trading program or other alternative measure will achieve greater reasonable progress than would be achieved through the installation and operation of BART. The 34 sources in Pennsylvania that the Commonwealth found to be subject to BART are discussed below in Table 7. For the EGUs, Pennsylvania relied on CAIR to satisfy the BART requirements for SO_2 and NO_X. As CAIR does not address PM emissions, Pennsylvania conducted BART analyses for PM for these EGUs subject to BART.

TABLE 7—PENNSYLVANIA BART LIMITS AND CONTROLS

BART Source name & unit ID	Pollutant and emission limit
ConocoPhillips FCCU/CO Boiler Unit ID C01	SO_2: 25 parts per million volumetric dry (ppmvd) (365-day rolling average). PM: 0.5 pound (lb)/1000 lb coke burn (3-hr average). NO_X: 121.1 ppmvd (365-day). 155.3 ppmvd (7-day).
ConocoPhillips Platform Feed Heater Unit ID 738	NO_X: 0.12 pound per million metric british thermal units (lb/MMBtu). SO_2: 0.011 lb/MMBtu (both limits are on an annual basis).

TABLE 7—PENNSYLVANIA BART LIMITS AND CONTROLS—Continued

BART Source name & unit ID	Pollutant and emission limit
Sunoco Inc. Marcus Hook Refinery FCCU/CO Boiler Unit ID 101 and COB1.	SO_2: 25 ppmvd (365-day rolling average). NO_X: 20 ppmvd (365-day rolling average). PM: 1.0 lb/1000 lb coke burn.
Sunoco Inc. Marcus Hook Refinery 17–2A, H–01 Heater	NO_X: 0.25 lb/MMBtu (24-hr basis). SO_2: 500 ppmvd.
United Refining Co. Boiler 4	NO_X: 0.173 lb/MMBtu. SO_2: 24.3 lbs/hr.
United Refining Co. Crude Heater—North	NO_X: 0.226 lb/MMBtu. SO_2: 207.7 lbs/hr.
Carmeuse Lime Inc. Kiln Number 5	NO_X: 6.0 lb/ton lime. SO_2: 500 ppmvd.
Lehigh Cement Co. Evansville Plant Kiln Number 1	NO_X: 367.7 pound per hour (lbs/hr). SO_2: 59.4 lbs/hr. PM: 34.8 tons/12-month period. PM10: 87.4 tons/12-month period.
Lehigh Cement Co. Evansville Plant Kiln Number 2	NO_X: 367.7 lbs/hr. SO_2: 59.4 lbs/hr. PM: 34.8 tons/12-month period. PM_{10}: 87.4 tons/12-month period.
Lehigh Cement Co. York Operations White Cement Kiln	NO_X: 8.2 lbs/ton. SO_2: 500 ppmvd. PM: 0.02 grains per dry standard cubic foot (grains/dscf).
Lafarge Corp. Whitehall Plant Kiln K–2	NO_X: 297.7 lbs/hr. NO_X: 260.5 lbs/hr. SO_2: 362 lbs/hr. PM: 14.8 lbs/hr.
Lafarge Corp. Whitehall Plant Kiln K–3	NO_X: 202.3 lbs/hr. NO_X: 166.0 lbs/hr. SO_2: 195.0 lbs/hr. PM: 7.3 lbs/hr.
CEMEX Inc. Wampum Plant Kiln No. 3	NO_X: 6.2 lbs/ton clinker. (May–Sep 6.0 lbs/ton). SO_2: 500 ppmvd. PM: 0.02 grains/dscf.
ESSROC Cement Bessemer Plant Kiln No. 5	NO_X: 476 lbs/hr. SO_2: 500 ppmvd. PM: 0.02 grains/dscf.
Keystone Cement Co. East Allen Plant Kiln No. 2	NO_X: 529 lbs/hr. SO_2: 500 ppmvd. PM: 0.02 grains/dscf.
ISG Plate LLC Coatesville Plant Electric Arc Furnace D	SO_2: 500 ppmvd. PM: 0.02 grains/dscf (primary baghouse). PM: 0.0052 grains/dscf (secondary baghouses).
AK Steel Corp. Butler Works Electric Arc Furnaces: #2, #3, and #4	NO_X: 75 lbs/hr. SO_2: 500 ppmvd. PM: 0.0036 grains/dscf.
PH Glatfelter Co. Spring Grove Plant No. 1 Power Boiler	NO_X: 0.66 lb/MMBtu (30-day rolling average). SO_2: 3.7 lb/MMBtu (30-day rolling average). PM: 3.6 × Heat Input (lbs/MMBtu) raised to a negative 0.56 power.
Appleton Papers Inc. Spring Mill Plant No. 3 Power Boiler	NO_X: 0.63 lb/MMBtu. SO_2: 4.0 lb/MMBtu (over any 1-hr period). PM: 3.6 × Heat Input (lbs/MMBtu) raised to a negative 0.56 power.
Dyno Nobel Inc. Donora Plant Ammonia Oxidation Plant	NO_X: 396 tons/12-month period. NO_2: 5.5 lb/ton acid product (expressed as 100% HNO_3).
Allegheny Energy Hatfields Ferry Power Main Boilers (#1, #2, and #3)	PM: 0.075 lb/MMBtu for each boiler.
PPL Brunner Island Brunner Island Boilers 2 and 3	PM: 0.1 lb/MMBtu for each boiler.
Exelon Generation Eddystone Plant Boilers 3 and 4	PM: 0.1 lb/MMBtu for each boiler.
EME Homer City Homer City Plant Main Boilers (#1, #2, #3)	PM: 0.1 lb/MMBtu for each boiler.
PPL Montour LLC Montour SES Boilers 1 and 2	PM: 0.1 lb/MMBtu for each boiler.
Reliant Energy LLC Portland Generating Boiler #2	PM: 0.1 lb/MMBtu.
First Energy Corp. Bruce Mansfield Plt Main Boilers (#1, #2, #3)	PM: 0.1 lb/MMBtu for each boiler.
Allegheny Energy Mitchell Power Station Boiler #3	PM: 0.1 lb/MMBtu.
Orion Power Midwest New Castle Plant Boiler #5	PM: 0.1 lb/MMBtu.
Reliant Energy NE Keystone Power Plant Boilers 1 and 2	PM: 0.1 lb/MMBtu for each boiler.
PPL Martins Creek Martins Creek Plant Boilers 3 and 4	PM: 0.1 lb/MMBtu for each boiler.
Reliant Energy NE Conemaugh Plant Boilers 1 and 2	PM: 0.1 lb/MMBtu for each boiler.
Trigen Edison Station Philadelphia Boilers 3 and 4	NO_X: 0.5 lb/MMBtu for each boiler. PM: 0.1 lb/MMBtu for each boiler. SO_2: 0.5% sulfur (#6 fuel oil), 0.2% sulfur (#2 oil).
Trigen Schuylkill Station Philadelphia Boiler #26	NO_X: 0.36 lb/MMBtu (30-day rolling avg). PM: 0.1 lb/MMBtu. SO_2: 0.5% sulfur (#6 fuel oil).

TABLE 7—PENNSYLVANIA BART LIMITS AND CONTROLS—Continued

BART Source name & unit ID	Pollutant and emission limit
Sunoco Chemicals Frankfort Plant Philadelphia Boiler No. 3	NO_X: 0.3 lbs/MMBtu. PM: 0.1 lb/MMBtu. SO_2: 0.52 lbs/MMBtu.
Sunoco Refinery, Inc Philadelphia FCCU/CO Boiler Unit ID 1232	SO_2: 25 ppmvd (365-day rolling average). NO_X: 20 ppmvd (365-day rolling average). PM: 0.5 lb/1000 lb coke burn.
Sunoco Refinery Inc. Philadelphia Process Heaters	NO_X: 0.020 lb/MMBtu (24-hr basis). SO_2: 500 ppmvd.
Allegheny Ludlum Corp. Allegheny County	
Basic Oxygen Furnaces	PM: 68 tons per year (tpy).
Slab Grinder	PM: 230 tpy.
Plate Burner/Torch Cutter	PM: 13 tpy.
Loftus Soaking Pits	PM: 14 tpy, NO_X: 194 tpy.
US Steel Clairton, Allegheny County, Clairton Coke Works	
Desulfurization Plant	SO_2: 590 tpy; NO_X: 27 tpy.
Boiler #2	SO_2: 1508 tpy; NO_X: 1285 tpy.
R1 Boiler	SO_2: 796 tpy: NO_X: 525 tpy.
T1 Boiler	SO_2: 572 tpy; NO_X: 358 tpy.
Orion Power Cheswick Plant Allegheny County Boiler No. 1	SO_2: 67,452 typ; NO_X: 10,840 tpy. PM_{10}: 361 tpy.

EPA agrees with PADEP's analyses and conclusions for the BART emission units located in Table 7 above. EPA has reviewed the Pennsylvania analyses and concluded they were conducted in a manner that is consistent with EPA's BART Guidelines. EPA has determined that Pennsylvania's submittals meet the requirements of section 169A(g)(2) of the CAA to consider available technology, the cost of compliance, the energy and nonair quality environmental impacts of compliance, any pollution control equipment in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology. Therefore, the conclusions reflect a reasonable application of EPA's guidance to these sources. EPA's analysis of these BART determinations can be found in the accompanying TSD for this rulemaking. The BART determinations for each of the facilities discussed above and the resulting BART emission limits were adopted by Pennsylvania into its regional haze SIP. PADEP incorporated the BART emission limits into Title V permits. The BART units in Pennsylvania are required to comply with these emission limits no later than five years after publication in the **Federal Register** of EPA's final approval of the Pennsylvania regional haze SIP, to allow time for needed operational changes.

C. Consultation With States and FLMs

On May 10, 2006, the MANE–VU State Air Directors adopted the Inter-RPO State/Tribal and FLM Consultation Framework that documented the consultation process within the context of regional haze planning, and was intended to create greater certainty and understanding among RPOs. MANE–VU states held ten consultation meetings and/or conference calls from March 1, 2007 through March 21, 2008. In addition to MANE–VU members attending these meetings and conference calls, participants from VISTAS, Midwest RPO, and the relevant Federal Land Managers were also in attendance. In addition to the conference calls and meeting, the FLMs were given the opportunity to review and comment on each of the technical documents developed by MANE–VU.

Pennsylvania submitted a draft regional haze SIP to the relevant FLMs for review and comment pursuant to 40 CFR 51.308(i)(2). The FLM provided comments on the draft regional haze SIP in accordance with 40 CFR 51.308(i)(3). The comments received from the FLMs were addressed and incorporated in Pennsylvania's SIP revision. The FLM's comments and PADEP's responses can be found in Appendix AA of the Pennsylvania submittal. The PADEP provided public notice of the opportunity to comment on the SIP revision and provided public notice of public hearing on October 9, 2010. The PADEP did not receive any comments during the public comment period. Pennsylvania commits in their SIP to ongoing consultation with the FLMs on Regional Haze issues throughout the implementation.

D. Periodic SIP Revisions and Five-Year Progress Reports

Consistent with the requirements of 40 CFR 51.308(g), Pennsylvania has committed to submitting a report on reasonable progress (in the form of a SIP revision) to the EPA every five years following the initial submittal of its regional haze SIP. The reasonable progress report will evaluate the progress made towards the RPGs for the MANE–VU Class I areas influenced by Pennsylvania.

IV. What action is EPA proposing to take?

EPA is proposing a limited approval of the revision to the Pennsylvania SIP submitted by the Commonwealth of Pennsylvania through the PADEP on December 20, 2010 as meeting some of the applicable regional haze requirements as set forth in sections 169A and 169B of the CAA and in 40 CFR 51.300–308, as described previously in this action. Accordingly, EPA is proposing to find that this revision meets the applicable visibility related requirements of CAA section 110(a)(2) including but not limited to 110(a)(2)(D)(i)(II) and 110(a)(2)(J), relating to visibility protection for the 1997 8-Hour Ozone NAAQS and the 1997 and 2006 $PM_{2.5}$ NAAQS. EPA is taking this action pursuant to those provisions of the CAA. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action. In a separate action, EPA has previously proposed a limited disapproval of the Pennsylvania regional haze SIP because of deficiencies in the Commonwealth's regional haze SIP submittal arising from the remand by the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) to EPA of CAIR. *See* 76 FR

82219. Consequently, we are not taking action in this notice to address the Commonwealth's reliance on CAIR to meet certain regional haze requirements.

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

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

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Visibility, Volatile organic compounds.

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

Dated: January 17, 2012.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2012–1512 Filed 1–25–12; 8:45 am]

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Notices

Federal Register
Vol. 77, No. 17
Thursday, January 26, 2012

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

January 23, 2012.

The Department of Agriculture will submit the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. 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.

DATES: Comments regarding these information collections are best assured of having their full effect if received by February 27, 2012. Copies of the submission(s) may be obtained by calling (202) 720–8681.

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

Agricultural Marketing Service

Title: Regulations Governing the Inspection and Grading of Manufactured or Processed Dairy Products—Recordkeeping.

OMB Control Number: 0581–0110.

Summary of Collection: The Agricultural Marketing Act of 1946 directs the Department to develop programs that will provide and enable the marketing of agricultural products. One of these programs is the USDA voluntary inspection and grading program for dairy products where these dairy products are graded according to U.S. grade standards by an USDA grader. The dairy products so graded may be identified with the USDA grade mark. Dairy processors, buyers, retailers, institutional users, and consumers have requested that such a program be developed to assure the uniform quality of dairy products purchased. In order for any service program to perform satisfactorily, there must be written guides and rules, which in this case are regulations for the provider and user.

Need and Use of the Information: The Agricultural Marketing Service will collect information to ensure that the dairy inspection program products are produced under sanitary conditions and buyers are purchasing a quality product. The information collected through recordkeeping are routinely reviewed and evaluated during the inspection of the dairy plant facilities for USDA approval. Without laboratory testing results required by recordkeeping, the inspectors would not be able to evaluate the quality of dairy products.

Description of Respondents: Business or other for-profit.

Number of Respondents: 487.

Frequency of Responses: Recordkeeping.

Total Burden Hours: 1,388.

Agricultural Marketing Service

Title: Regulations for Inspection of Eggs.

OMB Control Number: 0581–0113.

Summary of Collection: Congress enacted the Egg Products Inspection Act (21 U.S.C. 1031–1056) (EPIA) to provide a mandatory inspection program to assure egg products are processed under sanitary conditions, are wholesome, unadulterated, and properly labeled; to control the disposition of dirty and checked shell eggs; to control unwholesome, adulterated, and inedible egg products and shell eggs that are unfit for human consumption; and to control the movement and disposition of imported shell eggs and egg products that are unwholesome and inedible. Regulations developed under 7 CFR part 57 provide the requirements and guidelines for the Department and industry needed to obtain compliance. The Agricultural Marketing Service (AMS) will collect information using several forms. Forms used to collect information provide method for measuring workload, record of compliance and non compliance and a basis to monitor the utilization of funds.

Need and Use of the Information: AMS will use the information to assure compliance with the Act and regulations, to take administrative and regulatory action and to develop and revise cooperative agreements with the States, which conduct surveillance inspections of shell egg handlers and processors. If the information is not collected, AMS would not be able to control the processing, movement, and disposition of restricted shell eggs and egg products and take regulatory action in case of noncompliance.

Description of Respondents: Business or other for-profit; Federal Government; State, Local or Tribal Government.

Number of Respondents: 935.

Frequency of Responses: Recordkeeping; Reporting: On occasion; Quarterly.

Total Burden Hours: 1,937.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–1639 Filed 1–26–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

U.S. Department of Agriculture Multi-Family Housing Program 2012 Industry Forums—Open Teleconference and/or Web Conference Meetings

AGENCY: Rural Housing Service, USDA.

ACTION: Announcement of meetings.

SUMMARY: This Notice announces a series of teleconferences and/or Web conference meetings regarding the USDA Multi-Family Housing Program. The teleconference and/or Web conference meetings will be scheduled on a quarterly basis, but may be held monthly at the Agency's discretion. This Notice also outlines suggested discussion topics for the meetings and is intended to notify the general public of their opportunity to participate in the teleconference and/or Web conference meetings.

DATES: Teleconference and/or Web conference meetings are scheduled to occur during the months of January, April, July, and October of 2012. The dates and times for the teleconference and/or Web conference meetings will be announced via e-mail to parties registered as described below.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing to register for the meetings and obtain the call-in number, access code, Web link and other information for any of the public teleconference and/or Web conference meetings may contact Timothy James, Loan and Finance Analyst, Multi-Family Housing, (202) 720–1094, fax at (202) 720–0302, or email address *timothy.james@wdc.usda.gov* and provide their name title, agency/company name, address, telephone numbers and email address. People who are already registered do not need to register again.

SUPPLEMENTARY INFORMATION: The objectives of this series of teleconferences are as follows:

- Enhance the effectiveness of the Multi-Family Housing Program
- Establish a two-way communications forum to update industry participants and Rural Housing Service (RHS) staff
- Enhance RHS' awareness of issues that impact the Multi-Family Housing Program
- Increase transparency and accountability in the Multi-Family Housing Program

Topics to be discussed could include, but will not be limited to, the following:

- Updates on USDA Multi-Family Housing Program activities
- Perspectives on the Multi-Family Notice of Funds Availability processes
- Comments on Section 514/516 and Section 515 transaction processes
- Comments on particular servicing-related activities of interest at that time

Dated: January 16, 2012.

Tammye Trevino,

Administrator, Rural Housing Service.

[FR Doc. 2012–1573 Filed 1–25–12; 8:45 am]

BILLING CODE 3410–XV–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: National Oceanic and Atmospheric Administration (NOAA).

Title: Cooperative Game Fish Tagging Report.

OMB Control Number: 0648–0247.

Form Number(s): NOAA 88–162.

Type of Request: Regular submission (extension of a current information collection).

Number of Respondents: 10,000.

Average Hours per Response: 2 minutes.

Burden Hours: 333.

Needs and Uses: The Cooperative Game Fish Tagging Program was initiated in 1971 as part of a comprehensive research program resulting from passage of Public Law 86–359, Study of Migratory Game Fish, and other legislative acts under which the National Marine Fisheries Service (NMFS) operates. The Cooperative Tagging Center attempts to determine the migration patterns of, and other biological information for, billfish, tunas, and swordfish. The fish tagging report is provided to the angler with the tags, and he/she fills out the card with the information when a fish is tagged and mails it to NMFS. Information on each species is used by NMFS to determine migratory patterns, distance traveled, stock boundaries, age, and growth. These data are necessary input for developing management criteria by regional fishery management councils, states, and NMFS.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: *OIRA_Submission@omb.eop.gov*.

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW, Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *OIRA_Submission@omb.eop.gov*.

Dated: January 20, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–1590 Filed 1–25–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: International Trade Administration (ITA).

Title: Application for Insular Watch and Jewelry Program Benefits.

OMB Control Number: 0625–0040.

Form Number(s): ITA–334P; –334P–1; –334P–2; and –334P–3.

Type of Request: Regular submission (extension of a currently approved information collection).

Burden Hours: 4.

Number of Respondents: 2.

Average Hours per Response: 1.

Needs and Uses: Public Law 97–446, as amended by Public Law 103–465, Public Law 106–36, and Public Law 108–429, requires the Department of Commerce and the Department of the Interior (Departments) to administer the distribution of duty exemptions to watch producers and duty refunds, involving several million dollars biannually, to watch and jewelry producers in the insular possessions (*i.e.,* the U.S. Virgin Islands, Guam, American Samoa) and the Northern Mariana Islands. The primary consideration in collecting information is to administer the laws, prevent abuse of the program, and permit a fair and equitable distribution of its benefits. Form ITA–334P is the principal program form used for recording the annual operational data on the basis of which program entitlements are distributed among the various producers (and the provision of which to the Departments constitutes their annual application for these entitlements). The form is also used by new firms making

application for entitlements for the first time.

Affected Public: Business or other for-profit organization.

Frequency: Biannually and annually.

Respondent's Obligation: Required to obtain or retain benefit.

OMB Desk Officer: Wendy Liberante, (202) 395–3647.

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Wendy Liberante, OMB Desk Officer, Fax number (202) 395–7285 or via the Internet at *Wendy_L._Liberante@omb.eop.gov*.

Dated: January 20, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–1591 Filed 1–25–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Office of the Secretary

Estimates of the Voting Age Population for 2011

AGENCY: Office of the Secretary, Commerce.

ACTION: General Notice Announcing Population Estimates.

SUMMARY: This notice announces the voting age population estimates as of July 1, 2011, for each state and the District of Columbia. We are providing this notice in accordance with the 1976 amendment to the Federal Election Campaign Act, Title 2, United States Code, Section 441a(e).

FOR FURTHER INFORMATION CONTACT: Enrique Lamas, Chief, Population Division, U.S. Census Bureau, Room HQ–5H174, Washington, DC 20233, at (301) 763–2071.

SUPPLEMENTARY INFORMATION: Under the requirements of the 1976 amendment to the Federal Election Campaign Act, Title 2, United States Code, Section 441a(e), I hereby give notice that the estimates of the voting age population for July 1, 2011, for each state and the District of Columbia are as shown in the following table.

ESTIMATES OF THE POPULATION OF VOTING AGE FOR EACH STATE AND THE DISTRICT OF COLUMBIA: JULY 1, 2011

Area	Population 18 and over	Area	Population 18 and over
United States	237,657,645		
Alabama	3,675,597	Missouri	4,598,567
Alaska	534,277	Montana	775,845
Arizona	4,857,391	Nebraska	1,382,576
Arkansas	2,227,505	Nevada	2,059,547
California	28,419,993	New Hampshire	1,038,210
Colorado	3,886,708	New Jersey	6,778,345
Connecticut	2,777,395	New Mexico	1,562,805
Delaware	702,467	New York	15,179,189
District of Columbia	512,662	North Carolina	7,368,808
Florida	15,063,111	North Dakota	532,776
Georgia	7,325,352	Ohio	8,851,859
Hawaii	1,070,206	Oklahoma	2,855,349
Idaho	1,156,869	Oregon	3,008,092
Illinois	9,771,132	Pennsylvania	9,981,727
Indiana	4,919,319	Rhode Island	831,766
Iowa	2,337,939	South Carolina	3,598,675
Kansas	2,147,316	South Dakota	620,926
Kentucky	3,348,401	Tennessee	4,911,217
Louisiana	3,456,640	Texas	18,713,943
Maine	1,058,970	Utah	1,936,913
Maryland	4,481,654	Vermont	500,413
Massachusetts	5,182,521	Virginia	6,243,058
Michigan	7,580,375	Washington	5,248,281
Minnesota	4,067,335	West Virginia	1,470,570
Mississippi	2,228,273	Wisconsin	4,385,559
		Wyoming	433,221

Source: U.S. Census Bureau, Population Division.

Dated: January 18, 2012.

John E. Bryson,

Secretary, U.S. Department of Commerce.

[FR Doc. 2012–1635 Filed 1–25–12; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

[Docket No. 111115680–1675–01]

RIN 0605–XA39

Privacy Act of 1974; Altered System of Records

AGENCY: U.S. Census Bureau, Department of Commerce.

ACTION: Notice of Amendment, Privacy Act System of Records: COMMERCE/CENSUS–6, Population Census Records for 1910 and All Subsequent Decennial Censuses.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, Title 5 United States Code (U.S.C.) 552a(e)(4) and (11); and Office of Management and Budget (OMB) Circular A–130, Appendix I, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' the Department of Commerce is issuing notice of intent to amend the system of

records under COMMERCE/CENSUS–6, Population Census Records for 1910 and All Subsequent Decennial Censuses. This amendment would update certain provisions concerning the safeguards for records in the system, update system manager information, and address and minor administrative updates. Accordingly, the COMMERCE/CENSUS–6, Population Census Records for 1910 and All Subsequent Decennial Censuses notice published in the **Federal Register** on November 1, 2002 (67 FR 66610), is amended as below. We invite public comment on the system amendment announced in this publication.

DATES: *Comment Date:* To be considered, written comments on the proposed amended system must be submitted on or before February 27, 2012.

Effective Date: Unless comments dictate otherwise, the amended system of records will become effective as proposed on the date of publication of a subsequent notice in the **Federal Register**.

ADDRESSES: Please address comments to: Chief Privacy Officer, Room 8H115, U.S. Census Bureau, Washington, DC 20233–3700.

SUPPLEMENTARY INFORMATION: The Decennial Census of Population and Housing is one of the few Federal activities for which authority rests in the Constitution (Article 1, Section 2). Decennial census data collection processes touch the lives of every person in the United States. Decennial census data products provide the basis for apportioning among the states the seats in the U.S. House of Representatives, for developing the districts that members of Congress, state legislators, and other elected individuals represent, for the distribution of billions of dollars each year to governmental entities at all levels, and for untold numbers of governmental and business decisions. Decennial census records may also be used by respondents, their heirs, or legal representatives for proof of age, citizenship, proof of relationship, and limited use for genealogical purposes. The first change updates the safeguards to comprehensively cover the safeguards provided at the U.S. Census Bureau. The second change updates the system manager and corresponding address. Additionally, this amendment provides minor administrative updates to record source categories and exemptions claimed for the system. The entire resulting system of records notice, as amended, appears below.

SYSTEM NAME:

COMMERCE/CENSUS–6, Population Census Records for 1910 and All Subsequent Decennial Censuses.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

U.S. Census Bureau, National Processing Center, 1201 East 10th Street, Jeffersonville, IN 47132.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All persons ever counted during decennial censuses of population (1910 and all subsequent decennial censuses).

CATEGORIES OF RECORDS IN THE SYSTEM:

The categories of records contain records with direct identifiers (i.e., name) such as: household information: Name, address, relationship to head of household; demographic information: age (at time of census) or month/year (depending on census year), marital status, occupation and limited education data, race of household members, and other similar characteristics as reported in each census.

AUTHORITIES FOR MAINTENANCE OF THE SYSTEM:

Title 13, U.S.C. 8.

PURPOSE(S):

The purpose of this system is to search the 1910 and all subsequent decennial census records. Official census transcripts of the results are provided to the named person(s), their heirs, or legal representatives, upon receipt of a signed Application for Search of Census Records (Form BC–600). Census transcripts provide proof of age for Social Security or other retirement benefits. They can also be used in making passport applications, to prove relationship in settling estates, in limited genealogy research, or to satisfy other situations where a birth certificate or other legal documentation is needed but is not available. These records may be considered as statistical records pursuant to 5 U.S.C. 552(a), as they were originally collected for statistical purposes, and are now maintained to perform searches at the request of subject individuals under procedures published in the 15 CFR part 50 and in accordance with 13 U.S.C. 8 to provide proof of age, citizenship, proof of relationship, and limited use for genealogical purposes.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

None.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored in a computerized environment, paper, microform, and electronic media. Paper copies, digital media, and electronic media that contain sensitive information are stored in secure facilities within a locked drawer or cabinet, or in secure storage facilities with 24-hour monitoring. Records may also be stored in a highly restricted secure computerized environment with a customized level of authentication and access control.

RETRIEVABILITY:

A limited number of sworn U.S. Census Bureau staff will be permitted to retrieve individual records. Some census records are indexed by the SOUNDEX system—a numerical coding of the surname. The majority of census records are arranged on a geographic basis where the address must be known to determine which roll, microfilm, or electronic media that contains the name(s) for which a search is requested.

SAFEGUARDS:

The U.S. Census Bureau is committed to respecting respondent privacy and confidentiality. Through the Data Stewardship Program, we have implemented management, operational, and technical controls and practices to ensure high-level data protection to respondents of our censuses and surveys: (1) An unauthorized browsing policy protects respondent information from casual or inappropriate use by any person with access to Title 13 protected data. (2) All employees permitted to access the system are subject to the restriction, penalties, and prohibitions of 13 U.S.C. 9 and 214 as modified by Title 18 U.S.C. 3551, *et seq.,* and the Privacy Act of 1974 (5 U.S.C. 552a(b)(4)). (3) All U.S. Census Bureau employees and persons with special sworn status will be regularly advised of regulations issued pursuant to Title 13 U.S.C. governing the confidentiality of the data, and will be required to complete an annual Title 13 awareness program. (4) All computer systems that maintain sensitive information are in compliance with the Federal Information Security Management Act, which includes auditing and controls over access to restricted data. (5) The use of unsecured telecommunications to transmit individually identifiable information is prohibited. (6) Paper

copies that contain sensitive information are stored in secure facilities in a locked drawer or file cabinet behind a locked door. (7) Data sets released by the U.S. Census Bureau have been subjected to, and have successfully met, criteria established by an internal Disclosure Review Board to ensure no individually identifiable data are released. (8) Details from confidential records can only be released to the named persons, their heirs, or legal representatives upon submission of a notarized transcript application. (9) Individual records are confidential for 72 years (Title 44, U.S.C. § 2108 (b)).

RETENTION AND DISPOSAL:

Records are retained indefinitely. Records are stored at the Census Bureau's National Processing Center in Jeffersonville, Indiana, and also are provided to the National Archives and Records Administration for permanent retention. Records stored at the National Archives and Records Administration are not made public for 72 years.

SYSTEM MANAGER AND ADDRESS:

Associate Director for Field Operations, U.S. Census Bureau, 4600 Silver Hill Road, Washington, DC 20233–8000.

NOTIFICATION PROCEDURE:

None.

RECORD ACCESS PROCEDURES:

None.

CONTESTING RECORD PROCEDURES:

None.

RECORD SOURCE CATEGORIES:

Individuals covered by U.S. Census Bureau decennial censuses.

EXEMPTIONS CLAIMED FOR SYSTEM:

Pursuant to 5 U.S.C. 552a(k)(4) this system of records is exempt from the notification, access, and contest requirements of the agency procedures (under 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f)). This exemption is applicable as the data are maintained by the U.S. Census Bureau and required by Title 13 to be used solely as statistical records and are not used in whole or in part in making any determination about an identifiable individual. This exemption is made in accordance with the Department's rules, which appear in 15 CFR part 4, subpart B, and in accordance with agency rules published in the rules section of this **Federal Register**.

Dated: January 18, 2012.

Jonathan R. Cantor,

Chief Privacy Officer, Department of Commerce.

[FR Doc. 2012–1592 Filed 1–25–12; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

[Docket No. 111115678–1670–01]

RIN 0605–XA37

Privacy Act of 1974; System of Records

AGENCY: U.S. Census Bureau, Department of Commerce.

ACTION: Notice of Amendment, Privacy Act System of Records; COMMERCE/CENSUS–3, Individual and Household Statistical Surveys and Special Studies Records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, Title 5 United States Code (U.S.C.) 552a(e)(4) and (11); and Office of Management and Budget (OMB) Circular A–130, Appendix I, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' the Department of Commerce is issuing notice of intent to amend the system of records COMMERCE/CENSUS–3, Individual and Household Statistical Surveys and Special Studies Records. This amendment would change the name of the system of records to ''Special Censuses, Surveys, and Other Studies;'' amend certain provisions concerning the purpose of the system of records; update categories of individuals and records covered by the system; change procedures governing retrieval, storage, retention, disposal, and safeguards of the records in the system; and make other minor administrative updates. Accordingly, the system notice for COMMERCE/CENSUS–3, Individual and Household Statistical Surveys and Special Studies Records published in the **Federal Register** on November 01, 2002 (67 FR 66608) is amended as below. We invite public comment on the system amendment announced in this publication.

DATES: *Comment Date:* To be considered, written comments on the proposed amended system must be submitted on or before February 27, 2012.

Effective Date: Unless comments are received, the amended system of records will become effective as proposed on the date of publication of a subsequent notice in the **Federal Register**.

ADDRESSES: Please address comments to: Chief Privacy Officer, Room 8H115, U.S. Census Bureau, Washington, DC 20233–3700.

SUPPLEMENTARY INFORMATION: This update makes four program-related changes. The first of four proposed changes to program-related provisions updates the purpose of the system of records to include collection of statistical data from respondents, as well as the methodological research previously included in the original System of Record Notice (SORN). This update is a result of a re-alignment of the Census Bureau's systems of records to separate Census Bureau surveys protected by Title 13 confidentiality provisions from reimbursable surveys not protected by Title 13 confidentiality provisions. Census Bureau surveys protected by Title 13 confidentiality are now covered in this system of records, and reimbursable surveys are covered in COMMERCE/Census-7, ''Other Agency Surveys and Reimbursables.'' The second proposed change updates the categories of individuals in the system to include administrative records and cognitive interviews. The third change updates the categories of records in the system to provide additional information and details surrounding the records. The last change updates the policies and practices for storing, retaining, disposing, and safeguarding the records in the system to include recordings of survey and cognitive interviews and comprehensively cover the safeguards provided at the U.S. Census Bureau. The entire resulting system of records notice, as amended, appears below.

COMMERCE/CENSUS–3

SYSTEM NAME:

Special Censuses, Surveys, and Other Studies.

SECURITY CLASSIFICATION: NONE.

SYSTEM LOCATION:

Bowie Computer Center, U.S. Census Bureau, 17101 Melford Blvd., Bowie, Maryland 20715, and U.S. Census Bureau, National Processing Center, 1201 East 10th Street, Jeffersonville, Indiana 47103; and National Archives and Records Administration, Washington National Records Center, Washington, DC 20409.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system covers the population of the United States. Survey respondents typically are individuals aged 15 years old or over. Data collected directly from respondents may be supplemented with data from administrative record files received from other federal, state, or

local agencies, or commercial sources. These files are collected and processed under the Statistical Administrative Records system. Administrative record files are from agencies including, the Departments of Agriculture, Education, Health and Human Services, Homeland Security, Housing and Urban Development, Labor, Treasury, Veterans Affairs, and from the Office of Personnel Management, the Social Security Administration, the Selective Service System, and the U.S. Postal Service. Comparable data may also be sought from State agencies and commercial sources. Please see the COMMERCE/CENSUS–8, Statistical Administrative Records System SORN for more information. Additionally, subjects of cognitive interviews (to test understanding of a new survey form, for example) are covered in this system of records.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in this system of records consist of working statistical files (*i.e.,* those files being analyzed to produce survey results), survey data files (*i.e.,* those files containing answers directly from the respondent), and/or data contact files (*i.e.,* those files used for contacting respondents). Records in this system of records may contain information such as: Respondent contact information—telephone number, email address; Demographic information—date of birth, sex, race, ethnicity, household and family characteristics, mobility status, education, marital status, tribal affiliation, veteran's status, disability status; Geographical information—address and geographic codes; Health information—health problems, type of provider, services provided, cost of services, quality indicators; Economic information—housing and institutional characteristics, income, occupation, employment and unemployment information, health insurance coverage, federal and state program participation, assets and wealth; Activity and event related information—commuting, travel, childcare, recreation, consumer expenditures, community service, drug and alcohol use, and crime victimization; Field Representative (FR) related information—U.S. Census Bureau FR code, which is used only as an administrative control item for each record. Some records in this system of records may be obtained from datasets maintained by the COMMERCE/CENSUS–8, Statistical Administrative Records System where direct identifiers have been replaced with a unique non-identifying code prior to delivery to this system of records, and, therefore are not on the working statistical files. These categories of records are maintained on unique data sets that are extracted or combined on an as needed basis using the unique non-identifying codes but with the original identifiers removed. These records may contain: Demographic information—date of birth, sex, race, ethnicity, household and family characteristics, education, marital status, Tribal affiliation, and veteran's status; Geographical information—address and geographic codes; Mortality information—cause of death and hospitalization information; Health information—type of provider, services provided, cost of services, and quality indicators; Economic information—housing characteristics, income, occupation, employment and unemployment information, health insurance coverage, Federal program participation, assets, and wealth. Another category of records contains two types of records that are maintained on unique data sets that are extracted or combined on an as-needed basis using the unique non-identifying codes but with some name information retained. One type of records contains: Business information—business name, revenues, number of employees, and industry codes in support of economic statistical products. The other type contains: Respondent contact information—name, address, telephone number, age, and sex in support of survey and census data collection efforts. See the COMMERCE/CENSUS–8, Statistical Administrative Records System SORN for more information. However, for limited short-term projects, some records obtained from datasets maintained by the COMMERCE/CENSUS–8, Statistical Administrative Records System may contain some direct identifiers (such as name, Social Security Number (SSN)) that have been retained in working statistical files for this collection. These short-term projects must present project and use proposal documentation to a team of high level managers, and obtain approval to use direct identifiers in these working statistical files. Additionally, direct identifiers collected from survey respondents are routinely maintained on data contact files in order to facilitate respondent contact or to pre-load data for a data collection instrument.

AUTHORITIES FOR MAINTENANCE OF THE SYSTEM:

Title 13 U.S.C. 8(b), 182, and 196 provide the authority for the U.S. Census Bureau to conduct statistical surveys.

PURPOSE(S):

The purpose of this system of records is to collect statistical information from respondents through survey instruments or other means and to conduct methodological research on improving various aspects of surveys authorized by Title 13, U.S.C. 8(b), 182, and 196, such as: survey sampling frame design; sample selection algorithms; questionnaire development, design, and testing; usability testing of computer software and equipment; post data collection processing; data quality review; and non-response research.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

None. The data will be used only for statistical purposes. No disclosures which permit the identification of individual respondents, and no determinations affecting individual respondents are made.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records (including, but not limited to, sound files of survey or cognitive interviews or electronic datasets) will be stored in a secure computerized system and on magnetic media; output data will be electronic files or paper copies. Paper copies or magnetic media will be stored in a secure area within a locked drawer or cabinet. Data sets may be accessed only by authorized personnel. Control lists will be used to limit access to those employees with a need to know; rights will be granted based on job functions.

RETRIEVABILITY:

A limited number of sworn U.S. Census Bureau staff will be permitted to retrieve records containing direct identifiers (such as a name or SSN). Staff producing final statistical products will have access only to data sets from which direct identifiers have been deleted and replaced by unique non-identifying codes internal to the U.S. Census Bureau.

SAFEGUARDS:

The U.S. Census Bureau is committed to respecting respondent privacy and protecting confidentiality. Through the Data Stewardship Program, we have implemented management, operational, and technical controls and practices to ensure high-level data protection to respondents of our census and surveys. (1) An unauthorized browsing policy

protects respondent information from casual or inappropriate use by any person with access to Title 13 protected data. (2) All employees permitted to access the system are subject to the restriction, penalties, and prohibitions of 13 U.S.C. 9 and 214, as modified by Title 18 U.S.C. 3551, *et seq.;* the Privacy Act of 1974 (5 U.S.C. 552a(b)(4)); and when applicable, Title 26 U.S.C. 7213, 7213A, and 7431; as well as any additional restrictions imposed by statutory authority of a sponsor. (3) All U.S. Census Bureau employees and persons with special sworn status will be regularly advised of regulations issued pursuant to Title 13 U.S.C. governing the confidentiality of the data, and will be required to complete an annual Title 13 awareness program; and those who have access to Federal Tax Information data will be regularly advised of regulations issued pursuant to Title 26 U.S.C. governing the confidentiality of the data, and will be required to complete an annual Title 26 awareness program. (4) All computer systems that maintain sensitive information are in compliance with the Federal Information Security Management Act, which includes auditing and controls over access to restricted data. (5) The use of unsecured telecommunications to transmit individually identifiable information is prohibited. (6) Paper copies that contain sensitive information are stored in secure facilities in a locked drawer or file cabinet behind a locked door. (7) Additional data files containing direct identifiers will be maintained solely for the purpose of data collection activities, such as respondent contact and pre-loading an instrument for a continued interview, and will not be transferred to, or maintained on, working statistical files. (8) Any publications based on this system will be cleared for release under the direction of the U.S. Census Bureau's Disclosure Review Board, which will confirm that all the required disclosure avoidance procedures have been implemented and no information that identifies any individual is released.

RETENTION AND DISPOSAL:

Records are to be retained in accordance with the General Records Schedule and U.S. Census Bureau's records control schedules that are approved by the National Archives and Records Administration. Generally, records are retained for less than 10 years, unless a longer period is necessary for statistical purposes or for permanent archival retention.

SYSTEM MANAGER AND ADDRESS:

Associate Director for Demographic Programs, U.S. Census Bureau, 4600 Silver Hill Road, Washington, DC 20233–8000.

NOTIFICATION PROCEDURE:

None.

RECORD ACCESS PROCEDURES:

None.

CONTESTING RECORD PROCEDURES:

None.

RECORD SOURCE CATEGORIES:

Individuals and populations covered by selected administrative records systems and U.S. Census Bureau surveys and special censuses.

EXEMPTIONS CLAIMED FOR THIS SYSTEM:

Pursuant to Title 5 U.S.C. 552a(k)(4), this system of records is exempted from the notification, access, and contest requirements of the agency procedures (under 5 Title U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f)). This exemption is applicable as the data are maintained by the U.S. Census Bureau and required by Title 13 to be used solely as statistical records and are not used in whole or in part in making any determination about an identifiable individual. This exemption is made in accordance with the Department's rules, which appear in 15 CFR part 4 subpart B, and in accordance with agency rules published in the rules section of this **Federal Register**.

Dated: January 18, 2012.

Jonathan R. Cantor,

Chief Privacy Officer, Department of Commerce.

[FR Doc. 2012–1596 Filed 1–25–12; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

[Docket No. 111115679–1674–01]

RIN 0605–XA38

Privacy Act of 1974; Altered System of Records

AGENCY: U.S. Census Bureau, Department of Commerce.

ACTION: Notice of Amendment, Privacy Act System of Records; COMMERCE/CENSUS–4, Minority-Owned Business Enterprises Survey Records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, Title 5 United States Code (U.S.C.) 552a(e)(4) and (11); and Office of Management and Budget (OMB) Circular A–130, Appendix I, ''Federal Agency Responsibilities for Maintaining Records About Individuals'', the Department of Commerce is issuing notice of intent to amend the system of records entitled COMMERCE/CENSUS–4, ''Minority-Owned Business Enterprises Survey Records.'' This amendment would change the name of the system of records to ''Economic Survey Collection;'' would amend certain provisions concerning the purpose of the system of the records, categories of records covered by the system, routine uses of records maintained in the system, retrievability, and safeguards of records in the systems; and would make other minor administrative updates. Accordingly, the COMMERCE/CENSUS–4, Minority-Owned Business Enterprises Survey Records notice published in the **Federal Register** on November 1, 2002 (67 FR 66609) is amended as below. We invite public comment on the proposed change in this publication.

DATES: Comment Date: To be considered, written comments on the proposed amended system must be submitted on or before February 27, 2012.

Effective Date: Unless comments dictate otherwise, the amended system of records will become effective as proposed on the date of publication of a subsequent notice in the **Federal Register**.

ADDRESSES: Please address comments to: Chief Privacy Officer, Room 8H115, U.S. Census Bureau, Washington, DC 20233–3700.

SUPPLEMENTARY INFORMATION: This update makes five program-related changes. The first of five proposed changes updates the name and purpose of the system of records to expand the scope to include all economic programs, as well as surveys, such as the Survey of Business Owners and Survey of Construction. This update is a result of a System of Records Notice (SORN) re-alignment to cover all economic censuses and surveys authorized by, and kept confidential in accordance with Title 13; this SORN also includes government and building permit economic surveys that utilize public data sources, and, therefore, are not kept confidential in accordance with Title 13. The second proposed change updates the categories of individuals in the system to include the universe of small business owners in the U.S., as well as individuals engaged in business activity. The third proposed change updates the categories of records in the system to include selected administrative records from other federal, state, and local government agencies, or commercial sources,

combined with collected data from economic censuses and surveys. The fourth proposed change updates the routine uses of data to indicate that some governments and building permits data are public use data and may be disclosed. The fifth change updates the safeguards to comprehensively cover the safeguards provided at the Census Bureau. Additionally, this amendment provides minor administrative updates. The entire resulting system of records notice, as amended, appears below.

COMMERCE/CENSUS–4

SYSTEM NAME:

COMMERCE/CENSUS–4, Economic Survey Collection

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

The U.S. Census Bureau, 4600 Silver Hill Road, Washington, DC 20233; U.S. Census Bureau, Bowie Computer Center, 17101 Melford Boulevard, Bowie, Maryland 20715; and U.S. Census Bureau, National Processing Center, 1201 East 10th Street, Jeffersonville, Indiana 47132.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system covers individuals operating a business, data on individuals from federal, state and local governments, and businesses in the United States. Data collected directly from respondents may be supplemented with data from administrative record files received from other federal, state, or local agencies, or commercial sources. Most of these files are collected and processed under the Statistical Administrative Records System. Administrative record files are from agencies including, the Departments of Agriculture, Education, Health and Human Services, Homeland Security, Housing and Urban Development, Labor, Treasury, Veterans Affairs, and from the Office of Personnel Management, the Social Security Administration, the Selective Service System, and the U.S. Postal Service. Comparable data may also be sought from State agencies and commercial sources. Please see the COMMERCE/CENSUS–8, Statistical Administrative Records System SORN for more information.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in this system of records consist of working statistical files (*i.e.,* those files being analyzed to produce survey results), survey data files (*i.e.,* those files containing answers directly from the respondent), and/or data files (*i.e.,* those files used for contacting respondents). Records in this system of records may contain information such as: Demographic Information—gender, race, ethnicity, place of birth, and veteran status; Economic Information—business name, address, telephone number, geographic area, industry classification code, legal form of business, business receipts, number of employees, annual payroll and Federal Tax Information; Processing Information—employer identification number (EIN). Some records in this system of records may be obtained from datasets maintained by the COMMERCE/CENSUS–8, Statistical Administrative Records System where direct identifiers (SSN) have been replaced with a unique non-identifying code prior to delivery to this system of records. These categories of records are maintained on unique data sets that are extracted or combined on an as needed basis using the unique non-identifying codes but with the original identifiers removed. These records may contain: Demographic information—date of birth, sex, race, ethnicity, household and family characteristics, education, marital status, Tribal affiliation, and veteran's status; Geographical information—address and geographic codes; Mortality information—cause of death and hospitalization information; Health information—type of provider, services provided, cost of services, and quality indicators; Economic information—housing characteristics, income, occupation, employment and unemployment information, health insurance coverage, Federal program participation, assets, and wealth. Another category of records contains two types of records that are maintained on unique data sets that are extracted or combined on an as-needed basis using the unique non-identifying codes but with some name information retained. One type of records contains: Business information—business name, revenues, number of employees, and industry codes in support of economic statistical products. The other type contains: Respondent contact information—name, address, telephone number, age, and sex in support of survey and census data collection efforts. See the COMMERCE/CENSUS–8, Statistical Administrative Records System SORN for more information.

AUTHORITIES FOR MAINTENANCE OF THE SYSTEM:

13 U.S.C., Chapter 5, 8(b), 131, 132, and 182.

PURPOSE(S):

The economic survey collections covered by this system of records produce a wide-range of products for data users, including compilations of administrative records and survey-collected data, and numerous research and technical studies. For example, the U.S. Census Bureau's non-employer statistics program provides national and sub-national summary information on more than 20 million businesses without paid employees. The economic programs also combine data for non-employer and employer businesses in order to provide a complete picture of the Nation's economic activity. One example survey is, the Survey of Business Owners and Self-Employed Persons (SBO), which provides comprehensive information on demographic and economic characteristics of businesses and business owners. Another example survey is the Survey of Construction (SOC), which tracks a sample of builders from county building permit offices, to gauge the amount of residential construction by geographic area. Additionally, the economic programs provide data on the structure, function, finances, taxation, employment, and retirement systems within the United State's federal, state and local governments. A related purpose is to conduct research on the methodology associated with various aspects of surveys, such as data quality checks and review during post data collection processing. An other purposes of the system of records for economic collections include the integration of non-employer and employer records to form a comprehensive business universe file for subsequent analysis.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

(1) Building permit data is compiled from public use data, and, therefore, is not subject to confidentiality restrictions; and may be released to other agencies or individuals.

(2) Economic data related to government operations that are publicly available may be released and used by other federal agencies, state and local legislators, researchers, businesses, and individuals.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records will be stored in a secure computerized system and on electronic or magnetic media; output data will be either electronic or paper copies. Paper copies and magnetic media will be stored in a secure area within a locked drawer or cabinet. Data sets may be accessed only by authorized personnel. Control lists will be used to limit access to those employees with a need to know; rights will be granted based on job functions. For data that do not require confidentiality protections, security controls are not applied.

RETRIEVABILITY:

A limited number of sworn U.S. Census Bureau staff will be permitted to retrieve records containing direct identifiers (SSN). Staff producing final statistical products will have access only to data sets from which direct identifiers have been deleted and replaced by unique non-identifying codes internal to the Census Bureau. In those cases, information may be retrieved by the unique non-identifying code, name of the business owner, demographic characteristics, or economic characteristics.

SAFEGUARDS:

The U.S. Census Bureau is committed to respecting respondent privacy and protecting confidentiality. Through the Data Stewardship Program, we have implemented management, operational, and technical controls and practices to ensure high-level data protection to respondents of our census and surveys. (1) An unauthorized browsing policy protects respondent information from casual or inappropriate use by any person with access to Title 13 protected data. (2) All employees permitted to access the system are subject to the restriction, penalties, and prohibitions of 13 U.S.C. 9 and 214, as modified by Title 18 U.S.C. 3551, *et seq.;* the Privacy Act of 1974 (5 U.S.C. 552a(b)(4)); and when applicable, Title 26 U.S.C. 7213, 7213A, and 7431. (3) All U.S. Census Bureau employees and persons with special sworn status will be regularly advised of regulations issued pursuant to Title 13 U.S.C. governing the confidentiality of the data, and will be required to complete an annual Title 13 awareness program; and those who have access to Federal Tax Information data will be regularly advised of regulations issued pursuant to Title 26 U.S.C. governing the confidentiality of the data, and will be required to complete an annual Title 26 awareness program. (4) All computer systems that maintain sensitive information are in compliance with the Federal Information Security Management Act, which includes auditing and controls over access to restricted data. (5) The use of unsecured telecommunications to transmit individually identifiable information is prohibited. (6) Paper copies that contain sensitive information are stored in secure facilities in a locked drawer or file cabinet behind a locked door. (7) Any publications, based on data that confidentiality is protected, in this system will be cleared for release under the direction of the U.S. Census Bureau's Disclosure Review Board, which will confirm that all the required disclosure avoidance procedures have been implemented and no information that identifies any individual is released.

RETENTION AND DISPOSAL:

Records are to be retained in accordance with the General Records Schedules and U.S. Census Bureau's records control schedules that are approved by the National Archives and Records Administration. Records are retained in accordance with agreements developed with entities who provide the data. Federal tax information administrative record data will be retained and disposed of in accordance with Publication 1075, *Tax information Security Guidelines for Federal, State, and Local Agencies and Entities.* The U.S. Census Bureau issues an Annual Safeguard Activity Report that includes information on the retention and disposal of federal administrative record source data. Due to IRS regulation, Title 26 data cannot be transferred to the National Archive and Records Administration (NARA). Permanent data will be archived at the Census Bureau.

SYSTEM MANAGER AND ADDRESS:

Associate Director for Economic Programs, Room 8H132–North Building, U.S. Census Bureau, 4600 Silver Hill Road, Washington, DC 20233–8100.

NOTIFICATION PROCEDURE:

None.

RECORD ACCESS PROCEDURES:

None.

CONTESTING RECORDS PROCEDURES:

None.

RECORD SOURCE CATEGORIES:

Individuals, state and local governments, and businesses covered by economic censuses and surveys and selected administrative record systems.

EXEMPTIONS CLAIMED FOR SYSTEM:

Pursuant to Title 5 U.S.C. 552a(k)(4), this system of records is exempted from the notification, access, and contest requirements of the agency procedures (under Title 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f)). This exemption is applicable as the data are maintained by the U.S. Census Bureau and required by Title 13 to be used solely as statistical records and are not used in whole or in part in making any determination about an identifiable individual. This exemption is made in accordance with the Department's rules which appear in 15 CFR part 4 subpart B and in accordance with agency rules published in the rules section of this **Federal Register**.

Dated: January 18, 2012.

Jonathan R. Cantor,

Chief Privacy Officer, Department of Commerce.

[FR Doc. 2012–1595 Filed 1–25–12; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 07–2012]

Foreign-Trade Zone 45—Portland, Oregon; Expansion of Manufacturing Authority; Epson Portland, Inc. (Inkjet Ink Manufacturing); Portland, OR

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Port of Portland, grantee of FTZ 45, requesting an expansion of the scope of manufacturing authority approved within Subzone 45F, on behalf of Epson Portland, Inc. (EPI), 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 January 19, 2012.

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 involves the production of ink for inkjet printer cartridges using foreign and domestic inputs, activity which the applicant is now requesting to conduct under zone procedures. 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%). The scope otherwise would remain unchanged.

FTZ procedures could exempt EPI from customs duty payments on the additional foreign components 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. On its domestic sales, EPI would be able to choose the duty rates during customs entry procedures that apply to inkjet ink (duty rate—1.8%) or inkjet printer cartridges (duty-free) for the additional foreign inputs noted above. EPI would also be exempt from duty payments on foreign materials that become scrap or waste during the production process. The request indicates that the additional savings from FTZ procedures would help improve the plant's international competitiveness.

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 and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is March 26, 2012. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to April 10, 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 *www.trade.gov/ftz.*

For further information, contact Diane Finver at *Diane.Finver@trade.gov* (202) 482–1367.

Dated: January 20, 2012.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–1686 Filed 1–25–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1806]

Grant of Authority for Subzone Status, Delta Faucet Company (Faucets), Jackson, TN

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 Foreign-Trade Zones Act provides for ''* * * the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' and authorizes the Foreign-Trade Zones Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board's regulations (15 CFR Part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and when the activity results in a significant public benefit and is in the public interest;

Whereas, the Metropolitan Government of Nashville and Davidson County, grantee of Foreign-Trade Zone 78, has made application to the Board for authority to establish a special-purpose subzone at the faucet manufacturing facility of Delta Faucet Company, in Jackson, Tennessee, (FTZ Docket 42–2010, filed 6–7–2010);

Whereas, notice inviting public comment has been given in the **Federal Register** (75 FR 33765–33766, 6–15–2010) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby grants authority for subzone status for activity related to the manufacturing and distribution of faucets at the facility of Delta Faucet Company, located in Jackson, Tennessee (Subzone 78I), as described in the application and **Federal Register** notice, subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 17th day of January 2012.

Paul Piquado,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–1713 Filed 1–25–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–868, A–201–841]

Large Residential Washers From the Republic of Korea and Mexico: Initiation of Antidumping Duty Investigations

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* January 26, 2012.

FOR FURTHER INFORMATION CONTACT: David Goldberger (Mexico) or Holly Phelps (Republic of Korea), AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4136 or (202) 482–0656, respectively.

SUPPLEMENTARY INFORMATION:

The Petitions

On December 30, 2011, the Department of Commerce (''the Department'') received antidumping duty petitions concerning imports of large residential washers (washing machines) from the Republic of Korea (''Korea'') and Mexico filed in proper form by Whirlpool Corporation (''the petitioner''), a domestic producer of washing machines. *See* Large Residential Washers from the Republic of Korea and Mexico; Antidumping and Countervailing Duty Petitions (collectively, ''the petitions''). On January 5, 2012, the Department issued questionnaires regarding the petitions to the petitioner. The petitioner responded to the Department's request for information in the First Supplement to the AD/CVD Petitions, dated January 9, 2012 (First Supplement to the AD/CVD Petitions). On January 9, 2012, the Department requested additional information from the petitioner. The petitioner responded to the Department's request for additional

information in the Second Supplement to the AD/CVD Petitions, dated January 11, 2012 (Second Supplement to the AD/CVD Petitions).

In accordance with section 732(b) of the Tariff Act of 1930, as amended (''the Act''), the petitioner alleges that imports of washing machines from Korea and Mexico are being, or are likely to be, sold in the United States at less than fair value, within the meaning of section 731 of the Act, and that such imports materially injure, or threaten material injury to, an industry in the United States.

The Department finds that the petitioner filed these petitions on behalf of the domestic industry because the petitioner is an interested party as defined in section 771(9)(C) of the Act, and it has demonstrated sufficient industry support with respect to the investigations that it is requesting the Department to initiate (*see* ''Determination of Industry Support for the Petitions'' below).

Scope of Investigations

The products covered by these investigations are washing machines from Korea and Mexico. For a full description of the scope of the investigations, please see the ''Scope of the Investigations,'' in Appendix I of this notice.

Comments on Scope of Investigations

During our review of the petitions, we discussed the scope with the petitioner to ensure that it is an accurate reflection of the products for which the domestic industry is seeking relief. Moreover, as discussed in the preamble to the regulations (*See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27323 (May 19, 1997)), we are setting aside a period for interested parties to raise issues regarding product coverage. The Department encourages all interested parties to submit such comments by February 8, 2012, 20 calendar days from the date of signature of this notice. All comments must be filed on the records of the Korea and Mexico antidumping duty investigations as well as the simultaneously initiated Korea countervailing duty investigation (C–580–869). All comments and submissions to the Department must be filed electronically using Import Administration's Antidumping Countervailing Duty Centralized Electronic Service System (IA ACCESS).[1] An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by the time and date noted above. Documents excepted from the electronic submission requirements must be filed manually (*i.e.,* in paper form) with the Import Administration's APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue NW, Washington, DC 20230, and stamped with the date and time of receipt by the deadline noted above.

Comments on Product Characteristics for Antidumping Duty Questionnaires

We are requesting comments from interested parties regarding the appropriate physical characteristics of washing machines to be reported in response to the Department's antidumping questionnaires. This information will be used to identify the key physical characteristics of the subject merchandise in order to more accurately report the relevant costs of production, as well as to develop appropriate product comparison criteria.

Interested parties may provide any information or comments that they feel are relevant to the development of an accurate listing of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as (1) general product characteristics and (2) the product comparison criteria. We note that it is not always appropriate to use all product characteristics as product comparison criteria. We base product comparison criteria on meaningful commercial differences among products. In other words, while there may be some physical product characteristics utilized by manufacturers to describe washing machines, it may be that only a select few product characteristics take into account commercially meaningful physical characteristics. In addition, interested parties may comment on the order in which the physical characteristics should be used in product matching. Generally, the Department attempts to list the most important physical characteristics first and the least important characteristics last.

In order to consider the suggestions of interested parties in developing and issuing the antidumping duty questionnaires, we must receive comments at the above-referenced address by February 8, 2012. Additionally, rebuttal comments must be received by February 15, 2012. All comments must be filed on the records of both the Korea and Mexico antidumping duty investigations. All comments and submissions to the Department must be filed electronically using IA ACCESS, as referenced above.

Determination of Industry Support for the Petitions

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) At least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) Poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the industry.

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The International Trade Commission (''ITC''), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product (*see* section 771(10) of the Act), they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law. *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001), citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644

[1] *See http://www.gpo.gov/fdsys/pkg/FR–2011–07–06/pdf/2011–16352.pdf* for details of the Department's Electronic Filing Requirements, which went into effect on August 5, 2011. Information on help using IAACCESS can be found at *https://iaaccess.trade.gov/help.aspx* and a handbook can be found at *https://iaaccess.trade.gov/help/Handbook%20on%20Electronic%20Filling%20Procedures.pdf.*

(CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989).

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the petitioner does not offer a definition of domestic like product distinct from the scope of the investigations. Based on our analysis of the information submitted on the record, we have determined that washing machines constitute a single domestic like product and we have analyzed industry support in terms of that domestic like product. For a discussion of the domestic like product analysis in this case, *see* Antidumping Duty Investigation Initiation Checklist: Large Residential Washers from the Republic of Korea (''Korea AD Initiation Checklist'') and Antidumping Duty Investigation Initiation Checklist: Large Residential Washers from Mexico (''Mexico AD Initiation Checklist''), at Attachment II, Analysis of Industry Support for the Petitions Covering Large Residential Washers, on file electronically via IA ACCESS in the Central Records Unit, Room 7046, of the main Department of Commerce building.

In determining whether the petitioner has standing under section 732(c)(4)(A) of the Act, we considered the industry support data contained in the petitions with reference to the domestic like product as defined in the ''Scope of Investigations'' section above. To establish industry support, the petitioner provided its shipments of the domestic like product in 2010, and compared its shipments to the estimated total shipments of the domestic like product for the entire domestic industry. *See* Volume I of the petitions, at 10–14; Volume II of the petitions, at Exhibits 2–3, 5–8, and 9; First Supplement to the AD/CVD Petitions, at 4–8 and Exhibits A–C; and Second Supplement to the AD/CVD Petitions, at 4–5 and Exhibits Q–R. Because total industry production data for the domestic like product for 2010 is not reasonably available and the petitioner has established that shipments are a reasonable proxy for production data, we have relied upon the shipment data provided by the petitioner for purposes of measuring industry support. For further discussion, *see* Korea AD Initiation Checklist and Mexico AD Initiation Checklist, at Attachment II.

Our review of the data provided in the petitions, supplemental submissions, and other information readily available to the Department indicates that the petitioner has established industry support. First, the petitions established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, the Department is not required to take further action in order to evaluate industry support (*e.g.,* polling). *See* section 732(c)(4)(D) of the Act, Korea AD Initiation Checklist, and Mexico AD Initiation Checklist, at Attachment II. Second, the domestic producers have met the statutory criteria for industry support under section 732(c)(4)(A)(i) of the Act because the domestic producers who support the petitions account for at least 25 percent of the total production of the domestic like product. *See* Korea AD Initiation Checklist and Mexico AD Initiation Checklist, at Attachment II. Finally, the domestic producers have met the statutory criteria for industry support under section 732(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the petitions account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petitions. Accordingly, the Department determines that the petitions were filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act. *See id.*

The Department finds that the petitioner filed the petitions on behalf of the domestic industry because it is an interested party as defined in section 771(9)(C) of the Act and it has demonstrated sufficient industry support with respect to the antidumping duty investigations that it is requesting the Department initiate. *See id.*

Allegations and Evidence of Material Injury and Causation

The petitioner alleges that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of the imports of the subject merchandise sold at less than normal value (''NV''). In addition, the petitioner alleges that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.

The petitioner contends that the industry's injured condition is illustrated by reduced market share, reduced shipments, underselling and price depression or suppression, a decline in financial performance, lost sales and revenue, and an increase in the volume of imports and import penetration. *See* Volume I of the petitions, at 1–6 and 156–181; Volume II of the petitions, at Exhibits 1–4, 9, 33–38, and 49; and First Supplement to the AD/CVD Petitions at 8–13 and Exhibits C–L. We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by information reasonably available to the petitioner and meet the statutory requirements for initiation. *See* Korea AD Initiation Checklist and Mexico AD Initiation Checklist, at Attachment III: Analysis of Allegations and Evidence of Material Injury and Causation for the Petitions Covering Large Residential Washers from the Republic of Korea and Mexico.

Period of Investigations

The period of investigation (''POI'') is October 1, 2010, through September 30, 2011, for both Korea and Mexico. *See* 19 CFR 351.204(b)(1).

Allegations of Sales at Less Than Fair Value

The following is a description of the allegations of sales at less than fair value upon which the Department has based its decision to initiate investigations with respect to Korea and Mexico. The sources of, and adjustments to, the data relating to U.S. price and NV are discussed in greater detail in the Korea AD Initiation Checklist and the Mexico AD Initiation Checklist.

Korea

U.S. Price

The petitioner provided three U.S. prices based on average model-specific retail prices obtained from a market survey database. These prices were adjusted to exclude the retailer markup, as well as discounts and rebates, based on the petitioner's experience in, and knowledge of, the market. Originally, the petitioner deducted international freight based on U.S. Customs and Border Protection (''CBP'') data from U.S price for both price-to-price comparisons and price-to-constructed value (CV) comparisons. It subsequently revised these comparisons to remove the deduction for international freight from U.S. price. However, because it is more accurate for price-to-price comparisons to deduct international freight expenses from the U.S. price, we revised the price-to-price margin calculations to deduct international freight. *See* Korea AD Initiation Checklist.

Normal Value

The petitioner provided three home market prices based on a survey of retail prices in Korea. These prices were adjusted to exclude the retailer markup, as well as discounts and rebates, based on the petitioner's experience in, and knowledge of, the market. The petitioner further adjusted home market price by deducting Korean valued added tax (''VAT'') and other taxes. It made no other adjustments to home market price. *See* Korea AD Initiation Checklist.

Mexico

U.S. Price

The petitioner provided two U.S. prices based on average model-specific retail prices obtained from a market survey database. These prices were adjusted to exclude the retailer markup, as well as discounts and rebates, based on the petitioner's experience in, and knowledge of, the market. Originally, the petitioner deducted international freight based on CBP data from U.S price for both price-to-price comparisons and price-to-CV comparisons. It subsequently revised these comparisons to remove the deduction for international freight from U.S. price. However, because it is more accurate for price-to-price comparisons to deduct international freight expenses from the U.S. price, we revised the price-to-price margin calculations to deduct international freight. *See* Mexico AD Initiation Checklist.

Normal Value

The petitioner provided two home market prices based on retail prices available in Mexico. These prices were adjusted to exclude the retailer markup, as well as discounts and rebates, based on the petitioner's experience in, and knowledge of, the market. The petitioner further adjusted home market price by deducting Mexican VAT. It made no other adjustments to home market price. *See* Mexico AD Initiation Checklist.

Sales-Below-Cost Allegations

The petitioner provided information demonstrating reasonable grounds to believe or suspect that sales of large residential washing machines in the Korean and Mexican markets were made at prices below the fully-absorbed cost of production (''COP''), within the meaning of section 773(b) of the Act, and requested that the Department conduct a country-wide sales-below-cost investigation. The Statement of Administrative Action (''SAA''), submitted to the Congress in connection with the interpretation and application of the Uruguay Round Agreements Act, states that an allegation of sales below COP need not be specific to individual exporters or producers. *See* SAA, H.R. Doc. No. 103–316 at 833 (1994). The SAA states that ''Commerce will consider allegations of below-cost sales in the aggregate for a foreign country, just as Commerce currently considers allegations of sales at less than fair value on a country-wide basis for purposes of initiating an antidumping investigation.'' SAA at 833.

Further, the SAA provides that section 773(b)(2)(A) of the Act retains the requirement that the Department have ''reasonable grounds to believe or suspect'' that below-cost sales have occurred before initiating such an investigation. Reasonable grounds exist when an interested party provides specific factual information on costs and prices, observed or constructed, indicating that sales in the foreign market in question are at below-cost prices. *Id.*

Korea

Cost of Production

Pursuant to section 773(b)(3) of the Act, COP consists of the cost of manufacturing (''COM''); selling, general and administrative (''SG&A'') expenses; financial expenses; and packing expenses. The petitioner relied on its own production experience to calculate the raw material, packing, and freight costs included in the calculation of COM. The petitioner adjusted these inputs to account for known differences between U.S. and Korean prices and for differences in weights and technologies between the petitioner's washing machine models and those of the Korean producers' washing machine models sold in the comparison market and the United States. Inbound freight costs associated with procuring material inputs were calculated based on the petitioner's own experience adjusted for differences in weight between the washing machine models used to calculate COP/CV and the Korean models.

The petitioner relied on its own labor costs, adjusted for known differences between the U.S. and Korean hourly compensation rates for electrical equipment, appliance, and component manufacturing in 2007, as reported by the U.S. Bureau of Labor Statistics. The petitioner relied on its own experience to determine the per-unit factory overhead costs (exclusive of labor) associated with the production of washing machines.

The petitioner stated that the washing machine manufacturing processes in Korea are very similar to its own manufacturing processes, and therefore it is reasonable to estimate the Korean producers' usage rates based on the usage rates experienced by a U.S. washing machine producer. *See* Volume I of the petitions, at 21.

To determine SG&A expense rates, the petitioner relied on the fiscal year (FY) 2010 unconsolidated financial statements of two Korean producers of washing machines. The petitioner relied on the FY 2010 consolidated financial statements of the same two Korean producers of washing machines to determine the financial expense rates. *See* Korean Initiation Checklist for further discussion.

Based upon a comparison of the prices of the foreign like product in the home market to the calculated COP of the most comparable product, we find reasonable grounds to believe or suspect that sales of the foreign like product were made below the COP, within the meaning of section 773(b)(2)(A)(i) of the Act. Accordingly, the Department is initiating a country-wide cost investigation.

Normal Value Based on Constructed Value

Because it alleged sales below cost, pursuant to sections 773(a)(4), 773(b) and 773(e) of the Act, the petitioner calculated NV based on CV. The petitioner calculated CV using the same average COM, SG&A, financial expense, and packing figures used to compute the COP. The petitioner relied on the same 2010 unconsolidated financial statements used as the basis for the SG&A rates to calculate profit rates. Because one of the producers did not incur a profit, the petitioner did not include profit in the calculation of CV for that producer's washing machine model. We revised petitioner's calculation of the profit rate for the second Korean washing machine producer to exclude those income and expense items not included in the petitioner's calculation of that producer's COP. *See* Korean Initiation Checklist.

Fair Value Comparisons

Based on the data provided by the petitioner, there is reason to believe that imports of washing machines from Korea are being, or are likely to be, sold in the United States at less than fair value. Based on a comparison of U.S. price to home-market price, as discussed above, the estimated dumping margins range from 31.03 percent to 77.52 percent. Based on a comparison of U.S. price to CV, as discussed above, the

estimated dumping margins are 63.38 percent and 82.41 percent. *See id.*

Mexico

Cost of Production

Pursuant to section 773(b)(3) of the Act, COP consists of COM; SG&A expenses; financial expenses; and packing expenses. The petitioner relied on its own production experience to calculate the raw material, packing, and freight costs included in the calculation of COM. The petitioner adjusted these inputs to account for known differences between U.S. and Mexican prices and for differences in weights and technologies between the petitioner's U.S. washing machine models and those of the Mexican producers' washing machine models sold in the comparison market and the United States. Inbound freight costs associated with procuring material inputs were calculated based on the petitioner's own experience adjusted for differences in weight between the washing machine models used to calculate COP/CV and the Mexican models.

The petitioner relied on its own labor costs, adjusted for known differences between the U.S. and Mexican hourly compensation rates for electrical equipment, appliance, and component manufacturing in 2007, as reported by the U.S. Bureau of Labor Statistics. The petitioner relied on its own experience to determine the per-unit factory overhead costs (exclusive of labor) associated with the production of washing machines.

The petitioner stated that the washing machine manufacturing processes in Mexico are very similar to its own manufacturing processes, and therefore it is reasonable to estimate the Mexican producers' usage rates based on the usage rates experienced by a U.S. washing machine producer. *See* Volume I of the petition, at 21.

To determine SG&A expense rates, the petitioner relied on the FY 2010 unconsolidated financial statements of a Mexican producer of washing machines. The petitioner relied on the FY 2010 unconsolidated financial statements of the same producer of washing machines to determine the financial expense rate. Consistent with Department practice, we revised the petitioner's calculation of the financial expense rate to reflect the FY 2010 consolidated financial statements of the Mexican producer's parent company. *See* Mexican Initiation Checklist for further discussion.

Based upon a comparison of the prices of the foreign like product in the home market to the calculated COP of the most comparable product, we find reasonable grounds to believe or suspect that sales of the foreign like product were made below the COP, within the meaning of section 773(b)(2)(A)(i) of the Act. Accordingly, the Department is initiating a country-wide cost investigation.

Normal Value Based on Constructed Value

Because it alleged sales below cost, pursuant to sections 773(a)(4), 773(b) and 773(e) of the Act, the petitioner calculated NV based on CV. The petitioner calculated CV using the same average COM, SG&A, financial expense, and packing figures used to compute the COP. As discussed above, we revised the financial expenses included in the petitioner's calculation of CV to reflect the financial expenses based on the FY 2010 consolidated financial statements of the Mexican producer's parent company. Because the producer did not incur a profit, the petitioner did not include profit in the calculation of CV.

Fair Value Comparisons

Based on the data provided by the petitioner, there is reason to believe that imports of washing machines from Mexico are being, or are likely to be, sold in the United States at less than fair value. Based on a comparison of U.S. price to home market price, as discussed above, the estimated dumping margins are 27.21 percent and 58.62 percent. Based on a comparison of U.S. price to CV, as discussed above, the estimated dumping margins are 62.64 percent and 72.41 percent. *See id.*

Initiation of Antidumping Investigations

Based upon the examination of the petitions on washing machines from Korea and Mexico and other information reasonably available to the Department, the Department finds that these petitions meet the requirements of section 732 of the Act. Therefore, we are initiating antidumping duty investigations to determine whether imports of washing machines from Korea and Mexico are being, or are likely to be, sold in the United States at less than fair value. In accordance with section 733(b)(1)(A) of the Act, unless postponed, we will make our preliminary determinations no later than 140 days after the date of this initiation.

Targeted Dumping Allegations

On December 10, 2008, the Department issued an interim final rule for the purpose of withdrawing 19 CFR 351.414(f) and (g), the regulatory provisions governing the targeted dumping analysis in antidumping duty investigations, and the corresponding regulation governing the deadline for targeted-dumping allegations, 19 CFR 351.301(d)(5). *See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations,* 73 FR 74930 (December 10, 2008). The Department stated that ''{w}ithdrawal will allow the Department to exercise the discretion intended by the statute and, thereby, develop a practice that will allow interested parties to pursue all statutory avenues of relief in this area.'' *See id.,* 73 at 74931.

In order to accomplish this objective, if any interested party wishes to make a targeted dumping allegation in any of these investigations pursuant to section 777A(d)(1)(B) of the Act, such allegations are due no later than 45 days before the scheduled date of the country-specific preliminary determination.

Respondent Selection

Korea

The petition identifies three Korean producers that export washing machines to the United States: Samsung Electronics Co., Ltd. (Samsung), LG Electronics, Inc. (LG), and Daewoo Electronics Corporation (Daewoo). There is no information indicating that there are other Korean producers/exporters of the subject merchandise. Accordingly, the Department is selecting Samsung, LG, and Daewoo as mandatory respondents in this investigation pursuant to section 777A(e)(1) of the Act. Interested parties may submit comments regarding respondent selection within five calendar days of publication of this notice. Comments should be filed electronically using IA ACCESS.

Mexico

For this investigation, the Department intends to select respondents based on CBP data for U.S. imports under the Harmonized Tariff Schedule of the United States (''HTSUS'') number 8450.20.0090. We intend to release the CBP data under Administrative Protective Order (''APO'') to all parties with access to information protected by APO within five days of publication of this **Federal Register** notice and make our decision regarding respondent selection within 20 days of publication of this notice. The Department invites comments regarding the CBP data and respondent selection within ten days of publication of this **Federal Register** notice.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305. Instructions for filing such applications may be found on the Department's Web site at *http://ia.ita.doc.gov/apo.*

Distribution of Copies of the Petitions

In accordance with section 732(b)(3)(A) of the Act and 19 CFR 351.202(f), copies of the public version of the petitions and amendments thereto have been provided to the representatives of the Governments of Korea and Mexico. To the extent practicable, we will attempt to provide a copy of the public version of the petitions to each exporter named in the petition, as provided under 19 CFR 351.203(c)(2).

ITC Notification

We have notified the ITC of our initiation, as required by section 732(d) of the Act.

Preliminary Determinations by the ITC

The ITC will preliminarily determine, within 45 days after the date on which the petitions were filed, whether there is a reasonable indication that imports of washing machines from Korea and Mexico materially injure, or threaten material injury to, a U.S. industry. A negative ITC determination with respect to either country would result in the termination of the investigation with respect to that country; *see* section 703(a)(1) of the Act. Otherwise, these investigations will proceed according to statutory and regulatory time limits.

Notification to Interested Parties

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305. On January 22, 2008, the Department published *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures,* 73 FR 3634 (January 22, 2008). Parties wishing to participate in these investigations should ensure that they meet the requirements of these procedures (*e.g.,* the filing of letters of appearance as discussed at 19 CFR 351.103(d)).

Any party submitting factual information in an AD/CVD proceeding must certify to the accuracy and completeness of that information. *See* section 782(b) of the Act. Parties are hereby reminded that revised certification requirements are in effect for company/government officials as well as their representatives in all segments of any AD/CVD proceedings initiated on or after March 14, 2011. *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings: Interim Final Rule,* 76 FR 7491 (February 10, 2011) (*Interim Final Rule*) amending 19 CFR 351.303(g)(1) and (2). The formats for the revised certifications are provided at the end of the *Interim Final Rule.* The Department intends to reject factual submissions in any proceeding segments initiated on or after March 14, 2011, if the submitting party does not comply with the revised certification requirements.

This notice is issued and published pursuant to section 777(i) of the Act and 19 CFR 351.203(c).

Dated: January 19, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

Appendix I—Scope of the Investigations

The products covered by these investigations are all large residential washers and certain subassemblies thereof from Korea and Mexico.

For purposes of these investigations, the term ''large residential washers'' denotes all automatic clothes washing machines, regardless of the orientation of the rotational axis, with a cabinet width (measured from its widest point) of at least 24.5 inches (62.23 cm) and no more than 32.0 inches (81.28 cm).

Also covered are certain subassemblies used in large residential washers, namely: (1) All assembled cabinets designed for use in large residential washers which incorporate, at a minimum: (a) At least three of the six cabinet surfaces; and (b) a bracket; (2) all assembled tubs [2] designed for use in large residential washers which incorporate, at a minimum: (a) a tub; and (b) a seal; (3) all assembled baskets [3] designed for use in large residential washers which incorporate, at a minimum: (a) A side wrapper;[4] (b) a base; and (c) a drive hub;[5] and (4) any combination of the foregoing subassemblies.

Excluded from the scope are stacked washer-dryers and commercial washers. The term ''stacked washer-dryers'' denotes distinct washing and drying machines that are built on a unitary frame and share a common console that controls both the washer and the dryer. The term ''commercial washer'' denotes an automatic clothes washing machine designed for the ''pay per use'' market meeting either of the following two definitions:

(1)(a) It contains payment system electronics;[6] (b) it is configured with an externally mounted steel frame at least six inches high that is designed to house a coin/token operated payment system (whether or not the actual coin/token operated payment system is installed at the time of importation); (c) it contains a push button user interface with a maximum of six manually selectable wash cycle settings, with no ability of the end user to otherwise modify water temperature, water level, or spin speed for a selected wash cycle setting; and (d) the console containing the user interface is made of steel and is assembled with security fasteners;[7] *or*

(2)(a) It contains payment system electronics; (b) the payment system electronics are enabled (whether or not the payment acceptance device has been installed at the time of importation) such that, in normal operation,[8] the unit cannot begin a wash cycle without first receiving a signal from a *bona fide* payment acceptance device such as an electronic credit card reader; (c) it contains a push button user interface with a maximum of six manually selectable wash cycle settings, with no ability of the end user to otherwise modify water temperature, water level, or spin speed for a selected wash cycle setting; and (d) the console containing the user interface is made of steel and is assembled with security fasteners.

The products subject to these investigations are currently classifiable under subheading 8450.20.0090 of the Harmonized Tariff System of the United States (HTSUS). Products subject to these investigations may also enter under HTSUS subheadings 8450.11.0040, 8450.11.0080, 8450.90.2000, and 8450.90.6000. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the

[2] A ''tub'' is the part of the washer designed to hold water.

[3] A ''basket'' (sometimes referred to as a ''drum'') is the part of the washer designed to hold clothing or other fabrics.

[4] A ''side wrapper'' is the cylindrical part of the basket that actually holds the clothing or other fabrics.

[5] A ''drive hub'' is the hub at the center of the base that bears the load from the motor.

[6] ''Payment system electronics'' denotes a circuit board designed to receive signals from a payment acceptance device and to display payment amount, selected settings, and cycle status. Such electronics also capture cycles and payment history and provide for transmission to a reader.

[7] A ''security fastener'' is a screw with a non-standard head that requires a non-standard driver. Examples include those with a pin in the center of the head as a ''center pin reject'' feature to prevent standard Allen wrenches or Torx drivers from working.

[8] ''Normal operation'' refers to the operating mode(s) available to end users (*i.e.,* not a mode designed for testing or repair by a technician).

merchandise subject to this scope is dispositive.

[FR Doc. 2012–1679 Filed 1–25–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA960

Mid-Atlantic Fishery Management Council (MAFMC); Public Meetings

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

ACTION: Notice of public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council (Council) and its Surfclam, Ocean Quahog and Tilefish Committee, its Ecosystem and Ocean Planning Committee, and its Spiny Dogfish Committee will hold public meetings.

DATES: The meetings will be held Tuesday, February 14, 2012 through Thursday, February 16, 2012. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: Hilton Virginia Beach Oceanfront, 3001 Atlantic Avenue, Virginia Beach, VA; telephone: (757) 213–3001.

Council Address: Mid-Atlantic Fishery Management Council, 800 N. State St., Suite 201, Dover, DE 19901; telephone: (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D. Executive Director, Mid-Atlantic Fishery Management Council; telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: On Tuesday, February 14—The Surfclam, Ocean Quahog and Tilefish Committee will meet from 1 p.m. until 3 p.m. The Ecosystem and Ocean Planning Committee will meet from 3 p.m. until 5 p.m. On Wednesday, February 15—The Spiny Dogfish Committee will meet from 9 a.m. until 10 a.m. Action on the Omnibus Framework/Supplemental Environmental Assessment (EA) will occur from 10 a.m. until 12 p.m. A review of the Advisory Panel Workgroup Report will be held from 1 p.m. until 3 p.m. Action on the Squid, Mackerel, and Butterfish Framework will occur from 3 p.m. until 4 p.m. A Highly Migratory Species (HMS) presentation will be held from 4 p.m. until 5 p.m. There will be a Public Listening Session from 5 p.m. until 6 p.m. On Thursday February 16—The Council will hold its regular Business Session from 9 a.m. until 1 p.m. to approve the October and December minutes, receive Organizational Reports to include a SAW/SARC 53 Summary on Black Sea Bass, the New England Liaison Report, the Executive Director's Report, the Science Report, Committee Reports, and conduct any continuing and/or new business.

Agenda items by day for the Council's Committees and the Council itself are:

On Tuesday, February 14—The Surfclam, Ocean Quahog and Tilefish Committee will discuss and identify the next steps for Amendment 15. The Ecosystem and Ocean Planning Committee will receive a presentation by Dr. Steve Ross of UNC Wilmington on Bureau of Ocean Energy Management-funded work on deep-sea corals and consider and approve the mission statement.

On Wednesday, February 15—The Spiny Dogfish Committee will update and review the range of alternatives for Amendment 3. The Council will take action to revise risk policy measures through framework adjustment or other action regarding the Omnibus Framework or Supplemental EA. The Council will receive an Advisory Panel Workgroup Report to review and approve workgroup recommendations to modify the current process for Advisory panel membership and governance. The Council will take action to modify vessel hold certification requirements regarding the Squid, Mackerel and Butterfish Framework. The Council will hear a presentation on an Amendment that proposes catch shares in the Atlantic shark fishery. The Council will hold a Public Listening Session.

On Thursday, February 16—The Council will hold its regular Business Session to approve the October and December minutes, receive Organizational Reports to include a SAW/SARC 53 Summary on Black Sea Bass, the New England Liaison Report, the Executive Director's Report, Science Report, Committee Reports, and conduct any continuing and/or new business.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526–5251, at least 5 days prior to the meeting date.

Dated: January 23, 2012.

Tracey L. Thompson,

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

[FR Doc. 2012–1594 Filed 1–25–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XU87

Marine Mammals; File No. 15126

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

ACTION: Notice; issuance of permit amendment.

SUMMARY: Notice is hereby given that a major amendment to Permit No. 15126–01 has been issued to NMFS National Marine Mammal Laboratory (Responsible Party: Dr. John Bengtson, Director), Seattle, WA.

ADDRESSES: The permit amendment and related documents are available for review upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376; and

Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; phone (907) 586–7221; fax (907) 586–7249.

FOR FURTHER INFORMATION CONTACT: Tammy Adams or Amy Sloan, (301) 427–8401.

SUPPLEMENTARY INFORMATION: On November 25, 2011, notice was published in the **Federal Register** (76 FR 72681) that a request for an amendment Permit No. 15126–01 to conduct research on marine mammals had been submitted by the above-named applicant. The requested permit amendment has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The permit has been amended to include harassment of ribbon seals (*Phoca fasciata*), spotted seals (*P. largha*), ringed seals (*P. hispida*), and bearded seals (*Erignathus barbatus*) in the North Pacific Ocean, Bering Sea, Arctic Ocean, and coastal regions of Alaska during aerial surveys conducted from either rotary or fixed wing manned or unmanned aircraft. The amendment does not change the duration of the permit, which expires on March 30, 2015.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the

activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: January 20, 2012.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–1700 Filed 1–25–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA871

Takes of Marine Mammals Incidental to Specified Activities; Physical Oceanographic Studies in the Southwest Indian Ocean, January Through February, 2012

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to the United States Navy (Navy) to take marine mammals, by harassment, incidental to conducting physical oceanographic studies in the southwest Indian Ocean.

DATES: Effective January 23, 2012, through March 7, 2012.

ADDRESSES: A copy of the IHA and application are available by writing to P. Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

An electronic copy of the application containing a list of references used in this document may be obtained by writing to the above address, telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* NMFS wrote an Environmental Assessment (EA) and prepared a Finding of No Significant Impact (FONSI), which are available at the same Internet address. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Michelle Magliocca, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(D) of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce to authorize, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for the incidental taking of small numbers of marine mammals shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). The authorization must set forth the permissible methods of taking, other means of effecting the least practicable adverse impact on the species or stock and its habitat, and requirements pertaining to the mitigation, monitoring and reporting of such takings. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) of the MMPA establishes a 45-day time limit for NMFS' review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the public comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

NMFS received an application on August 15, 2011, from the United States Navy (Navy) for the taking of marine mammals, by Level B harassment, incidental to conducting physical oceanographic studies in the southwest Indian Ocean. Upon receipt of additional information, NMFS determined the application complete and adequate on September 14, 2011.

The Navy plans to use one source vessel, the R/V *Melville* (*Melville*), and a seismic airgun array to obtain high resolution imaging of ocean mixing dynamics at the Agulhas Return Current and Antarctic Circumpolar Currents (ARC/ACC) in a research project titled ARC12. The *Melville* will spend 14 days on seismic oceanography surveys and three days on acoustic Doppler current profiler (ADCP) mooring deployments and recoveries, other oceanographic sampling methods, and transit to and from the study site.

Acoustic stimuli (*i.e.,* increased underwater sound) generated during the operation of the airgun array has the potential to cause short-term behavioral disturbance for marine mammals in the survey area. This is the principal means of marine mammal taking associated with these activities, and the Navy has requested an authorization to take 30 species of marine mammals by Level B harassment. NMFS does not expect the use of the multibeam echosounder (MBES), subbottom profiler (SBP), or ADCPs to result in any take that has not already been considered in the discussion of the airguns, which will operate 24 hours per day. Take is also not expected to result from collision with the *Melville* because it is a single vessel moving at relatively slow speeds during seismic acquisition within the survey, for a relatively short period of time.

Description of the Specified Activity

The Navy's physical oceanographic studies are scheduled to commence on January 23, 2012, and continue for approximately 17 days ending on February 8, 2012. Some deviation from this timeline is possible due to logistics and weather conditions. NMFS is issuing an authorization that extends from January 23, 2012, through March 7, 2012.

Within this time period, the Navy will conduct seismic oceanography surveys using a towed array of two low-energy

105 in³ generator-injector (GI) airguns. The *Melville* is scheduled to depart from Cape Town, South Africa, on January 23, 2012, and transit to the survey area near the Agulhas Plateau, off the southern tip of Africa. The exact location of the ARC/ACC front in January cannot be predetermined due to the natural meander of the currents, but studies will most likely take place within the boundaries of 36°S to 43°S and 19°E to 30°E. The exact locations of the ARC/ACC frontal system will be determined on site using high-resolution conductivity-temperature-depth measurements. The total area of this region is about 207,500 nautical miles² (Nm²) (713,000 kilometers² [km²]). The proposed study will take place in water depths of approximately 1,000 to 5,200 meters (m). The survey will require approximately 17 days to complete approximately 2,489 km of transect lines, and be comprised of multiple transects across and along the ARC/ACC front.

Vessel Specifications

The *Melville,* owned by the Navy, is a seismic research vessel with a propulsion system designed to be as quiet as possible to avoid interference with the seismic signals emanating from the airgun array. The vessel, which has a length of 97 m (318 feet [ft]); a beam of 14 m (46 ft); and a maximum draft of 5 m (16 ft); is powered by two 1,385 horsepower (hp) Propulsion General Electric motors and a 900 hp retracting bow thruster. The *Melville's* operation speed during seismic acquisition will be approximately 7 to 11 km/hour (hr) (4 to 6 knots) and the cruising speed of the vessel outside of seismic operations will be about 20 km/hr (11 knots). The vessel also has a platform one deck below and forward of the bridge, which is positioned 12.5 m (41 ft) above the waterline and provides a relatively unobstructed 180 degree view forward. Aft views can be obtained along both the port and starboard decks.

Acoustic Source Specifications

Metrics Used in This Document

This section includes a brief explanation of the sound measurements frequently used in the discussions of acoustic effects in this document. Sound pressure is the sound force per unit area, and is usually measured in micropascals (μPa), where 1 pascal (Pa) is the pressure resulting from a force of one newton exerted over an area of one square meter. Sound pressure level (SPL) is expressed as the ratio of a measured sound pressure and a reference level. The commonly used reference pressure level in underwater acoustics is 1 μPa, and the units for SPLs are dB re: 1 μPa.

SPL (in decibels (dB)) = 20 log (pressure/reference pressure)

SPL is an instantaneous measurement and can be expressed as the peak, the peak-peak (p-p), or the root mean square (rms). Rms, which is the square root of the arithmetic average of the squared instantaneous pressure values, is typically used in discussions of the effects of sounds on vertebrates and all references to SPL in this document refer to rms unless otherwise noted. SPL does not take the duration of a sound into account.

Seismic Airguns

The *Melville* will deploy two GI guns, which are stainless steel cylinders charged with high pressure air that, when instantaneously released into the water column, generate sound. The GI guns will operate in harmonic mode (105 in³ in each of the generator and injector chambers for a total discharge volume of 210 in³) with a 1,200 m long hydrophone streamer. GI guns will be energized simultaneously at 2,000 psi every 17 seconds (s). The GI gun array will emit sound at a frequency range of 10 to 188 Hertz (Hz) and reach a peak source level of 240 dB re 1 μPa. Seismic oceanography studies will be conducted 24 hours (hrs) per day for 14 days (336 hrs) and the GI guns will be towed at a depth of 3 to 9 m.

Characteristics of the Airgun Pulses

Airguns function by venting high-pressure air into the water which creates an air bubble. The pressure signature of an individual airgun consists of a sharp rise and then fall in pressure, followed by several positive and negative pressure excursions caused by the oscillation of the resulting air bubble. The oscillation of the air bubble transmits sounds downward through the seafloor and the amount of sound transmitted in the near horizontal directions is reduced. However, the airgun array also emits sound that travels horizontally toward non-target areas. The nominal source levels of the airgun array that will be used by the Navy on the *Melville* are 234 dB re: 1 $\mu Pa_{(0\text{-}p)}$ to 240 dB re: 1 $\mu Pa_{(p\text{-}p)}$.

Predicted Sound Levels for the Airguns

Lamont-Doherty Earth Observatory (L–DEO) developed a verified model that predicts impulsive sound pressure field propagation and accurately describes acoustic propagation in marine waters of depths greater than 1,000 m. These model-generated sound propagation radii are routinely used for determination of received sound levels generated by impulsive sound sources, and have been previously applied in calculating the total ensonified area for use of two low-energy 105 in³ GI-guns. Modeled sound propagation radii of GI-gun sources that are the same or similar to the GI-guns used in this study, in water depths >1,000 m, are given in Table 1. These modeled acoustic propagation distances were applied in Environmental Assessments (EAs) and IHAs for seismic surveys conducted in the Eastern Tropical Pacific Ocean (ETP) off of Central America (NMFS, 2004), the Northern Gulf of Mexico (GOMEX) (L–DEO, 2003; NMFS, 2007), and the Arctic Ocean (NMFS, 2006).

For the ETP, one and three 105 in³ GI-gun arrays were modeled, with a source output level of 241 dB re 1 $\mu Pa_{(0\text{-}p)}$ and 247 dB re 1 $\mu Pa_{(p\text{-}p)}$. For the GOMEX survey, GI-gun source output levels were (a) 237 dB re 1 $\mu Pa_{(0\text{-}p)}$ and 243 dB re 1 $\mu Pa_{(p\text{-}p)}$; and (b) 229 dB re 1 $\mu Pa_{(0\text{-}p)}$ and 236 dB re 1 $\mu Pa_{(p\text{-}p)}$. L–DEO's modeling of a single G-gun has also been applied to a seismic survey in the Arctic Ocean. The source level for the 210 in³ G-gun was 246 dB re 1 $\mu Pa_{(0\text{-}p)}$ and 253 dB re 1 $\mu Pa_{(p\text{-}p)}$. However, because the G-gun generates more energy than a GI-gun of the same size, the distances for received sound levels may be an overestimate for the lower energy dual 105 in³ GI-gun source used in the ARC12 research project. The GI-gun is comprised of two, independently fired air chambers (the generator and the injector) to tune air bubble oscillation and minimize the amplitude of the acoustic pulse. In contrast, the G-gun is comprised of one chamber and generates a single, less refined injection of air into the water, which produces more acoustic energy than that of the GI-gun.

TABLE 1—MODELED SOUND PROPAGATION RADII FOR LOW-ENERGY AIR-GUN ARRAYS FOR DEPTHS >1,000 m

Air-gun configuration	Water depth (m)	Tow depth (m)	Received sound levels (dB re 1 μPa RMS)			
			190	180	160	Location
						Distance (m)
1 GI-gun 105 in^3	>1,000	2.5	10	27	275	ETP.
3 GI-guns 105 in^3	>1,000	2.5	26	82	823	ETP.
2 GI-guns 105 in^3 (a)	>1,000	3	20	69	670	GOMEX.
2 GI-guns 105 in^3 (b)	>1,000	6	15	50	520	GOMEX.
1 G-gun 210 in^3	>1,000	9	20	78	698	Arctic.

Based on extant modeling, the proposed sound propagation radii for the two 105 in^3 GI-guns are 20 m, 70 m, and 670 m for the 190, 180, and 160 dB re 1 μPa rms isopleths, respectively (Table 2). Empirical data indicate that for deep water (>1,000 m), the L–DEO model tends to overestimate the received sound level at a given distance (Tolstoy *et al.,* 2004). It follows that the proposed sound propagation radii are considered conservative, and the actual distance at which received sound levels are 160 dB re 1 uPa rms or greater are expected to be less than that proposed. The proposed sound propagation radii are also consistent with recent modeling of sound propagation in the Southern Ocean (Breitzke and Bohlen, 2010).

TABLE 2—SOUND PROPAGATION RADII FOR THE DUAL 105 IN^3 GI-GUN ARRAY PROPOSED FOR USE IN THE ARC12 RESEARCH PROJECT

Acoustic source	Frequency (Hz)	Source level (dB re 1 μPa)	Received levels (dB re 1 μPa)		
			190	180	160
			Distance (m)		
2 GI-guns 105 in^3	10–188	~240$_{(peak\text{-}to\text{-}peak)}$	20	70	670

Considering the circumference of the area ensonified to the 160 dB isopleth extends to 1,340 m (twice the 670 m radius); that the GI-gun array is towed approximately 2–9 m below the surface at a speed of 4 knots (7.4 km/hr), and that the seismic oceanographic surveys will be conducted for 14 days for 24 hrs/day, the Navy estimates that the seismic oceanographic survey distance will encompass 1,344 Nm (2,489 km). Multiplying the total linear distance of the seismic oceanographic survey by the area ensonified to the 160 dB isopleth (1,340 m), yields a total ensonified area of approximately 3,335 km^2.

Ocean Surveyor ADCP

A hull-mounted Teledyne RD Instruments Ocean Surveyor ADCP (TRDI OS ADCP) will be operated at 38 kHz with acoustic output pressure of 224 dB re 1 μPa. The beamwidth will be 30 degrees off nadir and the acoustic pressure along each beam is estimated at 180 dB re 1 μPa at 114 m. The TRDI OS ADCP will operate concurrently with the GI-gun array and intermittently to map the distribution of water currents and suspended materials in the water column.

Lowered ADCP (L–ADCP)

A lowered Teledyne RD Instruments ADCP (L–ADCP) will be mounted on a rosette with a conductivity-temperature-depth gauge. The beamwidth will be 30 degrees off nadir and the output pressure will be 216 dB re 1 μPa at 300 kHz. The L–ADCP will be deployed intermittently to collect hydrographic data.

Moored ADCP

Up to four long-range ADCPs (LR–ADCPs) will be anchored on the sea floor using 400 kilograms (kg) of scrap iron (assemblage of four scrap locomotive wheels). LR–ADCPs will be moored to the sea floor at an estimated 3,000 m, such that they float at a depth of 500 m below the sea surface. LR–ADCPs will be suspended from the iron anchorage assemblies by a single line comprised of ¾-inch (in) nylon line and ½-in wire rope. The LR–ADCPs and suspension line will be recovered at the close of the study via an acoustic release and the iron anchorage assembly will remain on the sea floor. The acoustic source frequency will be 75 kHz with an output pressure level of 200 dB re 1 μPa at a rate of once per second. The beamwidth will be four degrees and directed vertically upward at 20 degrees. LR–ADCPs will be moored several kilometers apart, in the area of the ARC/ACC frontal system, with exact mooring locations to be determined onsite due to the natural meander of the currents and front. LR–ADCPs will operate continuously for the estimated 14 days of research before being recovered.

Multibeam Echosounder

The *Melville* will operate a hull-mounted Kongsberg EM 122 multibeam echosounder (MBES) at 10.5 to 13 kilohertz (kHz). The MBES will generate acoustic pulses in a downward fan-shaped beam, one degree fore-aft and 150 degrees athwartship. For deep water operations, each ''ping'' is comprised of eight (>1,000 m depth; 3,280 ft) or four (<1,000 m depth; 3,280 ft) successive acoustic transmissions 2 to 100 milliseconds (ms) in duration. The maximum sound pressure output level would be 242 dB re 1 μPa.

Sub-bottom Profiler

The *Melville* will also operate a Knudsen 320B/R sub-bottom profiler (SBP). The SBP is dual-frequency and operates at 3.5 and 12 kHz with maximum power outputs of 10 kilowatts (kW) and 2 kW, respectively. The pulse length used during this study will be 0.8 to 24 ms, relative to water depth and sediment characteristics. The pulse repetition rates will be between 0.5 and 2 seconds (s) in shallow water and up to 8 s in deep water. A common operational mode is broadcast of five

pulses at 1-s intervals followed by a 5-s delay. Maximum acoustic output pressure will be 211 dB re 1 μPa at 3.5 kHz; however, systems are typically used at 80 percent capacity. The SPB emits a downward conical beam with a width of about 30 degrees.

Comments and Responses

A proposed authorization and request for public comments was published in the **Federal Register** on November 21, 2011 (76 FR 71940). During the 30-day public comment period, NMFS received comments from the Marine Mammal Commission (Commission) and one individual. The individual was generally opposed to the proposed authorization and the killing of marine mammals. The Navy did not request and NMFS is not authorizing the serious injury or mortality of marine mammals. All comments have been compiled and posted at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* Any application-specific comments that address the statutory and regulatory requirements or findings NMFS must make to issue an IHA are addressed in this section of the **Federal Register** notice.

Comment 1: The Commission recommends that NMFS require the Navy to re-estimate the proposed exclusion and buffer zones for the two-airgun array and associated numbers of marine mammal takes using operational and site-specific environmental parameters. If the exclusion and buffer zones are not re-estimated, the Commission recommends that NMFS require the Navy to provide a detailed justification for basing the exclusion and buffer zones for the proposed survey in the southwestern Indian ocean on modeling that relies on measurements from the Gulf of Mexico.

Response: NMFS disagrees that the Navy should re-estimate the proposed exclusion and buffer zones for the two-airgun array. The proposed exclusion and buffer zones are based on modeled and measured data from L–DEO. Empirical data indicate that for deep water (>1,000 m), L–DEO-modeled data tends to overestimate the received sound level at a given distance. The ARC12 research project will be conducted in waters up to 5,000 m (16,404 ft) in depth. Therefore, the sound propagation radii are considered conservative and the Navy expects the actual distance at which received levels reach 160 dB to be less. The sound propagation radii are also consistent with recent modeling of sound propagation in the Southern Ocean (Breitzke and Bohlen, 2010).

Comment 2: The Commission recommends that NMFS require the Navy to use species-specific mean maximum densities, rather than the mean average densities, and then re-estimate the anticipated number of takes.

Response: NMFS disagrees that the Navy should use mean maximum densities, rather than mean average densities. Marine mammal population density estimates were derived from the Navy Global Marine Species Density Database, which includes the highest quality, spatially modeled density data where available. Population density estimates were also evaluated relative to data on marine mammal population distributions, occurrence, status, and critical habitat, derived from: the Ocean Biogeographic Information System Seamap (OBIS–SEAMAP); the International Union for Conservation of Nature (IUCN, 2010); the Convention on the Conservation of Migratory Species of Wild Animals (CMS, 2010); NatureServe Explorer (NatureServe, 2010); the International Whaling Commission (IWC); and NOAA Fisheries Office of Protected Resources. The average (or best) population density data was used in exposure assessment, and is considered the most reasonable estimate to employ for this research endeavor, location, and time of year. The average (or best) population density data is also consistent with what NMFS has analyzed for previous seismic surveys.

Due to lack of detailed information on marine mammal population distributions and densities in the research area, informed assumptions on the exact distribution patterns of animals cannot be made. Therefore, exposure estimates are based on uniform distribution of marine mammals over the area for which population data is available. Many species are unlikely to be found in numbers that peak population density estimates suggest. During the January-February period, when the ARC12 research project is planned, many marine mammals will be outside of the action area.

Comment 3: The Commission recommends that NMFS require the Navy to extend the pause in airgun activity following a marine mammal sighting in the exclusion zone to cover the full dive times of all species likely to be encountered.

Response: NMFS believes that 15 min (for small whales and pinnipeds) and 30 min (for large whales) are appropriate periods of time to wait if the protected species observer (PSO) has not re-sighted the animal. Full, or maximum, dive times vary widely among species and NMFS considers 30 min a reasonable time to cease airgun activity on sighting of an animal, and sufficient to allow enough distance to develop between the research vessel and the animal. NMFS believes that the proposed monitoring and mitigation efforts will be effective in minimizing any incidental exposure of marine mammals to sounds generated by the airguns.

Description of the Marine Mammals in the Area of the Specified Activity

Forty marine mammal species are known to inhabit waters between South Africa and Antarctica. Six of these species are listed as endangered under the United States Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) and depleted under the MMPA, including the southern right (*Eubalaena australis*), humpback (*Megaptera novaeangliae*), sei (*Balaenoptera borealis*), fin (*Balaenoptera physalus*), blue (*Balaenoptera musculus*), and sperm (*Physeter macrocephalus*) whales. Most of the species occurring in the area spend the austral summer in preferred Antarctic habitats, and the austral winter in areas northward around the east and west coasts of Africa, South America, Australia, and islands of the Indian Ocean. Estimates of marine mammal population densities, anticipated occurrence, primary habitat(s), and ESA listing status for the forty marine mammal species were provided in the notice of proposed IHA (76 FR 71940, November 21, 2011).

Potential Effects of the Specified Activity on Marine Mammals

Acoustic stimuli generated by the operation of airguns, which introduce sound into the marine environment, may have the potential to cause Level B harassment of marine mammals in the proposed survey area. The effects of sounds from airgun operations might include one or more of the following: tolerance, masking of natural sounds, behavioral disturbance, temporary or permanent impairment, or non-auditory physical or physiological effects (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007).

Permanent hearing impairment, in the unlikely event that it occurred, would constitute injury, but temporary threshold shift (TTS) is not considered an injury but rather a type of Level B harassment (Southall *et al.,* 2007). Although the possibility cannot be entirely excluded, it is unlikely that the proposed project would result in any cases of temporary or permanent hearing impairment, or any significant

non-auditory physical or physiological effects. Based on the available data and studies described here, some behavioral disturbance is expected, but NMFS expects the disturbance to be localized and short-term.

The notice of the proposed IHA (76 FR 71940, November 21, 2011) included a discussion of the effects of sounds from seismic activities on cetaceans and pinnipeds. NMFS refers the reader to the Navy's application and NMFS' EA (*http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*) for additional information on the behavioral reactions by all types of marine mammals to seismic activities.

Anticipated Effects on Marine Mammal Habitat

The seismic survey will not result in any permanent impact on habitats used by the marine mammals in the survey area, including the food sources they use (*i.e.,* fish and invertebrates), and there will be no physical damage to any habitat. While it is anticipated that the specified activity may result in marine mammals avoiding certain areas due to temporary ensonification, this impact to habitat is temporary and reversible and was considered in the notice of the proposed IHA (76 FR 71940, November 21, 2011) as behavioral modification. The main impact associated with the proposed activity will be temporarily elevated noise levels and the associated direct effects on marine mammals, also discussed in the notice of the proposed IHA.

Anticipated Effects on Fish

One reason for the adoption of airguns as the standard energy source for marine seismic surveys is that, unlike explosives, they have not been associated with large-scale fish kills. However, existing information on the impacts of seismic surveys on marine fish populations is limited. There are three types of potential effects of exposure to seismic surveys: (1) Pathological, (2) physiological, and (3) behavioral. A general synopsis of the available information on the effects of exposure to seismic and other anthropogenic sound as relevant to fish was provided in the notice of proposed IHA (76 FR 71940, November 21, 2011).

Anticipated Effects on Invertebrates

The existing body of information on the impacts of seismic survey sound on marine invertebrates is very limited. However, there is some unpublished and very limited evidence of the potential for adverse effects on invertebrates, thereby justifying further discussion and analysis of this issue. The three types of potential effects of exposure to seismic surveys on marine invertebrates are pathological, physiological, and behavioral. Based on the physical structure of their sensory organs, marine invertebrates appear to be specialized to respond to particle displacement components of an impinging sound field and not to the pressure component (Popper *et al.,* 2001). A synopsis of available information on the effects of exposure to seismic survey sound on species of decapod crustaceans and cephalopods, the two taxonomic groups of invertebrates on which most such studies have been conducted was included in the notice of proposed IHA (76 FR 71940, November 21, 2011).

In conclusion, NMFS has determined that the Navy's marine seismic survey is not expected to have any habitat-related effects that could cause significant or long-term consequences for marine mammals or the food sources that they utilize.

Mitigation

In order to issue an incidental take authorization (ITA) under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and the availability of such species or stock for taking for certain subsistence uses.

The Navy will implement the following mitigation measures during the seismic survey:

Exclusion Zones

The Navy used the exposure threshold isopleths applicable to cetaceans and pinnipeds, as well as extant models of same/similar GI-gun sources and water depths, as the basis for their exclusion zones. The exclusion zone will be 70 m for the 180 dB exposure thresholds and will be employed for monitoring.

Speed or Course Alteration

If a marine mammal is observed moving on a path toward an exclusion zone, an attempt will be made to adjust the vessel speed or course in order to minimize the likelihood of an animal entering an exclusion zone. Speed and course alterations are not always possible when towing a long GI-gun array, but are considered possible options given the use of a dual GI-gun array.

Shut-Down Procedures

The Navy will shut down the operating airgun array if a marine mammal is seen within or approaching an exclusion zone. The Navy will implement a shut-down if a cetacean is observed within or approaching the 180 dB isopleth (70 m). Airgun activity will not resume until the marine mammal has cleared the exclusion zone or has not been seen for 15 (dolphins) to 30 minutes (whales).

Ramp-Up Procedures

Ramp-up will be comprised of gradually activating the dual GI-guns in sequence over a period of about 30 min until the desired operating level is reached. This should allow any marine mammals in the area to avoid the maximum sound source. Airguns will be activated in a sequence such that the source level of the array will increase in steps not exceeding 6 dB per 5-min periods over a total duration of 30 min. During ramp-up, protected species observers will monitor the exclusion zones for marine mammals and a shutdown will be implemented if an animal is detected in or approaching an exclusion zone.

NMFS carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: (1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals; (2) the proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and (3) the practicability of the measure for applicant implementation.

Based on our evaluation of the applicant's proposed measures, NMFS determined that the above mitigation measures provide the means of effecting the least practicable impacts on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth ''requirements pertaining to the monitoring and reporting of such taking.'' The MMPA implementing

regulations at 50 CFR 216.104 (a)(13) indicate that requests for IHAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area.

Monitoring

The Navy will sponsor marine mammal monitoring during the proposed activity, in order to implement the mitigation measures that require real-time monitoring, and to satisfy the monitoring requirements of the IHA. The Navy's monitoring plan is described below.

Vessel-Based Visual Monitoring

The Navy will continuously monitor the harassment isopleths during daytime and nighttime airgun operations. Visual monitoring will be comprised of three protected species observers (PSOs) typically working in shifts of 4-hr durations or less. A PSO platform is located one deck below and forward of the bridge (12.5 m [41 ft] above the waterline), providing a relatively unobstructed 180 degree view forward. Aft views can be obtained along both the port and starboard decks. During daytime operations, PSOs will systematically survey the area around the vessel with reticle and big-eye binoculars and the naked eye. A clinometer will be used to determine distances of animals in close proximity to the vessel, and hand-held fixed rangefinders and distance marks on the *Melville's* side rails will be used to measure the exact location of the exclusion zones. During nighttime operations, night vision devices will be available if required.

The PSOs will be in wireless communication with ship's officers on the bridge and scientists in the vessel's operations laboratory, so they can promptly advise of the need for avoidance maneuvers or seismic source shutdown. Shutdown of GI-gun operations will occur immediately upon observation/detection of any marine mammal in an exclusion zone. Following a shutdown, GI-gun ramp-up will not be initiated until PSOs have confirmed the marine mammal is no longer observed/detected for a period of 15 or 30 minutes (depending on species). If a marine mammal is outside of an exclusion zone and observed by a PSO to exhibit abnormal behaviors consistent with signs of harassment (e.g., avoidance, dive patterns, multiple changes in direction), operation of the GI-guns will cease until the animal moves out of the area or is not resighted for a period of 30 min.

PSO Data and Documentation

PSOs will record data to estimate the numbers of marine mammals exposed to various received sound levels and to document apparent disturbance reactions or lack thereof. Data will be used to estimate numbers of animals potentially 'taken' by harassment (as defined in the MMPA). They will also provide information needed to order a power down or shut down of the airguns when a marine mammal is within or nearing the exclusion zone.

When a sighting is made, the following information will be recorded:

1. Time, location, heading, speed, activity of the vessel, sea state, visibility, and sun glare;
2. Species, group size, age, individual size, sex (if determinable);
3. Behavior when first sighted and subsequent behaviors;
4. Bearing and distance from the vessel, sighting cue, exhibited reaction to the airgun sounds or vessel (*e.g.,* none, avoidance, approach, etc.), behavioral pace, and depth at time of detection;
5. Fin/fluke characteristics and angle of fluke when an animal submerges to determine if the animal executed a deep or surface dive;
6. Type and nature of sounds heard; and
7. Any other relevant information.

When shutdown is required for mitigation purposes, the following information will be recorded:

1. The basis for decisions resulting in shutdown of the GI-guns;
2. Information needed to estimate the number of marine mammals potentially taken by harassment;
3. Information on the frequency of occurrence, distribution, and activities of marine mammals in the study area;
4. Information on the behaviors and movements of marine mammals during and without operation of the GI-guns; and
5. Any adverse effects the shutdown had on the research.

PSOs will provide estimates of the numbers of marine mammals exposed to the GI-gun source and any disturbance reactions exhibited, or the lack thereof. Observations and data collection will aim to provide estimates of the actual numbers of animals taken, verify the level of harassment, aide in assessment of impacts on populations on conclusion of the study, and increase knowledge of species in the study area. Observations and data collection will also aim to provide information that will allow for verifying or disputing that the takings are negligible.

Reporting

The Navy will submit a report to NMFS within 90 days after the end of the cruise. The report will describe the operations that are conducted and sightings of marine mammals near the operations. The report will provide full documentation of methods, results, and interpretation pertaining to all monitoring. The 90-day report will summarize the dates and locations of seismic operations, and all marine mammal sightings (dates, times, locations, activities, associated seismic survey activities). The report will also include estimates of the number and nature of exposures that could result in ''takes'' of marine mammals.

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by the IHA (if issued), such as an injury (Level A harassment), serious injury, or mortality (*e.g.,* ship-strike, gear interaction, and/or entanglement), the Navy will immediately cease the specified activities and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS. The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Name and type of vessel involved;
- Vessel's speed during and leading up to the incident;
- Description of the incident;
- Status of all sound source use in the 24 hrs preceding the incident;
- Water depth;
- Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Description of all marine mammal observations in the 24 hrs preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities will not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with the Navy to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The Navy may not resume their activities until notified by NMFS via letter, email, or telephone.

In the event that the Navy discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less

than a moderate state of decomposition as described in the next paragraph), the Navy will immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS. The report must include the same information identified in the paragraph above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with the Navy to determine whether modifications in the activities are appropriate.

In the event that the Navy discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in the IHA (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the Navy will report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS within 24 hrs of the discovery. The Navy will provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Only take by Level B harassment is authorized as a result of the physical oceanographic survey off the southern coast of Africa. Acoustic stimuli (i.e., increased underwater sound) generated during the operation of the dual airgun array may have the potential to cause marine mammals in the survey area to be exposed to sounds at or greater than 160 dB or cause temporary, short-term changes in behavior. There is no evidence that the planned activities will result in injury, serious injury, or mortality within the specified geographic area for which the Navy seeks the IHA. NMFS determined that the required mitigation and monitoring measures will minimize any potential risk for injury or mortality.

NMFS included an in-depth discussion of the methods used to calculate the densities of marine mammals in the area of the survey in a previous notice for the proposed IHA (76 FR 71940, November 21, 2011). A summary is included here.

The estimates are based on a consideration of the number of marine mammals that could be disturbed appreciably by operations with the GI-gun array to be used during multiple transects totaling approximately 2,489 km (1,547 mi). Density estimates on the marine mammal species in the survey area are based on data derived from a number of sources: the Ocean Biogeographic Information System OBIS Seamap (OBIS–SEAMP); the International Union for Conservation of Nature (IUCN, 2010); the Convention on the Conservation of Migratory Species of Wild Animals (CMS, 2010); NatureServe Explorer (NatureServe, 2010); the International Whaling Commission (IWC); NOAA Fisheries Office of Protected Resources; and the Navy Marine Species Density Database (NMSDD); unless otherwise cited.

One method of estimating takes assumes marine mammals are uniformly distributed throughout a given area, although this is not representative of the real world distribution of marine mammals in any given geographic region. Marine mammals are typically found grouped in pods, concentrate around preferred breeding and foraging habitats, and most species follow seasonal migratory patterns and routes. However, due to lack of substantive information on marine mammal population distributions and densities in the area of the proposed action, informed assumptions on distribution patterns cannot be made, and exposure estimates are based on uniform distribution of marine mammals over the area for which population data are available. Bearing these factors in mind, the exposure estimates provided are considered reasonable approximations of potential exposure, and based on the best available information.

Table 3 provides estimates of the minimum, average (considered the best estimate), and maximum marine mammal population densities in the area of the proposed study during the austral summer, anticipated occurrence of each species, and requested take authorization. For all species evaluated, average population density estimates were used for calculation of the number of marine mammals that may be exposed. NMFS has used average (or best) population density estimates when analyzing the allowable harassment for ESA-listed marine mammals incidental to marine seismic surveys for scientific research purposes (*e.g.,* see NMFS 2010c, 2011c). The results of the monitoring reports from those surveys, and others, show that the use of the average estimate is appropriate for provision of reasonable estimates of exposure and harassment.

Because extant mathematical models poorly simulate and predict the natural meander of the AC, ARC, and ARC/ACC frontal system, and due to unpredictable weather conditions, it is not possible to accurately predict the exact location where seismic oceanographic survey transects would occur. For this reason, the minimum, average, and maximum population densities given in Table 3 are the mean of the population densities for each species within the coordinates of 36°S to 43°S, and 19°E to 30°E. The front is estimated to be phase-locked between 36°S to 40°S, and 21°E to 27°E; however, the position of the front can vary by up to 100 km (generally west, east, and south of this estimated location). Because the precise location of the seismic oceanography survey transects cannot be known in advance, it is not possible to accurately differentiate the numbers of marine mammals that may be exposed in waters of the global commons (high seas), as opposed to within the South African exclusive economic zone (EEZ). Because the specific location of research activities cannot be predetermined, due to the variables described, this assessment conservatively estimates that all exposures occur in waters of the global commons (high seas) where estimated population density estimates are higher.

Based on the best available population density estimates, 2,412 cetacea may potentially be exposed to sound pressure levels ≥160 dB re 1 μPa.rms. Of the total number of cetaceans that are estimated to be exposed, 62 are listed as endangered under the ESA: 29 fin (<0.2% of the southern hemisphere population), 1 humpback (<0.004% of the southern hemisphere population), 11 sei (<0.2% of the population south of 30°S), 1 southern right (<0.004% of the southern hemisphere population), and 20 sperm (<0.02% of the southern hemisphere population) whales. For all species, the number of individuals that would be exposed to sounds ≥160 dB re 1 μPa.rms is less than 0.2 percent of the given species' population for which regional population density estimates are known.

TABLE 3—ESTIMATED NUMBER OF MARINE MAMMALS EXPOSED TO ≥160 dB DURING THE PROPOSED ACTIVITY

Species	ESA[1]	Density			Authorized take
		Best	Min	Max	
Mysticetes:					
Antarctic minke whale	NL	<0.01	<0.01	0.01	14
Bryde's whale	NL	<0.01	<0.01	<0.01	1
Common minke whale	NL	0.03	0.02	0.05	103
Fin whale	E	0.01	<0.01	0.01	29
Humpback whale	E	<0.01	<0.01	<0.01	1
Sei whale	E	<0.01	<0.01	<0.01	11
Odontocetes:					
Arnoux's beaked whale	NL	<0.01	<0.01	0.01	15
Cuvier's beaked whale	NL	<0.01	<0.01	<0.01	12
Gray's beaked whale	NL	<0.01	<0.01	<0.01	11
Hector's beaked whale	NL	<0.01	<0.01	<0.01	9
Southern bottlenose whale	NL	<0.01	<0.01	0.01	21
Southern right whale	E	<0.01	<0.01	<0.01	1
Sperm whale	E	0.01	<0.01	0.01	20
Strap-toothed whale	NL	<0.01	<0.01	<0.01	9
True's beaked whale	NL	<0.01	<0.01	<0.01	10
Common bottlenose dolphin	NL	0.04	0.01	0.10	141
False killer whale	NL	<0.01	<0.01	<0.01	1
Hourglass dolphin	NL	<0.01	<0.01	<0.01	3
Killer whale	NL	0.01	<0.01	0.01	30
Long-beaked common dolphin	NL	<0.01	<0.01	<0.01	1
Long-finned pilot whale	NL	0.05	<0.01	0.10	180
Pantropical spotted dolphin	NL	0.01	<0.01	0.01	20
Pygmy killer whale	NL	<0.01	<0.01	<0.01	1
Risso's dolphin	NL	0.06	0.04	0.10	210
Rough-toothed dolphin	NL	<0.01	<0.01	<0.01	2
Short-beaked common dolphin	NL	0.24	0.13	0.38	799
Short-finned pilot whale	NL	0.03	0.01	0.04	86
Southern right whale dolphin	NL	0.01	<0.01	0.02	29
Spinner dolphin	NL	<0.01	<0.01	0.01	16
Striped dolphin	NL	0.19	0.03	0.31	626

Exposure estimates are based on marine mammal population density estimates relative to the total area ensonified by the GI-gun array, and evaluated for exposure to the 160 dB isopleth. Multiplying the total area ensonified during the seismic oceanography survey by the population estimate for each species, yields the estimated number of marine mammals exposed to sound pressures >160 dB. The total ensonified area is about 3,335 km^2 and assumes no area of overlap during the survey transects, which will cover a total distance of 2,489 km.

Negligible Impact and Small Numbers Analysis and Preliminary Determination

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * *an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to:

(1) The number of anticipated mortalities;

(2) The number and nature of anticipated injuries;

(3) The number, nature, and intensity, and duration of Level B harassment; and

(4) The context in which the takes occur.

As mentioned previously, NMFS estimates that 30 species of marine mammals could be potentially affected by Level B harassment over the course of the IHA. For each species, these numbers are small (less than one percent) relative to the population size.

No injuries, serious injuries, or mortalities are anticipated to occur as a result of the Navy's planned physical oceanographic survey, and none are authorized by NMFS. Additionally, for reasons presented in the notice of proposed IHA (76 FR 71940, November 21, 2011), temporary hearing impairment (and especially permanent hearing impairment) is not anticipated to occur during the proposed specified activity. Only short-term behavioral disturbance is anticipated to occur due to the brief and sporadic duration of the survey activities. No mortality or injury is expected to occur, and due to the nature, degree, and context of behavioral harassment anticipated, the activity is not expected to impact rates of recruitment or survival.

NMFS has determined, provided that the aforementioned mitigation and monitoring measures are implemented, that the impact of conducting a physical oceanographic survey off the southern coast of Africa, may result, at worst, in a temporary modification in behavior and/or low-level physiological effects (Level B harassment) of small numbers of certain species of marine mammals.

Of the ESA-listed marine mammals that may potentially occur in the survey area, blue and southern right whale populations are thought to be increasing; population trends for fin, humpback, sei, and sperm whales are not well known in the southern hemisphere. However, no take of blue whales was requested because of the low likelihood of encountering this species during the survey. There is no designated critical habitat for marine mammals in the survey area. There are also no important habitat areas (*e.g.,* breeding, calving, feeding, etc.) for marine mammals known around the area that would overlap with the survey. While behavioral modifications, including temporarily vacating the area during the operation of the airgun(s),

may be made by these species to avoid the resultant acoustic disturbance, the availability of alternate areas within these areas and the short and sporadic duration of the research activities, have led NMFS to determine that this action will have a negligible impact on the species in the specified geographic region.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS finds that the Navy's planned research activities (and the resulting total taking from the survey): (1) Will result in the incidental take of small numbers of marine mammals, by Level B harassment only; (2) will have a negligible impact on the affected species or stocks; and (3) will have mitigated impacts to affected species or stocks of marine mammals to the lowest level practicable.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks will not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act

Of the species of marine mammals that may occur in the proposed survey area, six are listed as endangered under the ESA, including the blue, fin, humpback, sei, southern right, and sperm whales. Under section 7 of the ESA, the Navy initiated formal consultation with NMFS, Office of Protected Resources, Endangered Species Act Interagency Cooperation Division, on this survey. NMFS' Office of Protected Resources, Permits and Conservation Division, also initiated formal consultation under section 7 of the ESA with NMFS' Office of Protected Resources, Endangered Species Act Interagency Cooperation Division, to obtain a Biological Opinion evaluating the effects of issuing the IHA on threatened and endangered marine mammals and, if appropriate, authorizing incidental take.

The Biological Opinion was issued on January 20, 2012, and concluded that the specified activity and issuance of the IHA are not likely to jeopardize the continued existence of blue, fin, humpback, sei, southern right, or sperm whales. The Biological Opinion also concluded that designated critical habitat for these species does not occur in the survey area and would not be affected by the survey. The Navy, in addition to the mitigation and monitoring requirements included in the IHA, will be required to comply with the Terms and Conditions of the Incidental Take Statement corresponding to NMFS' Biological Opinion issued to both the Navy and NMFS' Office of Protected Resources, Permits and Conservation Division.

National Environmental Policy Act (NEPA)

To meet NMFS' NEPA requirements for the issuance of an IHA to the Navy, NMFS prepared an Environmental Assessment (EA), titled ''Issuance of an Incidental Harassment Authorization to the Navy to Take Marine Mammals by Harassment Incidental to a Physical Oceanographic Survey in the Southwest Indian Ocean.'' NMFS provided relevant environmental information to the public through the notice for the proposed IHA (76 FR 71940, November 21, 2011) and has considered public comments received in response prior to finalizing the EA and deciding whether or not to issue a Finding of No Significant Impact (FONSI).

NMFS concluded that issuance of an IHA would not significantly affect the quality of the human environment and has issued a FONSI. Therefore, it is not necessary to prepare an Environmental Impact Statement for the issuance of an IHA to the Navy for this activity. The EA and FONSI for this activity can be viewed on NMFS' Web site (*http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*).

Authorization

As a result of these determinations, NMFS has issued an IHA to the Navy for conducting a physical oceanographic survey off the southern coast of Africa, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: January 20, 2012.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–1708 Filed 1–25–12; 8:45 a.m.]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission. Sunshine Act Meetings.

TIME AND DATE: 10 a.m., Friday February 17, 2012.

PLACE: 1155 21st St. NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance and Enforcement Matters. In the event that the times or dates of these or any future meetings change, an announcement of the change, along with the new time and place of the meeting will be posted on the Commission's Web site at *http://www.cftc.gov.*

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, (202) 418–5084.

Sauntia S. Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2012–1769 Filed 1–24–12; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission. Sunshine Act Meetings.

TIME AND DATE: 10 a.m., Friday February 24, 2012.

PLACE: 1155 21st St. NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance and Enforcement Matters. In the event that the times or dates of these or any future meetings change, an announcement of the change, along with the new time and place of the meeting will be posted on the Commission's Web site at *http://www.cftc.gov.*

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, (202) 418–5084.

Sauntia S. Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2012–1771 Filed 1–24–12; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 10 a.m., Friday February 10, 2012.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance and Enforcement Matters. In the event that the times or dates of these or any future meetings change, an announcement of the change, along with the new time and place of the meeting will be posted on the Commission's Web site at *http://www.cftc.gov*

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, (202) 418–5084.

Sauntia S. Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2012–1774 Filed 1–24–12; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission. Sunshine Act Meetings.

TIME AND DATE: 10 a.m., Friday February 3, 2012.

PLACE: 1155 21st St., NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance and Enforcement Matters. In the event that the times or dates of these or any future meetings change, an announcement of the change, along with the new time and place of the meeting will be posted on the Commission's Web site at *http://www.cftc.gov.*

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, (202) 418–5084.

Sauntia S. Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2012–1772 Filed 1–24–12; 4:15 pm]

BILLING CODE 6351–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Thursday, February 2, 2012, 9 a.m.–12 p.m.

PLACE: Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public.

MATTERS TO BE CONSIDERED:

1. *Decisional Matter:* Infant Swings—Notice of Proposed Rulemaking.
2. *Briefing Matter:* ASTM F'963 '11.

A live webcast of the Meeting can be viewed at *www.cpsc.gov/webcast.*

TIME AND DATE: Thursday, February 2, 2012; 2 p.m.–3 p.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Closed to the Public.

MATTER TO BE CONSIDERED:

Compliance Status Report

The Commission staff will brief the Commission on the status of compliance matters.

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: January 24, 2012.

Todd A. Stevenson,

Secretary.

[FR Doc. 2012–1847 Filed 1–24–12; 4:15 p.m.]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 12–C0006]

Hewlett-Packard Company, Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the **Federal Register** in accordance with the terms of 16 CFR 1118.20(e). Published below is a provisionally-accepted Settlement Agreement with Hewlett-Packard Company, containing a civil penalty of $425,000.00, within twenty (20) days of service of the Commission's final Order accepting the Settlement Agreement.[1]

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by February 10, 2012.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 12–C0006, Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Room 820, Bethesda, Maryland 20814–4408.

FOR FURTHER INFORMATION CONTACT: Amy S. Colvin, General Attorney, Division of Enforcement and Information, Office of the General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814–4408; telephone (301) 504–7639.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

Dated: January 20, 2012.

Todd A. Stevenson,

Secretary.

Settlement Agreement

1. In accordance with 16 CFR 1118.20, Hewlett-Packard Company (''HP'') and the staff (''Staff'') of the United States Consumer Product Safety Commission (''Commission'') hereby enter into this Settlement Agreement (''Agreement'') under the Consumer Product Safety Act (''CPSA''). The Agreement and the incorporated attached Order (''Order'') resolve the Staff's allegations set forth below.

Parties

2. The Staff is the staff of the U.S. Consumer Product Safety Commission, an independent federal regulatory agency established pursuant to, and responsible for, the enforcement of the CPSA, 15 U.S.C. 2051–2089.

3. HP is a corporation, organized and existing under the laws of Delaware, with its principal executive office located in Palo Alto, California.

Staff Allegations

4. Between December 2004 and July 2006, HP imported approximately 32,000 lithium-ion battery packs (the ''Products'') that were shipped with, sold as accessories for use with, or provided as spare parts for the following HP notebook computers: the HP Pavilion dv1000, dv8000, and zd8000 series; the Compaq Presario v2000 and v2400 series; and the HP Compaq nc6110, nc6120, nc6140, nc6220, nc6230, nx4800, nx4820, nx6110, nx6120, and nx9600 models. HP, in addition to computer and electronics stores nationwide, as well as various Web retailers, sold notebook computers that contained the Products for between $700 and $3,000. The Products that were sold separately for use with the

[1] The Commission voted 3–1 to provisionally accept this Settlement Agreement and Order. Chairman Inez M. Tenenbaum and Commissioners Nancy A. Nord and Anne M. Northup voted to provisionally accept the Settlement Agreement and Order. Commissioner Robert S. Adler voted to reject the Settlement Agreement and Order. Chairman Tenenbaum and Commissioner Adler filed statements concerning this action which may be viewed on the Commission's Web site at *http://www.cpsc.gov/pr/tenenbaum01192012.pdf* and *http://www.cpsc.gov/pr/adler01192012.pdf,* respectively, or obtained from the Commission's Secretariat.

notebook computers retailed for between $100 and $160.

5. The Products are ''consumer products'' and, at all relevant times, HP was a ''manufacturer'' of these consumer products, which were ''distributed in commerce,'' as those terms are defined or used in sections 3(a)(5), (8), and (11) of the CPSA, 15 U.S.C. 2052(a)(5), (8), and (11).

6. The Products can overheat, posing a fire and burn hazard to consumers.

7. Between June 2005 and March 2007, HP received 17 reports of Product incidents, some of which involved flames or fires.

8. Between March 2007 and April 2007, HP conducted a study, from which it obtained additional information about the Products.

9. By September 2007, HP knew of approximately 22 reports of incidents involving the Products. In at least two of those incidents, the Products caused injury to consumers. In at least one of those incidents, the consumer apparently went to the hospital. HP did not receive any information on the consumer's injuries or treatment, if any.

10. Despite being aware of the information set forth in Paragraphs 6 through 9, HP did not report to the Commission until July 25, 2008. By that time, HP was aware of at least 31 reports of incidents involving the Products, which had caused injuries to at least two consumers. HP also was aware that at least one consumer apparently went to the hospital because of an incident involving the Product. Following consultation with the Commission from July to October 2008, the Products were recalled in October 2008.

11. Although HP had obtained sufficient information to reasonably support the conclusion that the Products contained a defect which could create a substantial product hazard, or created an unreasonable risk of serious injury or death, HP failed to immediately inform the Commission of such defect or risk, as required by sections 15(b)(3) and (4) of the CPSA, 15 U.S.C. 2064(b)(3) and (4). In failing to immediately inform the Commission, HP knowingly violated section 19(a)(4) of the CPSA, 15 U.S.C. 2068(a)(4), as the term ''knowingly'' is defined in section 20(d) of the CPSA, 15 U.S.C. 2069(d).

12. Pursuant to section 20 of the CPSA, 15 U.S.C. 2069, HP is subject to civil penalties for its knowing failure to report, as required under section 15(b) of the CPSA, 15 U.S.C. 2064(b).

Response Of Hewlett-Packard Company

13. On or about October 30, 2008, the Commission, in cooperation with HP and other companies, announced a voluntary recall of the Products. The recall announcement can be accessed at: *http://www.cpsc.gov/cpscpub/prerel/prhtml09/09035.html.*

14. HP denies all of the Staff's allegations, including, but not limited to, the allegations that the Products (or the notebooks with which the Products were used) could create an unreasonable risk of serious injury or death, or that HP violated the reporting requirements of the CPSA. HP further denies that it committed any violation of the CPSA ''knowingly,'' as that term is defined in Section 20(d) of the CPSA, 15 U.S.C. 2069(d). With respect to the voluntary recall of the Products and the communications/reports leading up to that recall, HP acted in accordance with the CPSA and in its customers' best interests.

Agreement of the Parties

15. Under the CPSA, the Commission has jurisdiction over this matter and over HP.

16. In settlement of the Staff's allegations, HP shall pay a civil penalty in the amount of four hundred twenty-five thousand dollars ($425,000.00) within 20 calendar days of receiving service of the Commission's final Order accepting the Agreement. The payment shall be made by check payable to the order of the United States Treasury.

17. In consideration of HP's payment, the Commission agrees to release HP, as well as its current and former directors, officers, trustees, employees, agents, and representatives from any civil claim that the Commission has or may have against those parties arising out of or relating to the recall of October 30, 2008, or the Staff's allegations that HP failed to report in a timely manner a potential hazard involving the Products.

18. The parties enter into this Agreement for settlement purposes only. The Agreement does not constitute an admission by HP or a determination by the Commission that HP knowingly violated the CPSA's reporting requirements. The Agreement by the parties of the terms and conditions set forth herein is without any adjudication of any issue of fact or law.

19. Upon provisional acceptance of the Agreement by the Commission, the Agreement shall be placed on the public record and published in the **Federal Register**, in accordance with the procedures set forth in 16 CFR 1118.20(e). If the Commission does not receive any written request not to accept the Agreement within fifteen (15) calendar days, the Agreement shall be deemed finally accepted on the 16th calendar day after the date it is published in the **Federal Register**, in accordance with 16 CFR 1118.20(f).

20. Upon the Commission's final acceptance of the Agreement and issuance of the final Order, HP knowingly, voluntarily, and completely waives any rights it may have in this matter to the following: (i) An administrative or judicial hearing; (ii) judicial review or other challenge or contest of the Commission's actions; (iii) a determination by the Commission of whether HP failed to comply with the CPSA and the underlying regulations; (iv) a statement of findings of fact and conclusions of law; and (v) any claims under the Equal Access to Justice Act.

21. The Commission may publicize the terms of the Agreement and the Order.

22. The Agreement and the Order shall apply to, and be binding upon, HP and each of its successors and/or assigns.

23. The Commission issues the Order under the provisions of the CPSA, and a violation of the Order may subject HP and each of its successors and/or assigns to appropriate legal action.

24. The Agreement may be used in interpreting the Order. Understandings, agreements, representations, or interpretations apart from those contained in the Agreement and the Order may not be used to vary or contradict their terms. The Agreement shall not be waived, amended, modified, or otherwise altered without written agreement executed by the party against whom such waiver, amendment, modification, or alteration is sought to be enforced.

25. If any provision of the Agreement and the Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Agreement and the Order, such provision shall be fully severable. The balance of the Agreement and the Order shall remain in full force and effect, unless the Commission and HP agree that severing the provision materially affects the purpose of the Agreement and Order.

26. This Agreement may be signed in counterparts.

Hewlett-Packard Company
Dated: December 15, 2011.

By: _____

James Mouton,
Hewlett-Packard Company,
Senior Vice President & General Manager,
Personal Systems Group,
PC Global Business Unit,
11445 Compaq Center Dr W,
Houston, TX 77070.

Dated: December 20, 2011.

Sarah L. Wilson, Esquire,
Covington & Burling LLP,

1201 Pennsylvania Ave. NW.,
Washington, DC 20004,
Counsel for Hewlett-Packard Company.
U.S. Consumer Product Safety Commission Staff.
Cheryl A. Falvey,
General Counsel.
Melissa V. Hampshire,
Assistant General Counsel.

Dated: January 9, 2012.

By: _____

Amy S. Colvin,
General Attorney, Division of Enforcement and Information, Office of the General Counsel.

Order

Upon consideration of the Settlement Agreement entered into between Hewlett-Packard Company (''HP''), and the U.S. Consumer Product Safety Commission (''Commission'') staff, and the Commission having jurisdiction over the subject matter and over HP, and it appearing that the Settlement Agreement and the Order are in the public interest, it is

Ordered that the Settlement Agreement be, and hereby is, accepted; and it is

Further ordered that HP shall pay a civil penalty in the amount of four hundred twenty-five thousand dollars ($425,000.00) within twenty (20) calendar days of service of the Commission's final Order accepting the Settlement Agreement. The payment shall be made by check payable to the order of the United States Treasury. Upon the failure of HP to make the foregoing payment when due, interest on the unpaid amount shall accrue and be paid by HP at the federal legal rate of interest set forth at 28 U.S.C. 1961(a) and (b).

Provisionally accepted and provisional Order issued on the 20th day of January, 2012.

By Order of the Commission:

Todd A. Stevenson,
Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 2012–1644 Filed 1–25–12; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2012–OS–0010]

Privacy Act of 1974; System of Records

AGENCY: U.S. Central Command, DoD.

ACTION: Notice to Amend a System of Records.

SUMMARY: The U.S. Central Command is amending a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective on February 27, 2012 unless comments are received which result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.*

Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Evlyn Hearne, USCENTCOM CCJ6–RDF, 7115 South Boundary Blvd., MacDill AFB, FL 33621–5101 or at (813) 827–7482.

SUPPLEMENTARY INFORMATION: The U.S. Central Command systems of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT**.

The U.S. Central Command proposes to amend one system of records notice from its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The proposed amendment is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: January 23, 2012.

Aaron Siegel,
Alternate OSD Federal Register Liaison Officer, Department of Defense.

DPR 41 DoD

SYSTEM NAME:

Combined Mild Traumatic Brain Injury Registry (September 30, 2010, 75 FR 60431).

CHANGES:

Change system ID to read ''FCENTCOM 01''.

* * * * *

[FR Doc. 2012–1615 Filed 1–25–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Availability for Exclusive, Non-Exclusive, or Partially-Exclusive Licensing of an Invention Concerning the Use of Magnetism To Inactivate, Kill and/or Remove Malaria Parasites From Transfused Blood and Apparatus and Kits for Accomplishing the Same

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: The invention relates to preventing and/or reducing the incidence of transfusion-related malaria, and the use of magnetism to accomplish this. Announcement is made of the availability for licensing of the invention set forth in U.S. Provisional Patent Application Serial No. 61/584,977, entitled ''Use of Magnetism to Inactivate, Kill and/or Remove Malaria Parasites from Transfused Blood and Apparatus and Kits for Accomplishing the same,'' filed on January 10, 2012. The United States Government, as represented by the Secretary of the Army, has rights to this invention.

ADDRESSES: Commander, U.S. Army Medical Research and Materiel Command, ATTN: Command Judge Advocate, MCMR–JA, 504 Scott Street, Fort Detrick, Frederick, MD 21702–5012.

FOR FURTHER INFORMATION CONTACT: For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808. For licensing issues, Dr. Paul Mele, Office of Research and Technology Applications (ORTA), (301) 619–6664, both at telefax (301) 619–5034.

SUPPLEMENTARY INFORMATION: The invention relates to methods of preventing or reducing the incidence of transfusion-related malaria, and, in particular, to inactivating, killing and/or removing malaria parasites from blood supplies such as whole blood, platelets, plasma or other components of blood.

Brenda S. Bowen,
Army Federal Register Liaison Officer.

[FR Doc. 2012–1657 Filed 1–25–12; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army

Intent To Grant an Exclusive License of U.S. Government-Owned Invention

AGENCY: Department of the Army, DoD.

ACTION: Notice.

SUMMARY: In accordance with 35 U.S.C. 209(e), and 37 CFR 404.7(a)(1)(i) and 37 CFR 404.7(b)(1)(i), announcement is made of the intent to grant an exclusive, revocable license to the invention claimed in International Patent Application No. PCT/US2009/060852 entitled ''Method and Device for Detection of Bioavailable Drug Concentration In A Fluid Sample,'' filed on October 15, 2009 (which claims the benefit of U.S. Provisional Patent Application Serial No. 61/105,604 filed October 15, 2008). The intended licensee is The University of Tennessee with its principal place of business at UT Conference Center, Suite 211, 600 Henley Street, Knoxville, TN 37996–4122.

ADDRESSES: Commander, U.S. Army Medical Research and Materiel Command, ATTN: Command Judge Advocate, MCMR–JA, 504 Scott Street, Fort Detrick, MD 21702–5012.

FOR FURTHER INFORMATION CONTACT: For licensing issues, Dr. Paul Mele, Office of Research & Technology Applications, (301) 619–6664. For patent issues, Ms. Elizabeth Arwine, Patent Attorney, (301) 619–7808; both at telefax (301) 619–5034.

SUPPLEMENTARY INFORMATION: Anyone wishing to object to grant of this license can file written objections along with supporting evidence, if any, within 15 days from the date of this publication. Written objections are to be filed with the Command Judge Advocate (see **ADDRESSES**).

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2012–1645 Filed 1–25–12; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army

Army Education Advisory Subcommittee Meeting Notice

AGENCY: Department of the Army, DoD.

ACTION: Notice of open meeting.

SUMMARY: Under the provisions to the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Sunshine in the Government Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the following Federal advisory committee meeting will take place:

Name of Committee: Board of Visitors, U.S. Army War College Subcommittee.

Date of Meeting: February 23, 2012.

Place of Meeting: U.S. Army War College, 122 Forbes Avenue, Carlisle, PA, Command Conference Room, Root Hall, Carlisle Barracks, Pennsylvania 17013.

Time of Meeting: 8:30 a.m.–13:00 p.m.

Proposed Agenda: The purpose of the meeting is to obtain, review, and evaluate information related to the continued academic growth and development of the United States Army War College. General deliberations leading to provisional findings will be referred to the Army Education Advisory Committee for deliberation by the Committee under the open-meeting rules.

FOR FURTHER INFORMATION CONTACT: To request advance approval or obtain further information, contact COL Donald Myers, (717) 245–3907 or *donald.myers@us.army.mil*

SUPPLEMENTARY INFORMATION: This meeting is open to the public. Interested persons may submit a written statement for consideration by the U.S. Army War College Subcommittee. Written statements should be no longer than two type-written pages and must address: the issue, discussion, and a recommended course of action. Supporting documentation may also be included as needed to establish the appropriate historical context and to provide any necessary background information.

Individuals submitting a written statement must submit their statement to the Alternate Designated Federal Officer at the following address: Attn: Alternate Designated Federal Officer, Dept, of Academic Affairs, 122 Forbes Avenue, Carlisle, PA 17013. At any point, however, if a written statement is not received at least 10 calendar days prior to the meeting, which is the subject of this notice, then it may not be provided to or considered by the U.S. Army War College Subcommittee until its next open meeting.

The Alternate Designated Federal Officer will review all timely submissions with the U.S. Army War College Subcommittee Chairperson, and ensure they are provided to members of the U.S. Army War College Subcommittee before the meeting that is the subject of this notice. After reviewing the written comments, the Chairperson and the Alternate Designated Federal Officer may choose to invite the submitter of the comments to orally present their issue during an open portion of this meeting or at a future meeting.

The Alternate Designated Federal Officer, in consultation with the U.S. Army War College Subcommittee Chairperson, may, if desired, allot a specific amount of time for members of the public to present their issues for review and discussion by the U.S. Army War College Subcommittee.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2012–1650 Filed 1–25–12; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF ENERGY

Proposed Agency Information Collection

AGENCY: U.S. Department of Energy.

ACTION: Notice and request for OMB review and comment.

SUMMARY: The Department of Energy (DOE) has submitted to the Office of Management and Budget (OMB) for clearance, a proposal for collection of information under the provisions of the Paperwork Reduction Act of 1995. The proposed collection will supersede the existing Form OE–781R, ''Monthly Electricity Imports and Exports Report''. The Form OE–781R is currently suspended and would be terminated with the implementation of the proposed Form EIA–111.

DATES: Comments regarding this collection must be received on or before February 27, 2012. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, please advise the DOE Desk Officer at OMB of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at (202) 395–4650.

ADDRESSES: Written comments should be sent to the DOE Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, 735 17th Street, NW., Washington, DC 20503, and to Michelle Bowles. To ensure receipt of the comments by the due date, email (eia-111@eia.gov) is recommended. The mailing address is the U.S. Department of Energy, U.S. Energy Information Administration, Mail Stop: EI–23 (Form EIA–111), 1000 Independence Avenue SW., Washington, DC 20585. Alternatively,

Ms. Bowles may be contacted by telephone at (202) 586–2430 or via fax at (202) 287–1960.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of any forms and instructions (the draft proposed collection) should be directed to Michelle Bowles at the address listed above. Forms and instructions are also available on the internet at: *http://beta.eia.gov/survey/form-eia111/proposed.pdf.*

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) OMB No.; (2) Information Collection Request Title; (3) Type of Request; (4) Purpose; (5) Annual Estimated Number of Respondents; (6) Annual Estimated Number of Total Responses; (7) Annual Estimated Number of Burden Hours; (8) Annual Estimated Reporting and Recordkeeping Cost Burden.

1. New.
2. Form EIA–111, Quarterly Electricity Imports and Exports Report.
3. Three-year approval.
4. Form EIA–111 collects U.S. electricity import and export data. The data are used to get an accurate measure of the flow of electricity into and out of the United States. The import and export data are reported by U.S. purchasers, sellers and transmitters of wholesale electricity, including persons authorized by Order to export electric energy from the United States to foreign countries, persons authorized by Presidential Permit to construct, operate, maintain, or connect electric power transmission lines that cross the U.S. international border, and U.S. Balancing Authorities that are directly interconnected with foreign Balancing Authorities. Such entities are to report monthly flows of electric energy received or delivered across the border, the cost associated with the transactions, and actual and implemented interchange. The data collected on this form may appear in various EIA publications.
5. 173 respondents surveyed quarterly.
6. 692 responses annually.
7. Annual total of 4,152 hours.
10. Annual total of $0.

Statutory Authority: Section 13(b) of the Federal Energy Administration Act of 1974, Pub. L. 93–275, codified at 15 U.S.C. 772(b).

Issued in Washington, DC, January 18, 2012.

Stephanie Brown,

Director, Office of Survey Development and Statistical Integration, U. S. Energy Information Administration.

[FR Doc. 2012–1632 Filed 1–25–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

DOE/NSF High Energy Physics Advisory Panel

AGENCY: Department of Energy, Office of Science.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the DOE/NSF High Energy Physics Advisory Panel (HEPAP). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Monday, March 12, 2012; 10 a.m.–6 p.m. and Tuesday, March 13, 2012; 9 a.m.–1 p.m.

ADDRESSES: Hotel Palomar, 2121 P Street NW., Washington, DC 20037.

FOR FURTHER INFORMATION CONTACT: John Kogut, Executive Secretary; High Energy Physics Advisory Panel; U.S. Department of Energy; SC–25/Germantown Building, 1000 Independence Avenue SW., Washington, DC 20585–1290; Telephone: (301) 903–1298.

SUPPLEMENTARY INFORMATION:

Purpose of Panel: To provide advice and guidance to the Department of Energy and the National Science Foundation on scientific priorities within the field of high energy physics research.

Tentative Agenda: Agenda will include discussions of the following:

Monday, March 12, 2012 and Tuesday, March 13, 2012

- Discussion of Department of Energy High Energy Physics Program
- Discussion of National Science Foundation Elementary Particle Physics Program
- Reports on and Discussions of Topics of General Interest in High Energy Physics
- Public Comment (10-minute rule)

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of these items on the agenda, you should contact John Kogut by phone at: (301) 903–1298 or by email at: *John.Kogut@science.doe.gov.* You must make your request for an oral statement at least 5 business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Panel will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of the meeting will be available on the High Energy Physics Advisory Panel Web site at: *http://science.energy.gov/hep/hepap.*

Issued at Washington, DC on January 20, 2012.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2012–1671 Filed 1–25–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada

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), Nevada. 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: Wednesday, February 15, 2012, 5 p.m.

ADDRESSES: Atomic Testing Museum, 755 E. Flamingo Road, Las Vegas, Nevada 89119.

FOR FURTHER INFORMATION CONTACT: Denise Rupp, Board Administrator, 232 Energy Way, M/S 505, North Las Vegas, Nevada 89030. Phone: (702) 657–9088; Fax (702) 295–5300 or Email: *nssab@nv.doe.gov.*

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

1. Discussion regarding U233 Waste Disposition at the Nevada National Security Site

Public Participation: The EM SSAB, Nevada, 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 Denise Rupp 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 presentations pertaining to agenda items should contact Denise Rupp at the telephone number listed above. The request 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 to Denise Rupp at the address listed above or at the following Web site: *http://nv.energy.gov/nssab/MeetingMinutes.aspx*.

Issued at Washington, DC on January 20, 2012.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2012–1698 Filed 1–25–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Biological and Environmental Research Advisory Committee

AGENCY: Department of Energy; Office of Science.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces a meeting of the Biological and Environmental Research Advisory Committee (BERAC). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, February 16, 2012, 9 a.m. to 5 p.m.; Friday, February 17, 2012, 8:30 a.m. to 12 p.m.

ADDRESSES: Omni Shoreham Hotel, 2500 Calvert Street NW., Washington, DC 20008.

FOR FURTHER INFORMATION CONTACT: Dr. David Thomassen, Designated Federal Officer, BERAC, U.S. Department of Energy, Office of Science, Office of Biological and Environmental Research, SC–23/Germantown Building, 1000 Independence Avenue SW., Washington, DC 20585–1290. Phone (301) 903–9817; fax (301) 903–5051 or email: *david.thomassen@science.doe.gov.* The most current information concerning this meeting can be found on the Web site: *http://science.energy.gov/ber/berac/meetings/.*

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: To provide advice to the Director, Office of Science, Department of Energy, on the many complex scientific and technical issues that arise in the development and implementation of the Biological and Environmental Research Program.

Tentative Agenda Topics:

- Report from the Office of Science
- Report from the Office of Biological and Environmental Research
- News from the Biological Systems Science and Climate and Environmental Sciences Divisions
- Discussion on the Technology Implementation for Long-Term Vision charge
- Updates on the Joint Genome Institute, Environmental Molecular Sciences Laboratory, and Knowledgebase project
- New Business
- Public Comment

Public Participation: The Committee welcomes the attendance of the public at its Committee meetings. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact David Thomassen at the address or telephone number listed above. You must make your request for an oral statement at least five business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 45 days at the BERAC Web site: *http://science.energy.gov/ber/berac/meetings/berac-minutes/.*

Issued at Washington, DC, on January 20, 2012.

LaTanya Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2012–1693 Filed 1–25–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Orders Granting, Amending and Vacating Authority To Import and Export Natural Gas and Liquefied Natural Gas

	FE Docket Nos.
Gas Natural Caxitlan, S. DE R.L.	11–147–NG
Jordan Cove Energy Project, L.P.	11–127–LNG
Irving Oil Terminals Inc.	11–144–NG
Puget Sound Energy, Inc.	11–148–NG
Maritimes Ng Supply	11–143–NG
Tidal Energy Marketing Inc.	11–138–NG
Macquarie Energy LLC	11–149–NG
Iberdrola Energy Services, LLC	11–150–NG
Applied LNG Technologies Usa, L.L.C.	11–153–LNG
Freeport Lng Development, L.P.	11–156–LNG
NOCO Energy	11–151–NG
Devon Canada Marketing Corporation	11–152–NG
Suncor Energy Marketing Inc.	11–154–NG
Tidal Energy Marketing Inc.	11–159–NG
Tenaska Washington Partners, L.P.	11–160–NG
Applied LNG Technologies USA, L.L.C.	11–153–LNG
Yukon Pacific Company, L.P.	87–68–LNG
Yukon Pacific Company, L.P.	92–35–LNG

AGENCY: Office of Fossil Energy, Department of Energy (DOE).

ACTION: Notice of orders.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy gives notice that during December 2011, it issued Orders granting, amending and vacating authority to import and export natural gas and liquefied natural gas. These Orders are summarized in the attached appendix and may be found on the FE Web site at *http://www.fossil.energy.gov/programs/gasregulation/authorizations/Orders-2011.html.* They are also available for inspection and copying in the Office of Fossil Energy, Office of Natural Gas Regulatory Activities, Docket Room 3E–033, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478. The Docket Room is open between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, on January 19, 2012.

John A. Anderson,

Manager, Natural Gas Regulatory Activities, Office of Oil and Gas Global Security and Supply, Office of Fossil Energy.

APPENDIX

DOE/FE ORDERS GRANTING IMPORT/EXPORT AUTHORIZATIONS

Order No.	Date issued	FE Docket No.	Authorization holder	Description of action
3040	12/02/11	11–147–NG	Gas Natural Caxitlan, S. de R.L	Order granting blanket authority to export natural gas to Mexico.
3041	12/07/11	11–127–LNG	Jordan Cove Energy Project, L.P.	Order granting long-term multi-contract authority to export LNG by vessel from the Jordan Cove LNG Terminal to Free Trade Agreement nations.
3042	12/07/11	11–144–NG	Irving Oil Terminals Inc	Order granting blanket authority to import natural gas from Canada.
3043	12/07/11	11–148–NG	Puget Sound Energy, Inc	Order granting blanket authority to import/export natural gas from/to Canada.
3044	12/08/11	11–143–NG	Maritimes NG Supply	Order granting blanket authority to import natural gas from Canada.
3045	12/09/11	11–138–NG	Tidal Energy Marketing Inc	Order granting blanket authority to import natural gas from Canada.
3046	12/09/11	11–149–NG	Macquarie Energy LLC	Order granting blanket authority to import/export natural gas from/to Canada/Mexico, to import LNG from Canada/Mexico by truck, to export LNG to Canada/Mexico by vessel, and to import LNG from various international sources by vessel.
3047	12/13/11	11–150–NG	Iberdrola Energy Services, LLC	Order granting blanket authority to import/export natural gas from/to Canada.
3048	12/13/11	11–153–LNG	Applied LNG Technologies USA L.L.C.	Order granting blanket authority to import LNG from various international sources by vessel, to import LNG from Canada/Mexico by truck and to export LNG to Canada/Mexico by vessel.
3049	12/22/11	11–156–LNG	Freeport LNG Development, L.P.	Order granting blanket authority to import LNG from various international sources by vessel.
3050	12/22/11	11–151–NG	NOCO Energy Corp.	Order granting blanket authority to import/export natural gas from/to Canada.
3051	12/22/11	11–152–NG	Devon Canada Marketing Corporation.	Order granting blanket authority to import natural gas from Canada.
3052	12/22/11	11–154–NG	Suncor Energy Marketing Inc	Order granting blanket authority to import/export natural gas from/to Canada.
3053	12/22/11	11–159–NG	Tidal Energy Marketing Inc	Order granting blanket authority to export natural gas to Canada
3054	12/22/11	11–160–NG	Tenaska Washington Partners, L.P.	Order granting blanket authority to import natural gas from Canada.
3048–A	12/22/11	11–153–LNG	Applied LNG Technologies, LLC.	Order amending DOE/FE Order No. 3048 to authorize export of LNG to Canada/Mexico by truck.
350–C	12/22/11	92–35–LNG 87–68–LNG	Yukon Pacific Company, L.P	Order vacating prior authorizations to export LNG.

[FR Doc. 2012–1691 Filed 1–25–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Nationwide Categorical Waivers Under the American Recovery and Reinvestment Act of 2009 (Recovery Act)

AGENCY: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy (DOE).

ACTION: Notice of Limited Waivers.

SUMMARY: The U.S. Department of Energy (DOE) is hereby granting a nationwide limited waiver of the Buy American requirements of section 1605 of the Recovery Act under the authority of Section 1605(b)(2), (iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality), with respect to Recovery Act projects funded by EERE for: (1) 5–25 Watt LED Candelabra Bulbs (includes Flame tip, bent tip, A19, S11, G16.5 or G25 clear bulb enclosure); (2) 140 Watt LED fixtures with 10 degree beams capable of illuminating from 100 feet, UL certified; and (3) 27 Watt round LED fixtures, producing 1 foot-candle at 242 feet distance, UL certified. This waiver expires May 1, 2012.

DATES: Effective Date: 1/10/2012.

FOR FURTHER INFORMATION CONTACT: Christine Platt-Patrick, Office of Energy Efficiency and Renewable Energy (EERE), (202) 287–1553, Department of Energy, 1000 Independence Avenue SW., Mailstop EE–2K, Washington, DC 20585.

SUPPLEMENTARY INFORMATION: Under the authority of American Recovery and Reinvestment Act of 2009 (Recovery Act), Public Law 111–5, section 1605(b)(2), the head of a Federal department or agency may issue a ''determination of inapplicability'' (a waiver of the Buy American provision) if the iron, steel, or relevant manufactured good is not produced or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality (''nonavailability''). The authority of the Secretary of Energy to make all inapplicability determinations was re-delegated to the Assistant Secretary for Energy Efficiency and Renewable Energy (EERE), for EERE projects under the Recovery Act, in Redelegation Order No. 00–002.01E, dated April 25, 2011. Pursuant to this delegation the Acting Assistant Secretary, EERE, has concluded that: (1) 5–25 Watt LED Candelabra Bulbs (includes Flame tip, bent tip, A19, S11, G16.5 or G25 clear bulb enclosure); (2) 140 Watt LED fixtures with 10 degree beams capable of illuminating from 100 feet, UL certified; and (3) 27 Watt round LED fixtures, producing 1 foot-candle at 242 feet

distance, UL certified, are not produced or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality. The above items, when used on eligible EERE Recovery Act-funded projects, qualify for the ''nonavailability'' waiver determination.

In order to utilize this waiver, grantees must have taken substantial steps towards procurement of these items by May 1, 2012.

EERE has developed a robust process to ascertain in a systematic and expedient manner whether or not there is domestic manufacturing capacity for the items submitted for a waiver of the Recovery Act Buy American provision. This process involves a close collaboration with the United States Department of Commerce National Institute of Standards and Technology (NIST) Manufacturing Extension Partnership (MEP), in order to scour the domestic manufacturing landscape in search of producers before making any nonavailability determinations.

The MEP has 59 regional centers with substantial knowledge of, and connections to, the domestic manufacturing sector. MEP uses their regional centers to ''scout'' for current or potential manufacturers of the product(s) submitted in a waiver request. In the course of this interagency collaboration, MEP has been able to find exact or partial matches for manufactured goods that EERE grantees had been unable to locate. As a result, in those cases, EERE was able to work with the grantees to procure American-made products rather than granting a waiver.

Upon receipt of completed waiver requests for the three products in the current waiver, EERE reviewed the information provided and submitted the relevant technical information to the MEP. The MEP then used their network of nationwide centers to scout for domestic manufacturers. The MEP reported that their scouting process did not locate any domestic manufacturers for these exact or equivalent items.

In addition to the MEP collaboration outlined above, the EERE Buy American Coordinator worked with other manufacturing stakeholders to scout for domestic manufacturing capacity or an equivalent product for each item contained in this waiver. EERE also conducted significant amounts of independent research to supplement MEP's scouting efforts, including utilizing the solar experts employed by the Department of Energy's National Renewable Energy Laboratory. EERE's research efforts confirmed the MEP findings that the goods included in this waiver are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.

The nonavailability determination is also informed by the inquiries and petitions to EERE from recipients of EERE Recovery Act funds, and from suppliers, distributors, retailers and trade associations—all stating that their individual efforts to locate domestic manufacturers for these items have been unsuccessful.

Specific technical information for the manufactured goods included in this non-availability determination is detailed below:

(1) 5–25 Watt LED Candelabra Bulbs (includes Flame tip, bent tip, A19, S11, G16.5 or G25 clear bulb enclosure.

LED Candelabra or medium base, outdoor use, dimmable, mercury free, 2700 and/or 3000 Kelvin Correlated Color Temperature (CCT), 80+ Color Rendering Index (CRI), 5–25 watt Flame tip, bent tip, A19, S11, G16.5 or G25 clear bulb enclosure. Domestic manufacturers are working to enter the market in the near future, however, production cannot yet meet the needs of current projects. EERE is committed to assisting grantees to complete projects while supporting domestic manufacturing—thus this waiver will expire May 1, 2012.

(2&3) 140 Watt LED fixtures with 10 degree beams capable of illuminating from 100 feet, UL certified; and 27 Watt round LED fixtures, producing 1 foot-candle at 242 feet distance, UL certified.

The new LED fixtures represent a relatively new, emerging technology that can provide comparable light output at substantially lower energy levels. As a new technology, the number of manufacturers, though growing, is somewhat limited. Domestic manufacturers are working to enter the market in the near future, however, production cannot yet meet the needs of current projects. EERE is committed to assisting grantees to complete projects while supporting domestic manufacturing—thus this waiver will expire May 1, 2012.

In light of the foregoing, and under the authority of section 1605(b)(2) of Public Law 111–5 and Redelegation Order 00–002–01E, with respect to Recovery Act projects funded by EERE, I hereby issue a ''determination of inapplicability'' (a waiver under the Recovery Act Buy American provision) for: (1) 5–25 Watt LED Candelabra Bulbs (includes Flame tip, bent tip, A19, S11, G16.5 or G25 clear bulb enclosure); (2) 140 Watt LED fixtures with 10 degree beams capable of illuminating from 100 feet, UL certified; and (3) 27 Watt round LED fixtures, producing 1 foot-candle at 242 feet distance, UL certified. This waiver expires May 1, 2012.

Having established a proper justification based on domestic nonavailability, EERE hereby provides notice that on January 10, 2012, three (3) nationwide categorical waivers of section 1605 of the Recovery Act were issued as detailed *supra.* This notice constitutes the detailed written justification required by Section 1605(c) for waivers based on a finding under subsection (b).

This waiver determination is pursuant to the delegation of authority by the Secretary of Energy to the Assistant Secretary for Energy Efficiency and Renewable Energy with respect to expenditures within the purview of his responsibility. Consequently, this waiver applies to all EERE projects carried out under the Recovery Act.

Authority: Public Law 111–5, section 1605.

Issued in Washington, DC on January 10, 2012.

Henry C. Kelly,

Acting Assistant Secretary, Energy Efficiency and Renewable Energy, U.S. Department of Energy.

[FR Doc. 2012–1625 Filed 1–25–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Nationwide Limited Public Interest Waiver Under the American Recovery and Reinvestment Act of 2009 (Recovery Act)

AGENCY: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy (DOE).

ACTION: Notice of limited public interest waiver.

SUMMARY: The U.S. Department of Energy (DOE) is hereby granting a nationwide limited waiver of the Buy American requirements of section 1605 of the Recovery Act under the authority of section 1605(b)(1) (amended public interest waiver), with respect to donated manufactured goods.

DATES: *Effective Date:* December 6, 2011.

FOR FURTHER INFORMATION CONTACT: Christine Platt Patrick, Weatherization and Intergovernmental Program, Office of Energy Efficiency and Renewable Energy (EERE), (202) 287–1553, *buyamerican@ee.doe.gov,* Department of Energy, 1000 Independence Avenue SW., Mailstop EE–2K, Washington, DC 20585.

SUPPLEMENTARY INFORMATION: Under the authority of the Recovery Act, section 1605(b)(1), the head of a Federal department or agency may issue a ''determination of inapplicability'' (a waiver of the Buy American provisions) if the application of section 1605 would be inconsistent with the public interest. On April 25, 2011, the Secretary of Energy delegated the authority to make all inapplicability determinations to the Assistant Secretary for Energy Efficiency and Renewable Energy, for EERE Recovery Act projects.

Pursuant to this delegation, the Acting Assistant Secretary has determined that application of section 1605 restrictions would be inconsistent with the public interest for items donated (provided at zero cost) to EERE-funded Recovery Act projects.

This determination waives the Buy American requirements in EERE-funded Recovery Act projects for donated manufactured goods. This waiver Expires May 1, 2012.

Definitions—Donated means manufactured goods provided to the project at zero cost. These goods must not hold a caveat, expectation, or quid-pro-quo of any sort, nor may their donation bind the grant recipient in any way. The recipient, for example, may not agree to pay more for one item, so as to have another item donated, nor may they promise more business in the future in exchange for a donated item. The Contracting Officer and the Project Officer will be consulted to determine whether the goods qualify as donated; this will serve to prevent abuse of this waiver. This waiver applies only to the donated manufactured goods themselves. All funds used in the project are still subject to the Buy American requirements and other contract requirements.

The Buy American provision ''prohibits use of recovery funds for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.'' 2 CFR 176. However, in a number of cases, grant recipients and sub recipients have been able to secure offers of donation, for items already installed that are non-compliant with the Buy American provision of the Recovery Act. Offers of donation may free up the need to spend federal dollars that otherwise would have been spent on those donated items and that may also count towards the recipient's cost share (10 CFR § 600.224) for grants that require cost sharing. When donated items are used in a project, freeing up allocated Recovery Act funds, grantees will work with their Project Officers to allocate funds to other projects, or to broaden the existing project. The ''freed-up'' Recovery Act funds may not be used on the purchase of non-compliant manufactured goods in accordance with applicable laws.

For the reasons outlined above, I find that it is in the public interest to issue a waiver of the Recovery Act Buy American provisions that allows grantees to use donated manufactured goods in EERE funded projects. This waiver should not be used as a means to circumvent the Recovery Act Buy American provisions through encouraging recipients to knowingly accept non-compliant goods that would be used on a Recovery Act project to further leverage Recovery Act funds.

Issuance of this nationwide public interest waiver recognizes EERE's commitment to expeditious costing of Recovery Act dollars by enabling grantees and vendors to easily ascertain whether a project complies with the Buy American provision. Issuance of this waiver removes any need for EERE to issue a Recovery Act Buy American non-compliance finding and negates economic waste that would result by having a recipient uninstall or remove a donated good that is otherwise compliant with the Recovery Act Buy American provisions.

In light of the foregoing, and under the authority of section 1605(b)(1) of Public Law 111–5 and the Redelegation Order of April 25, 2011, with respect to Recovery Act projects funded by EERE, on December 6, 2011, the Assistant Secretary issued a new ''determination of inapplicability'' (a waiver under the Recovery Act Buy American provisions) for donated manufactured goods.

The Assistant Secretary reserves the right to revisit and amend this determination based on new information or new developments.

Authority: Public Law 111–5, section 1605.

Issued Washington, DC on December 6, 2011.

Henry Kelly,

Acting Assistant Secretary, Energy Efficiency and Renewable Energy, U.S. Department of Energy.

[FR Doc. 2012–1623 Filed 1–25–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC12–59–000.

Applicants: Old Trail Wind Farm, LLC, Telocaset Wind Power Partners, LLC, High Prairie Wind Farm II, LLC, Cloud County Wind Farm, LLC, Pioneer Prairie Wind Farm I, LLC, Sagebrush Power Partners, LLC, Arlington Wind Power Project LLC, Marble River, LLC, Flat Rock Windpower LLC, Blue Canyon Windpower LLC, Wheat Field Wind Power Project LLC, Lost Lakes Wind Farm LLC, Blue Canyon Windpower V LLC, Blackstone Wind Farm LLC, Meadow Lake Wind Farm IV LLC, Blackstone Wind Farm II LLC, Blue Canyon Windpower II LLC, High Trail Wind Farm, LLC, Meadow Lake Wind Farm LLC, Meadow Lake Wind Farm II LLC, Meadow Lake Wind Farm III LLC, Rail Splitter Wind Farm, LLC, Flat Rock Windpower II LLC, Paulding Wind Farm II LLC, Blue Canyon Windpower VI LLC, China Three Gorges Corporation, China Three Gorges International (Europe) S.A.

Description: Application for Authorization for Disposition of Jurisdictional Facilities and Request for Expedited Action of Arlington Wind Power Project LLC, et al.

Filed Date: 1/17/12.

Accession Number: 20120117–5259.

Comments Due: 5 p.m. ET 2/7/12.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–3876–001; ER11–2044–002; ER10–2611–001.

Applicants: Cordova Energy Company, LLC, MidAmerican Energy Company, Saranac Power Partners, L.P.

Description: Revised Attachment B to replace Attachment B in Applicant's June 30 market analysis f Cordova Energy Company LLC, et al.

Filed Date: 7/6/11.

Accession Number: 20110706–5086.

Comments Due: 5 p.m. ET 1/25/12.

Docket Numbers: ER12–817–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35: 01–17–12 RAR Compliance Filing to be effective 7/28/2010.

Filed Date: 1/17/12.

Accession Number: 20120117–5229.

Comments Due: 5 p.m. ET 2/7/12.

Docket Numbers: ER12–818–000.
Applicants: El Paso Electric Company.
Description: El Paso Electric Company submits tariff filing per 35.13(a)(2)(iii: Arlington Valley Solar II IA to be effective 1/13/2012.
Filed Date: 1/17/12.
Accession Number: 20120117–5243.
Comments Due: 5 p.m. ET 2/7/12.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF12–164–000.
Applicants: Smithfield Packing Company.
Description: Form 556—Notice of self-certification as qualifying cogeneration facility status.
Filed Date: 1/17/12.
Accession Number: 20120117–5199.
Comments Due: None Applicable.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RD11–3–000.
Applicants: North American Electric Reliability Corporation.
Description: Compliance Filing of the North American Electric Reliability Corporation in Response to November 17, 2011 Order Approving Reliability Standard FAC–013–2—Assessment of Transfer Capability for the Near-Term Transmission Planning Horizon.
Filed Date: 1/17/12.
Accession Number: 20120117–5202.
Comments Due: 5 p.m. ET 2/16/12.

Docket Numbers: RD11–10–000.
Applicants: North American Electric Reliability Corporation.
Description: Compliance Filing of the North American Electric Reliability Corporation in Response to November 17, 2011 Order Approving Reliability Standard FAC–008–3—Facility Ratings.
Filed Date: 1/17/12.
Accession Number: 20120117–5203.
Comments Due: 5 p.m. ET 2/16/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 18, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–1611 Filed 1–25–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER03–1182–000; *ER10–3079–000.*
Applicants: Tyr Energy, LLC.
Description: Supplement to Request for Category 1 Seller Determination, Tariff Amendment, and, in the Alternative, Request for Exemption.
Filed Date: 1/6/12.
Accession Number: 20120106–5105.
Comments Due: 5 p.m. ET 1/27/12.

Docket Numbers: ER12–819–000.
Applicants: ISO New England Inc.
Description: ISO New England Inc. submits tariff filing per 35.13(a)(2)(iii: Corrections to Conform Lang. in Section I.1.2 to be effective 1/31/2011.
Filed Date: 1/18/12.
Accession Number: 20120118–5028.
Comments Due: 5 p.m. ET 2/8/12.

Docket Numbers: ER12–820–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.15: Notice of Cancellation of Original SA No. 2800 in Docket No. ER11–3203–000 to be effective 12/19/2011.
Filed Date: 1/18/12.
Accession Number: 20120118–5029.
Comments Due: 5 p.m. ET 2/8/12.

Docket Numbers: ER12–821–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits tariff filing per 35.13(a)(2)(iii: True-Up to SGIA and Svc Agmt w/County Sanitation Districts of LA County to be effective 3/19/2012.
Filed Date: 1/18/12.
Accession Number: 20120118–5049.
Comments Due: 5 p.m. ET 2/8/12.

Docket Numbers: ER12–822–000.
Applicants: Public Service Company of New Hampshire.
Description: Public Service Company of New Hampshire submits tariff filing per 35.13(a)(2)(iii: PSNH and Former CVEC Interconnection Agreements to be effective 3/18/2012.
Filed Date: 1/18/12.
Accession Number: 20120118–5057.
Comments Due: 5 p.m. ET 2/8/12.

Docket Numbers: ER12–823–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Original Service Agreement No. 3162; Queue No. X2–087 to be effective 12/20/2011.
Filed Date: 1/18/12.
Accession Number: 20120118–5058.
Comments Due: 5 p.m. ET 2/8/12.

Docket Numbers: ER12–824–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Queue Position W2–050; Original Service Agreement No. 3175 to be effective 12/19/2011.
Filed Date: 1/18/12.
Accession Number: 20120118–5064.
Comments Due: 5 p.m. ET 2/8/12.

Docket Numbers: ER12–825–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 01–18–12 Att L–Mod E_RAR filing to be effective 3/19/2012.
Filed Date: 1/18/12.
Accession Number: 20120118–5066.
Comments Due: 5 p.m. ET 2/8/12.

Docket Numbers: ER12–826–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Original Service Agreement No. 3163; Queue No. X1–113 to be effective 12/20/2011.
Filed Date: 1/18/12.
Accession Number: 20120118–5094.
Comments Due: 5 p.m. ET 2/8/12.

Docket Numbers: ER12–827–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: 1883R1 Westar Energy, Inc. NITSA NOA to be effective 12/1/2011.
Filed Date: 1/18/12.
Accession Number: 20120118–5095.
Comments Due: 5 p.m. ET 2/8/12.

Docket Numbers: ER12–828–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: 1884R1 Westar Energy, Inc. NITSA NOA to be effective 12/1/2011.
Filed Date: 1/18/12.

Accession Number: 20120118–5096.
Comments Due: 5 p.m. ET 2/8/12.

Docket Numbers: ER12–829–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: 1887R1 Westar Energy, Inc. NITSA NOA to be effective 12/1/2011.
Filed Date: 1/18/12.
Accession Number: 20120118–5098.
Comments Due: 5 p.m. ET 2/8/12.

Docket Numbers: ER12–830–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: 1888R1 Westar Energy, Inc. NITSA NOA to be effective 12/1/2011.
Filed Date: 1/18/12.
Accession Number: 20120118–5101.
Comments Due: 5 p.m. ET 2/8/12.

Docket Numbers: ER12–831–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: 1889R1 Westar Energy, Inc. NITSA NOA to be effective 12/1/2011.
Filed Date: 1/18/12.
Accession Number: 20120118–5103.
Comments Due: 5 p.m. ET 2/8/12.

Docket Numbers: ER12–832–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: 1890R1 Westar Energy, Inc. NITSA NOA to be effective 12/1/2011.
Filed Date: 1/18/12.
Accession Number: 20120118–5104.
Comments Due: 5 p.m. ET 2/8/12.

Docket Numbers: ER12–833–000.
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: 1897R1 Westar Energy, Inc. NITSA NOA to be effective 12/1/2011.
Filed Date: 1/18/12.
Accession Number: 20120118–5105.
Comments Due: 5 p.m. ET 2/8/12.

Docket Numbers: ER12–834–000.
Applicants: Entergy Arkansas, Inc.
Description: Entergy Arkansas, Inc. submits tariff filing per 35: ETI/College Station IA Compliance Filing to be effective 12/19/2011.
Filed Date: 1/18/12.
Accession Number: 20120118–5120.
Comments Due: 5 p.m. ET 2/8/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 18, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–1614 Filed 1–25–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC12–60–000
Applicants: Black Hills Corporation, Enserco Energy Inc., Twin Eagle Resource Management, LLC
Description: Joint Application for Authorization under Section 203 of the Federal Power Act, and Request for Confidential Treatment, Expedited Consideration and Waivers of Black Hills Corp., et al.
Filed Date: 1/19/12
Accession Number: 20120119–5140
Comments Due: 5 p.m. ET 2/9/12

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2984–003
Applicants: Merrill Lynch Commodities, Inc.
Description: Merrill Lynch Commodities, Inc. Notice of Non-Material Change in Status.
Filed Date: 1/18/12
Accession Number: 20120118–5153
Comments Due: 5 p.m. ET 2/8/12

Docket Numbers: ER12–551–001
Applicants: Westar Energy, Inc.
Description: Westar Energy, Inc. submits tariff filing per: Supplement to Amended Compliance Filing, Schedule 3A to be effective N/A.
Filed Date: 1/19/12
Accession Number: 20120119–5000
Comments Due: 5 p.m. ET 2/9/12

Docket Numbers: ER12–665–001
Applicants: ITC Midwest LLC
Description: ITC Midwest LLC submits tariff filing per 35.17(b): Amendment to Filing to be effective 2/21/2012.
Filed Date: 1/19/12
Accession Number: 20120119–5057
Comments Due: 5 p.m. ET 2/9/12

Docket Numbers: ER12–705–001
Applicants: ITC Midwest LLC
Description: ITC Midwest LLC submits tariff filing per 35.17(b): Amendment Filing to be effective 2/28/2012.
Filed Date: 1/19/12
Accession Number: 20120119–5056
Comments Due: 5 p.m. ET 2/9/12

Docket Numbers: ER12–835–000
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii): PJM Queue X2–082; First Revised Service Agreement Nos. 3156 and 3157 to be effective 12/20/2011.
Filed Date: 1/19/12
Accession Number: 20120119–5125
Comments Due: 5 p.m. ET 2/9/12

Docket Numbers: ER12–836–000
Applicants: PacifiCorp
Description: PacifiCorp's Termination of Maintenance Agreement between PacifiCorp and Lakeview Biomass, LLC.
Filed Date: 1/19/12
Accession Number: 20120119–5137
Comments Due: 5 p.m. ET 2/9/12

Docket Numbers: ER12–837–000
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii): Queue Position X2–013; Original Service Agreement No. 3176 to be effective 12/20/2011.
Filed Date: 1/19/12
Accession Number: 20120119–5150
Comments Due: 5 p.m. ET 2/9/12

Docket Numbers: ER12–838–000
Applicants: Southwest Power Pool, Inc.
Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii): 2213R1 Cimarron Windpower II GIA to be effective 12/20/2011.
Filed Date: 1/19/12
Accession Number: 20120119–5154
Comments Due: 5 p.m. ET 2/9/12

Docket Numbers: ER12–839–000
Applicants: FPLE Rhode Island State Energy, L.P.
Description: FPLE Rhode Island State Energy, L.P. submits tariff filing per 35.13(a)(2)(iii): Entergy RISE Notice of Succession to be effective 1/19/2012.

Filed Date: 1/19/12
Accession Number: 20120119–5162
Comments Due: 5 p.m. ET 2/9/12

Docket Numbers: ER12–840–000
Applicants: Northern Indiana Public Service Company
Description: Northern Indiana Public Service Company submits tariff filing per 35.13(a)(2)(iii): Definitions to be effective 2/1/2012.
Filed Date: 1/19/12
Accession Number: 20120119–5174
Comments Due: 5 p.m. ET 2/9/12

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 19, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–1613 Filed 1–25–12; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 21, 2012.

A. **Federal Reserve Bank of St. Louis** (Glenda Wilson, Community Affairs Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. *Cabool State Bank Employee Stock Ownership Plan,* Cabool, Missouri; to acquire additional voting shares, for a total of 31.95 percent of the voting shares of Cabool Bancshares, Inc., and thereby indirectly acquire additional voting shares of Cabool State Bank, both in Cabool, Missouri.

B. **Federal Reserve Bank of Minneapolis** (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *State Bankshares, Inc.,* Fargo, North Dakota; to acquire 100 percent of the voting shares of First Hawley Bancshares, Inc., and thereby indirectly acquire voting shares of First National Bank, both in Hawley, Minnesota.

C. Federal Reserve Bank of San Francisco (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *First PacTrust Bancorp, Inc.,* Chula Vista, California; to become a bank holding company by acquiring 100 percent of the voting shares of Beach Business Bank, Manhattan Beach, California.

In connection with this application, Applicant also has applied to retain 100 percent of the voting shares of Pacific Trust Bank, fsb, Chula Vista, California, and thereby engage in operating a nonbank thrift subsidiary, pursuant to section 225.28(b)(4) of Regulation Y.

Board of Governors of the Federal Reserve System, January 23, 2012.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2012–1616 Filed 1–25–12; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Annual Update of the HHS Poverty Guidelines

AGENCY: Department of Health and Human Services.

ACTION: Notice.

SUMMARY: This notice provides an update of the Department of Health and Human Services (HHS) poverty guidelines to account for last calendar year's increase in prices as measured by the Consumer Price Index.

DATES: *Effective Date:* Date of publication, unless an office administering a program using the guidelines specifies a different effective date for that particular program.

ADDRESSES: Office of the Assistant Secretary for Planning and Evaluation, Room 404E, Humphrey Building, Department of Health and Human Services, Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: For information about how the guidelines are used or how income is defined in a particular program, contact the Federal, state, or local office that is responsible for that program. For information about poverty figures for immigration forms, the Hill-Burton Uncompensated Services Program, and the number of people in poverty, use the specific telephone numbers and addresses given below.

For general questions about the poverty guidelines themselves, contact Kendall Swenson or Gordon Fisher, Office of the Assistant Secretary for Planning and Evaluation, Room 404E, Humphrey Building, Department of Health and Human Services, Washington, DC 20201—telephone: (202) 690–7507—or visit *http://aspe.hhs.gov/poverty/.*

For information about the percentage multiple of the poverty guidelines to be used on immigration forms such as USCIS Form I–864, Affidavit of Support, contact U.S. Citizenship and Immigration Services at 1–(800) 375–5283.

For information about the Hill-Burton Uncompensated Services Program (free or reduced-fee health care services at certain hospitals and other facilities for persons meeting eligibility criteria involving the poverty guidelines), contact the Office of the Director, Division of Health Facilities, Health Resources and Services Administration, HHS, Room 10–105, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. To speak to a staff member,

please call (301) 443–5656. To receive a Hill-Burton information package, call 1–(800) 638–0742 (for callers outside Maryland) or 1–(800) 492–0359 (for callers in Maryland). You also may visit *http://www.hrsa.gov/gethealthcare/affordable/hillburton/.*

For information about the number of people in poverty, visit the Poverty section of the Census Bureau's web site at *http://www.census.gov/hhes/www/poverty/poverty.html* or contact the Census Bureau's Customer Service Center at 1–(800) 923–8282 (toll-free) or visit *http://ask.census.gov* for further information.

SUPPLEMENTARY INFORMATION:

Background

Section 673(2) of the Omnibus Budget Reconciliation Act (OBRA) of 1981 (42 U.S.C. 9902(2)) requires the Secretary of the Department of Health and Human Services to update the poverty guidelines at least annually, adjusting them on the basis of the Consumer Price Index for All Urban Consumers (CPI–U). The poverty guidelines are used as an eligibility criterion by the Community Services Block Grant program and a number of other Federal programs. The *poverty guidelines* issued here are a simplified version of the *poverty thresholds* that the Census Bureau uses to prepare its estimates of the number of individuals and families in poverty.

As required by law, this update is accomplished by increasing the latest published Census Bureau poverty thresholds by the relevant percentage change in the Consumer Price Index for All Urban Consumers (CPI–U). The guidelines in this 2012 notice reflect the 3.2 percent price increase between calendar years 2010 and 2011. After this inflation adjustment, the guidelines are rounded and adjusted to standardize the differences between family sizes. The same calculation procedure was used this year as in previous years. (Note that these 2012 guidelines are roughly equal to the poverty thresholds for calendar year 2011 which the Census Bureau expects to publish in final form in September 2012.)

The poverty guidelines continue to be derived from the Census Bureau's current official poverty thresholds; they are not derived from the Census Bureau's new Supplemental Poverty Measure (SPM).

The following guideline figures represent annual income.

2012 Poverty Guidelines for the 48 Contiguous States and the District of Columbia

Persons in family/household	Poverty guideline
1	$11,170
2	15,130
3	19,090
4	23,050
5	27,010
6	30,970
7	34,930
8	38,890

For families/households with more than 8 persons, add $3,960 for each additional person.

2012 Poverty Guidelines for Alaska

Persons in family/household	Poverty guideline
1	$13,970
2	18,920
3	23,870
4	28,820
5	33,770
6	38,720
7	43,670
8	48,620

For families/households with more than 8 persons, add $4,950 for each additional person.

2012 Poverty Guidelines for Hawaii

Persons in family/household	Poverty guideline
1	$12,860
2	17,410
3	21,960
4	26,510
5	31,060
6	35,610
7	40,160
8	44,710

For families/households with more than 8 persons, add $4,550 for each additional person.

Separate poverty guideline figures for Alaska and Hawaii reflect Office of Economic Opportunity administrative practice beginning in the 1966–1970 period. (Note that the Census Bureau poverty thresholds—the version of the poverty measure used for statistical purposes—have never had separate figures for Alaska and Hawaii.) The poverty guidelines are not defined for Puerto Rico or other outlying jurisdictions. In cases in which a Federal program using the poverty guidelines serves any of those jurisdictions, the Federal office that administers the program is generally responsible for deciding whether to use the contiguous-states-and-DC guidelines for those jurisdictions or to follow some other procedure.

Due to confusing legislative language dating back to 1972, the poverty guidelines sometimes have been mistakenly referred to as the ''OMB'' (Office of Management and Budget) poverty guidelines or poverty line. In fact, OMB has never issued the guidelines; the guidelines are issued each year by the Department of Health and Human Services. The poverty guidelines may be formally referenced as ''the poverty guidelines updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2).''

Some federal programs use a percentage multiple of the guidelines (for example, 125 percent or 185 percent of the guidelines), as noted in relevant authorizing legislation or program regulations. Non-Federal organizations that use the poverty guidelines under their own authority in non-Federally-funded activities also may choose to use a percentage multiple of the guidelines.

The poverty guidelines do not make a distinction between farm and non-farm families, or between aged and non-aged units. (Only the Census Bureau poverty thresholds have separate figures for aged and non-aged one-person and two-person units.)

Note that this notice does not provide definitions of such terms as ''income'' or ''family,'' because there is considerable variation in defining these terms among the different programs that use the guidelines. These variations are traceable to the different laws and regulations that govern the various programs. This means that questions such as ''Is income counted before or after taxes?'', ''Should a particular type of income be counted?'', and ''Should a particular person be counted as a member of the family/household?'' are actually questions about how a specific program applies the poverty guidelines. All such questions about how a specific program applies the guidelines should be directed to the entity that administers or funds the program, since that entity has the responsibility for defining such terms as ''income'' or ''family,'' to the extent that these terms are not already defined for the program in legislation or regulations.

Dated: January 19, 2012.

Kathleen Sebelius,

Secretary of Health and Human Services.

[FR Doc. 2012–1603 Filed 1–25–12; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project: ''Assessing the Feasibility of Disseminating Effective Health Center Products through Mobile Phone Applications.'' In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3521, AHRQ invites the public to comment on this proposed information collection.

This proposed information collection was previously published in the **Federal Register** on November 15th, 2011 and allowed 60 days for public comment. No comments were received. The purpose of this notice is to allow an additional 30 days for public comment.

DATES: Comments on this notice must be received by February 27, 2012.

ADDRESSES: Written comments should be submitted to: AHRQ's OMB Desk Officer by fax at (202) 395–6974 (attention: AHRQ's desk officer) or by email at *OIRA_submission@omb.eop.gov* (attention: AHRQ's desk officer).

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by email at *doris.lefkowitz@AHRO.hhs.gov*.

SUPPLEMENTARY INFORMATION:

Proposed Project

Assessing the Feasibility of Disseminating Effective Health Center Products Through Mobile Phone Applications

The Agency for Healthcare Research and Quality (AHRQ) requests that the Office of Management and Budget (OMB) approve, under the Paperwork Reduction Act of 1995, this collection of information from users of work products and services initiated by the John M. Eisenberg Clinical Decisions and Communications Science Center (Eisenberg Center).

AHRQ is the lead agency charged with supporting research designed to improve the quality of healthcare, reduce its cost, improve patient safety, decrease medical errors, and broaden access to essential services. AHRQ's Eisenberg Center's mission is improving communication of findings to a variety of audiences (''customers''), including consumers, clinicians, and health care policy makers. The Eisenberg Center compiles research results into useful formats for customer stakeholders. The Eisenberg Center also conducts investigations into effective communication of research findings in order to improve the usability and rapid incorporation of findings into medical practice. The Eisenberg Center is one of three components of AHRQ's Effective Health Care (EHC) Program. The collections proposed under this clearance include activities to assess the feasibility of using specific media and awareness-raising processes to encourage consumers who are at risk for selected health problems for which EHC Program materials are available to access information about such materials using mobile phone technologies. The project will specifically focus on promoting awareness of eight consumer guides developed through the EHC Program. The guides are all published in English and Spanish-language versions. All of the guides are designed to help decision makers, including clinicians and health care consumers, use research evidence to maximize the benefits of health care, minimize harm, and optimize the use of health care resources.

The project will test the feasibility of using mobile telephone technology for the dissemination of EHC Program materials to underserved health consumer populations using: (a) Short message services (SMS), usually referred to as texting, that can be provided to people with basic cell phone service and texting support; and (b) mobile Web access that provides access to the Internet via a mobile interface.

Different methods and/or vehicles will be used to promote awareness of opportunities to obtain cell phone- or smart phone-based information about the availability of EHC Program materials including: (1) Wall posters in patient service areas of the three (3) participating clinics; (2) flyers about the products distributed in magazine racks and through patient kiosks in some areas of the clinics; (3) flyers/announcements given to patients at checkout from the clinic; and (4) health fairs convened to address general health issues, where the information can be provided. Promotional materials will invite potential users to send a specific text message with the keyword associated with the relevant health condition to the advertised number. Subjects will receive a response text with a brief message about the condition and an invitation to either (a) request a printed consumer guide or (b) access the mobile Web site to view the guide.

This project has the following goals:

(1) Summarize marketing efforts in terms of total numbers of posters, flyers, and information sheets distributed through specific venues (*e.g.,* patient waiting areas, patient check-out processes) and numbers of individuals contacted through health fairs and related activities;

(2) Summarize the extent to which persons in targeted patient populations responded to marketing efforts;

(3) Assess patient satisfaction with: (a) The means by which patients were alerted as to the availability of EHC Program materials; (b) the methods patients used to request and access the EHC Program materials; and (c) the value and relevancy of the information that they obtained;

(4) Characterize perceptions of clinical care providers and clinical staff persons in terms of: (a) The value of efforts to promote patient awareness of EHC Program materials using marketing techniques described in this feasibility project; and (b) the effect of these efforts on workflow issues and related aspects of clinic operations.

This study is being conducted by AHRQ through its contractor, the Eisenberg Center—Baylor College of Medicine, pursuant to AHRQ's statutory authority to conduct and support research, and disseminate information, on healthcare and on systems for the delivery of such care, including activities with respect to both the quality, effectiveness, efficiency, appropriateness and value of healthcare services and clinical practice. 42 U.S.C. 299a(a)(1) and (4).

Method of Collection

To achieve the goals of this project the following data collections will be implemented:

(1) Focus Groups with Clinicians. A focus group will be conducted at each of the three participating clinics during regularly scheduled internal clinic meetings, to determine how the introduction of marketing materials and related resources influenced, if at all, delivery of care in the clinical settings. Special emphasis will be placed on determining if introduction of the project materials changed the ways in which patients interacted with clinicians. It is expected that each focus

group will include no more than 10 clinical professionals (*e.g.,* physicians, physician assistants, nurses and nurse practitioners, pharmacists).

(2) Focus Groups with Support Staff. A focus group will be conducted with support staff working in each of the three participating clinics, during regularly scheduled meetings, to determine if the introduction of the project materials altered clinic workflows. It is expected that each focus group will include no more than 12 support staff (*e.g.,* receptionists, nursing assistants, other personnel who interact with patients).

(3) Patient Interviews. In-person interviews conducted immediately after the patient exits the clinic will be used to determine if patients: (a) Saw and understood the marketing materials (*e.g.,* posters and flyers) in clinic settings; (b) were encouraged by the marketing materials to text and request information about their health issue(s); (c) could identify specific reasons why they did or did not text; and (d) have suggestions about how marketing materials might be changed so that they would be more likely to encourage patients like themselves to text.

(4) Feedback Questionnaire for Patients Requesting Mailed Guides. All persons that respond to the marketing materials by requesting any of the eight guides to be mailed to them will be asked to complete a brief paper questionnaire included with the guides. The purpose of the questionnaire is to assess the extent to which the guides were easy to read and understand, whether the guides provided the information they sought, and any suggestions for improving and delivering the guides.

(5) Feedback Questionnaire for Patients Visiting the Mobile Web Site. All persons that access the guides via the mobile Web site will be asked to complete a brief online questionnaire. Only subjects exposed to the promotion materials will receive the address of the mobile Web site during the text message conversation, and therefore we expect no other individuals to visit this site. The purpose of the questionnaire is to determine if the guides were useful, the mobile Web site was easy to use, whether they found the information they needed and experienced any difficulty in accessing the guides through their cell phone.

(6) Usage Log Data. Data from automated electronic log systems will be collected from two sources: (1) Mobile Commons, the contractor that manages the cell phone-related message delivery and cell phone-based communication; and (2) the Eisenberg Center at Baylor College of Medicine that manages the EHC Web site visits. Usage log data gathered from the cell phone service contractor will include: (1) Counts of text messages received from persons requesting information about consumer guides; (2) the distribution of message counts across originating clinics tracked through the use of distinctive call-in or short code numbers assigned to each clinic; and (3) the numbers and originating clinic-specific distributions of follow-up texts Because text communications will be date and time stamped, Eisenberg Center staff will be able to calculate mean durations in time from receipt of the initial messages and follow-ups, which may be useful in determining navigation patterns and suggesting connectivity barriers. Usage log data gathered from the mobile Web site will allow for identification of: (1) The number of visitors that originate from a specific uniform record locator (URL) associated with each clinic; (2) the duration of visits to the EHC Web site to gather desired information and explore other resources available through the Web site; (3) the number of pages viewed by each visitor; and (4) the number of downloads of the full report associated with each guide, which will also be made available. These data will be obtained using automated systems already in place, and no special effort will be needed to generate these data; this task is not included in the burden estimates in Exhibit 1 below.

The Eisenberg Center will determine the feasibility of this approach to encouraging patients and anyone else viewing the marketing materials to access information that may be helpful to them in understanding health care choices and engaging more fully in their own health care, and whether this approach should be pursued further. This information will be used to determine the feasibility of: (a) Mounting broader efforts to distribute consumer guides, as well as other EHC Program products, using mobile technologies as tools to heighten awareness of these resources by potential users who rely on mobile communication devices for information access; and (b) initiating additional studies to identify factors that encourage or deter effective use of increasingly pervasive communication modalities (*e.g.,* cell phones, smart phones) in communicating with care providers and others and to access information from the Internet and health-related Web sites.

Estimated Annual Respondent Burden

Exhibit 1 shows the estimated annualized burden for the respondents' time to participate in this research. Focus groups will be conducted with about 10 clinicians per each of the 3 participating clinics (30 total) and about 12 clinical support staff per clinic (36 total), and will last 45 minutes. Interviews will be conducted with about 100 patients per clinic (300 total) upon exit from the clinical visit, with each interview lasting about 15 minutes. The Feedback Questionnaire for the Mailed Guides will be completed by approximately 200 persons and will take 10 minutes to complete and the Feedback Questionnaire for the Mobile site will be completed by about 200 persons and also requires 10 minutes to complete. The total annual burden is estimated to be 191 hours. Exhibit 2 shows the estimated annualized cost burden associated with the respondent's time to participate in this research. The total annual cost burden is estimated to be $5,320.

EXHIBIT 1—ESTIMATED ANNUALIZED TOTAL BURDEN HOURS

Type of data collection	Number of respondents per respondent	Number of responses	Hours per response	Total burden hours
Focus Groups with Clinicians	30	1	45/60	23
Focus Groups with Support Staff	36	1	45/60	27
Patient Interviews	300	1	15/60	75
Feedback Questionnaire for Patients Requesting Mailed Guides	200	1	10/60	33
Feedback Questionnaire for Patients Visiting Mobile Web site	200	1	10/60	33
Total	766	na	na	191

EXHIBIT 2—ESTIMATED ANNUALIZED TOTAL COST BURDEN

Type of data collection	Number of respondents	Total burden hours	Average hourly wage rate *	Total cost burden
Focus Groups with Clinicians	30	23	$83.59	$1,923
Focus Groups with Support Staff	36	27	14.31	386
Patient Interviews	300	75	21.35	1,601
Feedback Questionnaire for Patients Requesting Mailed Guides	200	33	21.35	705
Feedback Questionnaire for Patients Visiting Mobile Web site	200	33	21.35	705
Total	766	191	na	5,320

* Based upon the mean wages for clinicians (29–1062 family and general practitioners), clinical team members (31–9092 medical assistants) and consumers (00–0000 all occupations), National Compensation Survey: Occupational wages in the United States May 2010, ''U.S. Department of Labor, Bureau of Labor Statistics.''

Estimated Annual Costs to the Federal Government

The maximum cost to the Federal Government is estimated to be $203,531 annually. Exhibit 3 shows the total and annualized cost by the major cost components.

EXHIBIT 3—ESTIMATED TOTAL AND ANNUALIZED COST

Cost component	Total cost	Annualized cost
Project Development	$146,175	$73,088
Data Collection Activities	85,425	42,713
Data Processing and Analysis	65,375	32,688
Project Management	47,588	23,794
Overhead	62,500	31,250
Total	407,063	203,531

Request for Comments

In accordance with the Paperwork Reduction Act, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ healthcare research and healthcare information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) 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 upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: January 17, 2012.

Carolyn M. Clancy,

Director.

[FR Doc. 2012–1402 Filed 1–25–12; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project: ''Nursing Home Survey on Patient Safety Culture Comparative Database.'' In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3521, AHRQ invites the public to comment on this proposed information collection.

This proposed information collection was previously published in the **Federal Register** on November 2nd, 2011 and allowed 60 days for public comment. No comments were received. The purpose of this notice is to allow an additional 30 days for public comment.

DATES: Comments on this notice must be received by February 27, 2012.

ADDRESSES: Written comments should be submitted to: AHRQ's OMB Desk Officer by fax at (202) 395–6974 (attention: AHRQ's desk officer) or by email at *OIRA_submission@omb.eop.gov* (attention: AHRQ's desk officer).

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by email at *doris.lefkowitz@AHRQ.hhs.gov*.

SUPPLEMENTARY INFORMATION:

Proposed Project

Nursing Home Survey on Patient Safety Culture Comparative Database

The Agency for Healthcare Research and Quality (AHRQ) requests that the Office of Management and Budget (OMB) approve, under the Paperwork Reduction Act of 1995, AHRQ's

collection of information for the AHRQ Nursing Home Survey on Patient Safety Culture (Nursing Home SOPS) Comparative Database. The Nursing Home SOPS Comparative Database consists of data from the AHRQ Nursing Home Survey on Patient Safety Culture. Nursing homes in the U.S. are asked to voluntarily submit data from the survey to AHRQ through its contractor, Westat. The Nursing Home SOPS Database is modeled after the Hospital SOPS Database [OMB NO. 0935–0162, approved 05/04/2010] that was originally developed by AHRQ in 2006 in response to requests from hospitals interested in knowing how their patient safety culture survey results compare to those of other hospitals. In 1999, the Institute of Medicine called for health care organizations to develop a ''culture of safety'' such that their workforce and processes focus on improving the reliability and safety of care for patients (IOM, 1999; To Err is Human: Building a Safer Health System). To respond to the need for tools to assess patient safety culture in nursing homes, AHRQ developed and pilot tested the Nursing Home Survey on Patient Safety Culture with OMB approval (OMB NO.0935–0132; Approved July 5, 2007). The survey is designed to enable nursing homes to assess provider and staff opinions about patient safety issues, medical error, and error reporting and includes 42 items that measure 12 dimensions of patient safety culture. AHRQ released the survey into the public domain along with a Survey User's Guide and other toolkit materials in November 2008 on the AHRQ Web site (located at *http://www.ahrq.gov/qual/patientsafetyculture/nhsurvindex.htm*). Since its release, the survey has been voluntarily used by hundreds of nursing homes in the U.S.

The Nursing Home SOPS and the Comparative Database are supported by AHRQ to meet its goals of promoting improvements in the quality and safety of health care in nursing home settings. The survey, toolkit materials, and preliminary comparative database results are all made available in the public domain along with technical assistance provided by AHRQ through its contractor at no charge to nursing homes, to facilitate the use of these materials for nursing home patient safety and quality improvement.

The goal of this project is to create the Nursing Home SOPS Comparative Database. This database will (1) allow nursing homes to compare their patient safety culture survey results with those of other nursing homes; (2) provide data to nursing homes to facilitate internal assessment and learning in the patient safety improvement process; and (3) provide supplemental information to help nursing homes identify their strengths and areas with potential for improvement in patient safety culture. De-identified data files will also be available to researchers conducting patient safety analysis. The database will include 42 items that measure 12 areas, or composites, of patient safety culture.

This study is being conducted by AHRQ through its contractor, Westat, pursuant to AHRQ's statutory authority to conduct and support research on healthcare and on systems for the delivery of such care, including activities with respect to the quality, effectiveness, efficiency, appropriateness and value of healthcare services and with respect to quality measurement and improvement, and database development. 42 U.S.C. 299a(a)(1) and (2), and (a)(8).

Method of Collection

To achieve the goal of this project the following activities and data collections will be implemented:

(1) Nursing Home Eligibility and Registration Form—The purpose of this form is to determine the eligibility status and initiate the registration process for nursing homes seeking to voluntarily submit their NH SOPS data to the NH SOPS Comparative Database. The nursing home (or parent organization) point of contact (POC) will complete the form. The POC is either a corporate level health care manager for a Quality Improvement Organization (QIO), a survey vendor who contracts with a nursing home to collect their data, or a nursing home Director of Nursing or nurse manager. Many nursing homes are part of a QIO or larger nursing home or health system that includes many nursing home sites

(2) Data Use Agreement—The purpose of this form is to obtain authorization from nursing homes to use their voluntarily submitted NH SOPS data for analysis and reporting according to the terms specified in the Data Use Agreement (DUA). The nursing home POC will complete the form.

(3) Nursing Home Site Information Form—The purpose of this form is to obtain basic information about the characteristics of the nursing homes submitting their NH SOPS data to the NH SOPS Comparative Database (*e.g.,* bed size, urbanicity, ownership, and geographic region). The nursing home POC will complete the form.

(4) Data Submission—After the nursing home POC has completed the Nursing Home Eligibility and Registration Form, the Data Use Agreement and the Nursing Home Site Information Form they will submit their data from the NH SOPS to the NH SOPS Comparative Database.

Data from the AHRQ Nursing Home Survey on Patient Safety Culture are used to produce three types of products: (1) A Nursing Home SOPS Comparative Database Report that is produced periodically and made available in the public domain on the AHRQ Web site (see *http://www.ahrq.gov/qual/nhsurvey11/nhsurv111.pdf* for the 2011 report); (2) Nursing Home Survey Feedback Reports that are confidential, customized reports produced for each nursing home that submits data to the database; and (3) Research data sets of staff-level and nursing home-level de-identified data that enable researchers to conduct additional analyses.

Estimated Annual Respondent Burden

Exhibit 1 shows the estimated annualized burden hours for the nursing home to participate in the Nursing Home SOPS Comparative Database. The POC completes a number of data submission steps and forms, beginning with completion of the online Nursing Home SOPS Database Eligibility and Registration form and Data Use Agreement, which will be completed for 85 nursing homes or groups of affiliated nursing homes annually. The Nursing Home Site Information Form will be completed for each individual nursing home; since each POC represents an average of 5 nursing homes a total of 425 Information Forms will be completed annually and requires about 5 minutes to complete. The POC will submit data for all of the nursing homes they represent which will take about 5 and ½ hours, including the amount of time POCs typically spend deciding whether to participate in the database and preparing their materials and data set for submission to the database, and performing the submission. The total annual burden hours are estimated to be 511.

Nursing homes administer the AHRQ Nursing Home Survey on Patient Safety Culture on a periodic basis. Hospitals submitting to the Hospital SOPS Comparative Database administer the survey every 16 months on average. Similarly, the number of nursing home submissions to the database is likely to vary each year because nursing homes do not administer the survey and submit data every year. The 85 respondents/POCs shown in Exhibit 1 are based on an estimate of nursing homes submitting data in the coming years, with the following assumptions:

- 30 POCs for QIOs submitting on behalf of 10 nursing homes each.

- 5 POCs for vendors outside of QIOs submitting on behalf of 10 nursing homes each.
- 50 independent nursing homes submitting on their own behalf.

EXHIBIT 1—ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents/ POCs	Number of responses per POC	Hours per response	Total burden hours
Eligibility/Registration Forms	85	1	3/60	4
Data Use Agreement	85	1	3/60	4
Nursing Home Site Information Form	85	5	5/60	35
Data Submission	85	1	5.5	468
Total	340	NA	NA	511

Exhibit 2 shows the estimated annualized cost burden based on the respondents' time to submit their data. The cost burden is estimated to be $21,152 annually.

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN

Form name	Number of respondents/ POCs	Total burden hours	Average hourly wage rate *	Total cost burden
Eligibility/Registration Forms	85	4	$41.39	$166
Data Use Agreement	85	4	41.39	166
Nursing Home Site Information Form	85	35	41.39	1,449
Data Submission	85	468	41.39	19,371
Total	340	511	NA	21,152

* The wage rate in Exhibit 2 is based on May 2009 National Industry-Specific Occupational Employment and Wage Estimates, Bureau of Labor Statistics, U.S. Dept of Labor. Mean hourly wages for nursing home POCs are located at *http://www.bls.gov/oes/2009/may/naics4_623100.htm* and *http://www.bls.gov/oes/2009/may/naics2_62.htm*. The hourly wage of $41.39 is the weighted mean of $41.94 (General and Operations Managers; N = 25), $37.29 (Medical and Health Services Managers; N = 25), $42.89 (General and Operations Managers; N = 30) and $50.00 (Computer and Information Systems Managers; N = 5).

Estimated Annual Costs to the Federal Government

The estimated annualized cost to the government for developing, maintaining, and managing the database and analyzing the data and producing reports is shown below. The cost is estimated to be $310,000 annually. The total cost over the three years of this information collection request is $930,000.

EXHIBIT 3—ESTIMATED ANNUALIZED COST

Cost component	Total cost	Annualized cost
Project Development	$59,715	$19,905
Data Collection Activities	82,107	27,369
Data Processing and Analysis	111,963	37,321
Publication of Results	111,966	37,322
Project Management	7,464	2,488
Overhead	556,785	185,595
Total	930,000	310,000

Request for Comments

In accordance with the Paperwork Reduction Act, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ healthcare research and healthcare information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ' s estimate of burden (including hours and costs) of the proposed collection(s) 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 upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: January 17, 2012.

Carolyn M. Clancy,

Director.

[FR Doc. 2012–1400 Filed 1–25–12; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project: ''Assessing the Feasibility of Disseminating Effective Health Care Products through a Shared Electronic Medical Record Serving Member Organization of a Health Information Exchange.'' In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501–3521, AHRQ invites the public to comment on this proposed information collection.

This proposed information collection was previously published in the **Federal Register** on November 15th, 2011 and allowed 60 days for public comment. No comments were received. The purpose of this notice is to allow an additional 30 days for public comment.

DATES: Comments on this notice must be received by February 27, 2012.

ADDRESSES: *Written comments should be submitted to:* AHRQ's OMB Desk Officer by fax at (202) 395–6974 (attention: AHRQ's desk officer) or by email at *OIRA_submission@omb.eop.gov* (attention: AHRQ's desk officer).

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by email at *doris.lefkowitz@AHRQ.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Project

Assessing the Feasibility of Disseminating Effective Health Care Products through a Shared Electronic Medical Record Serving Member Organization of a Health Information Exchange

The Agency for Healthcare Research and Quality (AHRQ) requests that the Office of Management and Budget (OMB) approve under the Paperwork Reduction Act of 1995 this collection of information from users of work products and services initiated by the John M. Eisenberg Clinical Decisions and Communications Science Center (Eisenberg Center).

AHRQ is the lead agency charged with supporting research designed to improve the quality of healthcare, reduce its cost, improve patient safety, decrease medical errors, and broaden access to essential services. AHRQ's Eisenberg Center's mission is improving communication of findings to a variety of audiences (''customers''), including consumers, clinicians, and health care policy makers. The Eisenberg Center compiles research results into useful formats for customer stakeholders. The Eisenberg Center also conducts investigations into effective communication of research findings in order to improve the usability and rapid incorporation of findings into medical practice. The Eisenberg Center is one of three components of AHRQ's Effective Health Care (EHC) Program. The collections proposed under this clearance include activities to assess the feasibility of disseminating materials developed by the Eisenberg Center through the use of an electronic medical record (EMR) shared by a network of clinical care providers that are part of a Health Information Exchange (HIE) operating in multiple sites in several states. Our Community Health Information Network (OCHIN) members include 30 clinical care organizations operating more than 230 primary care clinics in six states. Data will be gathered from three different OCHIN-member organizations representing a total of 10 primary care clinics. The information generated will be provided to AHRQ to guide decision making and planning for additional efforts to foster EHC Program product distribution via EMR prompting and product linkages.

This research has the following goals:

(1) Identify facilitators and barriers to successful efforts to implement processes that: (a) Support use of EHC Program products by clinicians in practice, and (b) place relevant clinical information in the hands of patients and family members in languages and formats that are appropriate to patients' information needs;

(2) Examine ways in which EHC Program products can be used in concert with other support programs and products (*e.g.*, healthwise® resources available through the EMR; brief patient instructions and letters, including those designed for use with persons having very low literacy skills);

(3) Assess the extent to which EHC Program products are used (*e.g.*, accessed by clinicians, provided to patients in relevant formats) in settings where use is supported by automated EMR features, such as on-screen prompts and reminders; and

(4) Document the perceived value of integrating EHC Program products into systems of care supported by an EMR system as self-reported by clinicians involved in direct care of patients and clinic support personnel who interact with patients.

This study is being conducted by AHRQ through its contractor, the Eisenberg Center—Baylor College of Medicine, pursuant to AHRQ's statutory authority to conduct and support research, and disseminate information, on healthcare and on systems for the delivery of such care, including activities with respect to the quality, effectiveness, efficiency, appropriateness and value of healthcare services and clinical practice. 42 U.S.C. 299a(a)(1) and (4).

Method of Collection

To achieve the goals of this project the following data collections will be implemented:

(1) Automated Data Capture from EMR Usage Logs. Electronic usage data will be collected to determine the extent to which EHC Program guides for clinicians and patients were accessed to support shared decision making and patient education. The data will be retrieved from the existing EMR-linked database operated by the Kaiser Permanente staff in their coordination of activities related to the OCHIN HIE. Data will include: (a) Number and frequency of retrieval of EHC resource materials; (b) specific types of materials retrieved; and (c) health topic or condition targeted in the EHC materials. These data will inform the development of follow-up questions to be administered to clinicians and patients in the interviews and surveys described below. Because the data will be obtained using automated systems already in place, no special effort will be needed to generate these data, and thus this task is not included in the burden estimates in Exhibits 1 and 2.

(2) Interviews with Clinicians. Interviews will be held with clinical service providers for the following purposes: (a) Obtain perceptions of the overall value, relevancy, currency and appropriateness of EHC Program products in addressing the health service needs of patients treated in clinical settings; (b) assess ease of use of the materials in terms of access via the EMR; (c) determine perceived success of efforts to employ EHC Program products and related materials in addressing the needs of patients with limited language skills and/or low literacy levels; and (d) describe the relative success of efforts to use the EHC Program products in concert with other tools (*e.g.*, healthwise® resources) in promoting patient engagement in their own health care or in the care of family members.

(3) Interviews with Support Staff. Interviews will be held with non-clinical support staff to characterize perceptions of how the introduction of EHC Program products: (a) Affected clinic workflows and influenced the work that staff was required to do in supporting clinician-patient interactions; and (b) facilitated or impeded efforts to inform patients about actions they could take in being more fully involved in their own health care.

(4) Interviews with Patients. Interviews will be held with recruited patients to determine if they: (a) Viewed the EHC Program products that they were provided as useful to them in understanding their health issues; (b) were able to understand the EHC Program-related information that was provided to them sufficiently to take actions in their own health care; and (c) have suggestions about how the EHC Program materials could be changed or the delivery of them done in a different way to make the materials more useful and/or accessible to patients.

(5) Survey of Clinicians. A questionnaire will be administered to clinical care providers near the end of the study to gather quantitative data around their assessments of: (a) The relevancy of the EHC Program materials to the patients they serve; (b) the appropriateness of the products in addressing specific clinical issues; (c) the ease of use of the system created to provide access to EHC Program products through the EMR; and (d) overall ratings of the approach in addressing patient needs with regard to specific conditions addressed by the products available.

The interviews with clinicians, clinical staff, and patients will be conducted throughout the project period, approximately every three months with different sets of participants, to inform and refine delivery mechanisms and monitor progress.

This information will be used to determine the feasibility of: (a) Mounting broader efforts to distribute clinician and consumer guides, as well as other EHC products using EMRs as the primary vehicle for providing product access at the point of care; and (b) initiating additional studies to identify factors that encourage or deter effective integration of EHC products into care processes using electronic tools and care delivery support systems, like the EMR, that are increasingly common in clinical work settings.

Estimated Annual Respondent Burden

Exhibit 1 shows the estimated annualized burden for the respondents' time to participate in this research. Three rounds of interviews will be conducted during the project period (each round of interviews to be held approximately every three months with separate sets of participants) to assess progress and adjust methods or refine materials as needed. Interviews will be conducted with 100 patients, 50 clinicians and 50 clinical support staff. Each interview is estimated to last no more than 30 minutes. All clinicians in each participating clinic will have access to the EMR and will be invited to participate in an online questionnaire. Approximately 200 clinicians will complete the 10-minute questionnaire.

Exhibit 2 shows the estimated annualized cost burden associated with the respondents' time to participate in this research. The total annual cost burden is estimated to be $6,274.

EXHIBIT 1—ESTIMATED ANNUALIZED TOTAL BURDEN HOURS

Type of data collection	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
Interviews with Clinicians	50	1	30/60	25
Interviews with Support Staff	50	1	30/60	25
Interviews with Patients	100	1	30/60	50
Survey of Clinicians	200	1	10/60	33
Total	400	na	na	133

EXHIBIT 2—ESTIMATED ANNUALIZED TOTAL COST BURDEN'>

Type of data collection	Number of respondents	Total burden hours	Average hourly wage rate	Total cost burden
Interviews with Clinicians	50	25	$83.59	$2,090
Interviews with Support Staff	50	25	14.31	358
Interviews with Patients	100	50	21.35	1,068
Survey of Clinicians	200	33	83.59	2,758
Total	400	133	na	6,274

Based upon the mean wages for clinicians (29–1062 family and general practitioners), clinical team members (31–9092 medical assistants) and patients/consumers (00–0000 all occupations), National Compensation Survey: Occupational wages in the United States May 2010, ''U.S. Department of Labor, Bureau of Labor Statistics.''

Estimated Annual Costs to the Federal Government

The maximum cost to the Federal Government is estimated to be $217,451 annually for two years.

Exhibit 3 shows the total and annualized cost by the major cost components.

EXHIBIT 3—ESTIMATED TOTAL AND ANNUALIZED COST

Cost component	Total cost	Annualized cost
Project Development	$153,750	$76,875
Data Collection Activities	162,465	81,233
Data Processing and Analysis	33,563	16,781
Project Management	22,625	11,313
Overhead	62,500	31,250
Total	434,903	217,451

Request for Comments

In accordance with the Paperwork Reduction Act, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ healthcare research and healthcare information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) 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 upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: January 17, 2012.

Carolyn M. Clancy,

Director.

[FR Doc. 2012–1398 Filed 1–25–12; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Scientific Information Request on the Use of Natriuretic Peptide Measurement in the Management of Heart Failure

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS.

ACTION: Request for scientific information submissions.

SUMMARY: The Agency for Healthcare Research and Quality (AHRQ) is seeking scientific information submissions from medical device manufacturers of natriuretic peptide measurement assays. Scientific information is being solicited to inform our Comparative Effectiveness Review of Use of Natriuretic Peptide Measurement in the Management of Heart Failure, which is currently being conducted by the Evidence-based Practice Centers for the AHRQ Effective Health Care Program. Access to published and unpublished pertinent scientific information on this device will improve the quality of this comparative effectiveness review. AHRQ is requesting this scientific information and conducting this comparative effectiveness review pursuant to Section 1013 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Public Law 108–173.

DATES: Submission Deadline on or before February 27, 2012.

ADDRESSES: Online submissions: *http://effectivehealthcare.AHRQ.gov/index.cfm/submit-scientific-information-packets/*. Please select the study for which you are submitting information from the list of current studies and complete the form to upload your documents.

Email submissions: ehcsrc@ohsu.edu (please do not send zipped files—they are automatically deleted for security reasons).

Print submissions: Robin Paynter, Oregon Health and Science University, Oregon Evidence-based Practice Center, 3181 SW. Sam Jackson Park Road, Mail Code: BICC, Portland, OR 97239–3098.

FOR FURTHER INFORMATION CONTACT: Robin Paynter, Research Librarian, Telephone: (503) 494–0147 or Email: *ehcsrc@ohsu.edu*.

SUPPLEMENTARY INFORMATION: In accordance with Section 1013 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Public Law 108–173, the Agency for Healthcare Research and Quality has commissioned the Effective Health Care (EHC) Program Evidence-based Practice Centers to complete a comparative effectiveness review of the evidence for use of natriuretic peptide measurement in the management of heart failure.

The EHC Program is dedicated to identifying as many studies as possible that are relevant to the questions for each of its reviews. In order to do so, we are supplementing the usual manual and electronic database searches of the literature by systematically requesting information (*e.g.,* details of studies conducted) from medical device industry stakeholders through public information requests, including via the **Federal Register** and direct postal and/or online solicitations. We are looking for studies that report on natriuretic peptide measurement assays, including those that describe adverse events, as specified in the key questions detailed below. The entire research protocol, including the key questions, is also available online at: *http://effectivehealthcare.ahrq.gov/index.cfm/search-for-guides-reviews-and-reports/?pageaction=displayproduct&productid=899#4210.*

This notice is a request for industry stakeholders to submit the following:

- A current product label, if applicable (preferably an electronic PDF file).
- Information identifying published randomized controlled trials and observational studies relevant to the clinical outcomes. Please provide both a list of citations and reprints if possible.
- Information identifying unpublished randomized controlled trials and observational studies relevant to the clinical outcomes. If possible, please provide a summary that includes the following elements: Study number, study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, primary and secondary outcomes, baseline characteristics, number of patients screened/eligible/enrolled/lost to withdrawn/follow-up/analyzed, and effectiveness/efficacy and safety results.
- Registered ClinicalTrials.gov studies. Please provide a list including the ClinicalTrials.gov identifier, condition, and intervention.

Your contribution is very beneficial to this program. AHRQ is not requesting and will not consider marketing material, health economics information, or information on other indications. This is a voluntary request for information, and all costs for complying with this request must be borne by the submitter. In addition to your scientific

information please submit an index document outlining the relevant information in each file along with a statement regarding whether or not the submission comprises all of the complete information available.

Please Note: The contents of all submissions, regardless of format, will be available to the public upon request unless prohibited by law.

The draft of this review will be posted on AHRQ's EHC program Web site and available for public comment for a period of 4 weeks. If you would like to be notified when the draft is posted, please sign up for the email list at: *http://effectivehealthcare.AHRQ.gov/index.cfm/join-the-email-list1/*.

The Key Questions

Key Question 1: In patients presenting to the emergency department or urgent care facilities with signs or symptoms suggestive of heart failure (HF):

1. What is the test performance of BNP and NT-proBNP for HF?
2. What are the optimal decision cut points for BNP and NT-proBNP to diagnose and exclude HF?
3. What determinants affect the test performance of BNP and NTproBNP (e.g., age, gender, comorbidity)?

Key Question 2: In patients presenting to a primary care physician with risk factors, signs, or symptoms suggestive of HF:

1. What is the test performance of BNP and NT-proBNP for HF?
2. What are the optimal decision cut points for BNP and NT-proBNP to diagnose and exclude HF?
3. What determinants affect the test performance of BNP and NTproBNP (e.g., age, gender, comorbidity)?

Key Question 3: In HF populations, is BNP or NT-pro BNP measured at admission, discharge or change between admission and discharge an independent predictor of morbidity and mortality outcomes?

Key Question 4: In HF populations, does BNP measured at admission, discharge or change between admission and discharge add predictive information to other prognostic methods?

Key Question 5: Is BNP or NT-pro BNP measured in the community setting an independent predictor of morbidity and mortality outcomes in general populations?

Key Question 6: In patients with HF, does BNP assisted therapy or intensified therapy compared to usual care, improve outcomes?

Key Question 7: What is the biological variation of BNP and NT-proBNP in patients with HF and without HF?

Dated: January 17, 2012.

Carolyn M. Clancy,

Director, AHRQ.

[FR Doc. 2012–1403 Filed 1–25–12; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration on Aging

Agency Information Collection Activities; Proposed Collection; Comment Request; Annual Reporting Requirements for the Older American Act Title VI Grant Program

AGENCY: Administration on Aging, HHS.

ACTION: Notice.

SUMMARY: The Administration on Aging (AoA) is announcing an opportunity for public comment on the proposed extension of an existing collection of information by the agency.

Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection requirements relating to Performance Reports for Title VI grants.

DATES: Submit written or electronic comments on the collection of information by March 26, 2012.

ADDRESSES: Submit electronic comments on the collection of information to: *Margaret.Graves@aoa.hhs.gov.* Submit written comments on the collection of information to Margaret Graves, Administration on Aging, Washington, DC 20201 or by fax at (202) 357–3560).

FOR FURTHER INFORMATION CONTACT: Margaret Graves at (202) 357–3502 or *Margaret.Graves@aoa.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under 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 request 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, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, AoA is publishing notice of the proposed collection of information set forth in this document. With respect to the following collection of information, AoA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of AoA's functions, including whether the information will have practical utility; (2) the accuracy of AoA'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.

AoA estimates the burden of this collection of information as follows: Annual submission of the Program Performance Reports are due 90 days after the end of the budget period and final project period.

Respondents: Federally Recognized Tribes, Tribal and Native Hawaiian Organizations receiving grants under Title VI, Part A, Grants for Native Americans; Title VI, Part B, Native Hawaiian Program and Title VI, Part C, Native American Caregiver Support Program.

Estimated Number of Responses: 256.

Total Estimated Burden Hours: 640.

Dated: January 23, 2012.

Kathy Greenlee,

Assistant Secretary for Aging.

[FR Doc. 2012–1605 Filed 1–25–12; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30-Day-12–0805]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–7570 or send an

email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Racial and Ethnic Approaches to Community Health (REACH) US Evaluation—Revision — National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

From 2009–2011, CDC conducted annual risk factor surveys that tracked health trends among racial and ethnic minority groups (OMB No. 0920–0805, exp. 2/29/2012). The surveys were conducted in areas where community interventions were implemented as part of the Racial and Ethnic Approaches to Community Health across the U.S. (REACH US) program. The REACH US program is a national multilevel strategy to reduce and eliminate health disparities in racial and ethnic minorities. Priority areas for the program include breast and cervical cancer; cardiovascular disease; diabetes mellitus; adult/older adult immunization, hepatitis B, and/or tuberculosis; asthma; and infant mortality. Priority populations for the program are African American, American Indian, Alaska Native, Hispanic American, Asian American, and Pacific Islander citizens.

CDC is requesting OMB approval to conduct two additional cycles of data collection in 2012 and 2013. Risk factor information will be collected from a random sample of adults in 28 REACH US communities (900 individuals per community). After households have been selected through address-based sampling, health information will be collected through a self-administered, mailed questionnaire, or through interviews conducted by telephone or in-person with members of the selected households.

The estimated burden per response is 15 minutes. The surveys will help to assess the prevalence of various risk factors associated with chronic diseases, deficits in breast and cervical cancer screening and management, and deficits in adult immunizations. Survey results will be used for REACH US program evaluation and to assess progress towards the national goal of eliminating health disparities within minority populations.

OMB approval is requested for two years. Minor changes to the survey questions will be implemented, and adjustments will be made to the estimated number of respondents. Participation is voluntary and there are no costs to respondents other than their time. The total estimated burden hours are 9,460.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Members of REACH U.S. communities	Screening Interview	14,700	1	3/60
	Household Member Interview	10,600	1	15/60
	REACH Study Booklet self-administered questionnaire.	24,300	1	15/60

Kimberly S. Lane,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2012–1624 Filed 1–25–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30-Day-11–11EP]

Proposed Data Collections Submitted for Public Comment and Recommendations

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (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. Written comments should be received within 60 days of this notice.

Proposed Project

Validation of an Occupational Safety and Health Questionnaire—New—National Institute for occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The mission of the National Institute for Occupational Safety and Health (NIOSH) is to promote safety and health at work for all people through research and prevention. Under Public Law 91–596, Section 20 and 22 (section 20–22, Occupational Safety and Health Act of 1970), NIOSH has the responsibility to conduct research to advance the health and safety of workers. In this capacity, NIOSH will administer a questionnaire designed to assess differences in approaches to and perspectives of workplace safety between American-born and Latino immigrant workers.

The rapid growth of Latino immigrant population in the United States has increased the demand for Spanish-language occupational safety and health training materials. Typically, this need has been met by translating existing, English-language training materials into Spanish rather than developing new materials specifically designed for

Latino immigrants. Critics suggest that such efforts frequently fall short of the mark because of poor translations and a failure to address the cultural, legal, educational and socio-economic realities that differentiate Latino immigrant workers from the American-born workers for whom the training materials were originally developed. The failure of current occupational safety and health training approaches with Latino immigrants is highlighted by data from Bureau of Labor Statistics indicating that significant occupational health disparities exist between Latino immigrant workers and American-born workers.

A major obstacle to designing and assessing the impact of occupational safety and health training interventions with Latino immigrants is the lack of a rigorously validated questionnaire addressing the issues believed to be contributing to the occupational health disparities experienced by this group. In order to better understand some of the factors that may be contributing to the persistent occupational health disparities between Latino immigrant and American-born workers, NIOSH is developing a questionnaire that focuses on important occupational safety and health issues such as risk perception, risk acceptance and workplace coping strategies. The content of this questionnaire was guided, in part, by data collected from focus groups conducted with both Latino immigrants and American-born workers. Additionally, a review of the existing literature and feedback from experts in the field of occupational health disparities contributed to questionnaire content.

For validation purposes, this questionnaire will be administered to a sample of approximately 600 workers employed in a broad range of industries. In order to account for differences in level of acculturation, 200 of the workers will be Latino immigrants who have been in the United States less than 2 years and 200 of the workers will be Latino immigrants who have been in the United States more than 5 years. An additional 200 American-born workers will be given the questionnaire so that their responses may be contrasted with those of the Latino immigrants. Half of the workers will be male and the other half female. In order to account for potential regional differences, 300 of the workers will be from New Mexico, a state that has historically always had a large Latino population and 300 workers will be from Ohio, a state that has only recently experienced a large increase in its Latino population. The sample sizes are not based upon power analyses comparing expected group differences. Rather, the sample sizes are based upon recommendations related to validation of questionnaires, both on the basis of individual items and the analysis of the underlying structural elements.

Participants for this data collection will be recruited with the assistance of contractors who have successfully performed similar tasks for NIOSH in the past. The Latino immigrants will be assessed first so that an American-born workers sample can be recruited that can be matched in terms of occupation and industry. Depending upon literacy level and/or individual preferences, the questionnaire will be administered verbally or in ''paper and pencil'' format to participants in either English or Spanish. Based upon previous experiences working with these populations, it is estimated that each questionnaire will take approximately 75 minutes to complete.

The purpose of this information collection is to validate a questionnaire assessing factors that are thought to contribute to the persistent occupational health disparities experienced by Latino immigrant workers. Once validated, this questionnaire can be used in other efforts to assess the impact of occupational safety and health interventions aimed at the Latino immigrant community. Without the benefit of this data, NIOSH will be unable to assess variables related to the occupational health disparities experienced by Latino immigrants or to better assess the impact of occupational safety and health training interventions targeted at this group.

Once this study is complete, results will be made available via various means including print publications and the agency internet site. NIOSH expects to complete data collection no later than March 2012. There is no cost to respondents other than their time. The total estimated annual burden hours are 810.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Recruitment Script	600	1	3/60
Opening Statement	600	1	3/60
Questionnaire	600	1	1.25

Kimberly S. Lane,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2012–1680 Filed 1–25–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60-Day 12–0566]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call (404) 639–7570 and send comments to Tony Richardson, CDC Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have

practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (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. Written comments should be received within 60 days of this notice.

Proposed Project

Evaluation of Worker Notification Program (0920–0566, Expiration 2/28/2011)—Reinstatement—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The National Institute for Occupational Safety and Health (NIOSH), under Section 20(a)(1), (a)(4), (a)(7)(c), and Section 22(d), (e)(5)(7) of the Occupational Safety and Health Act (29 U.S.C. 669), has the responsibility to conduct research relating to occupational safety and health relating to innovative methods, techniques, and approaches for dealing with occupational safety and health problems.

Since the Right to Know movement in the late 1970s, NIOSH has been developing methods and materials to notify subjects of its epidemiological studies. Within NIOSH, notifying workers of past exposures is done to inform surviving cohort members of findings from NIOSH studies. Current NIOSH policy dictates how and when worker notification should occur. The extent of the notification effort depends upon the level of excess mortality or the extent of the disease or illness found in the study population. Current notification efforts range from posting results at the facilities studied to mailing individual letters to surviving members of the study population and other stakeholders. Each year, the NIOSH Industrywide Studies Branch (IWSB), Division of Surveillance, Hazard Evaluation, and Field Studies (DSHEFS) typically prepares materials for two to three completed studies. This often requires individual letters be mailed to study populations ranging in size from 200–20,000 workers each. An evaluation instrument would gauge the effectiveness of notification materials and improve future communication of risk information.

The purpose of the proposed evaluation tool is to obtain feedback from workers that would improve the quality and usefulness of the Institute's worker notification activities. Researchers from NIOSH propose to routinely include a Reader Response postcard with notification materials to assess the value and usefulness of said materials. We are requesting approval for three years. Participation is voluntary. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number respondents	Number responses	Avg. burden per response (hours)	Total burden (hours)
Reader Response Card	8,000	1	10/60	1,333
Total				1,333

Kimberly S. Lane,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2012–1670 Filed 1–25–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Initial Review

The meeting announced below concerns Epidemiology, Prevention and Treatment of Influenza and Other Respiratory Infections in Ghana, IP12–001, Studies at the Animal-Human Interface of Influenza and Other Zoonotic Diseases in Vietnam, IP12–002, The Incidence of Community Associated Influenza and Other Respiratory Infections in the United States, IP12–003, and Epidemiology, Prevention and Treatment of Influenza and Other Respiratory Infections in Panama and Central America Region, IP12–006, initial review.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Time and Date: 8 a.m.–5 p.m., March 16, 2012 (Closed).

Place: Sheraton Gateway Hotel Atlanta Airport, 1900 Sullivan Road, Atlanta, Georgia 30337, Telephone: (770) 997–1100.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to ''Epidemiology, Prevention and Treatment of Influenza and Other Respiratory Infections in Ghana, FOA IP12–001; Studies at the Animal-Human Interface of Influenza and Other Zoonotic Diseases in Vietnam, FOA IP12–002; The Incidence of Community Associated Influenza and Other Respiratory Infections in the United States, FOA IP12–003; and Epidemiology, Prevention and Treatment of Influenza and Other Respiratory Infections in Panama and Central America Region, FOA IP12–006.''

Contact Person For More Information: Gregory Anderson, M.S., M.P.H., Scientific Review Officer, CDC, 1600 Clifton Road NE., Mailstop E60, Atlanta, Georgia 30333, Telephone: (404) 718–8833.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: January 18, 2012.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2012–1665 Filed 1–25–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Safety and Occupational Health Study Section (SOHSS), National Institute for Occupational Safety and Health, (NIOSH)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting of the aforementioned committee:

Times and Dates

8 a.m.–5 p.m., February 22, 2012 (Closed),

8 a.m.–5 p.m., February 23, 2012 (Closed).

PLACE: Embassy Suites, 1900 Diagonal Road, Alexandria, Virginia 22314, Telephone: (703) 684–5900, Fax: (703) 684–0653.

STATUS: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

PURPOSE: The Safety and Occupational Health Study Section will review, discuss, and evaluate grant application(s) received in response to the Institute's standard grants review and funding cycles pertaining to research issues in occupational safety and health, and allied areas.

It is the intent of NIOSH to support broad-based research endeavors in keeping with the Institute's program goals. This will lead to improved understanding and appreciation for the magnitude of the aggregate health burden associated with occupational injuries and illnesses, as well as to support more focused research projects, which will lead to improvements in the delivery of occupational safety and health services, and the prevention of work-related injury and illness. It is anticipated that funded research will promote these program goals.

MATTERS TO BE DISCUSSED: The meeting will convene to address matters related to the conduct of Study Section business and for the study section to consider safety and occupational health-related grant applications.

These portions of the meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, Centers for Disease Control and Prevention, pursuant to Section 10(d) Public Law 92–463.

Agenda items are subject to change as priorities dictate.

CONTACT PERSON FOR MORE INFORMATION: Price Connor, Ph.D., NIOSH Health Scientist, 2400 Executive Parkway, Mailstop E–20, Atlanta, Georgia 30345, Telephone: (404) 498–2511, Fax: (404) 498–2571.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: January 18, 2012.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2012–1687 Filed 1–25–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Initial Review

The meeting announced below concerns Evaluation of Dengue Epidemiology, Outcomes, and Prevention in Sentinel Surveillance and Research Sites in Puerto Rico, Funding Opportunity Announcement (FOA), CK12–001, initial review.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

Time and Date: 1 p.m.–5 p.m., April 18, 2012 (Closed).

Place: Teleconference.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the initial review, discussion, and evaluation of applications received in response to ''Evaluation of Dengue Epidemiology, Outcomes and Prevention in Sentinel Surveillance and Research Sites in Puerto Rico, FOA CK12–001, initial review.''

Contact Person for More Information: Greg Anderson, MPH, MS, Scientific Review Officer, CDC, 1600 Clifton Road NE., Mailstop E60, Atlanta, Georgia 30333, *Telephone:* (404) 718–8833.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: January 18, 2012.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2012–1675 Filed 1–25–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Arthritis and Musculoskeletal and Skin Diseases Initial Review Group, Arthritis and Musculoskeletal and Skin Diseases Special Grants Review Committee.

Date: February 23–24, 2012.

Time: 7:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Helen Lin, Ph.D., Scientific Review Officer, NIH/NIAMS/RB, 6701 Democracy Blvd., Suite 800, Bethesda, MD 20817, (301) 594–4952, *linh1@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: January 19, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–1674 Filed 1–25–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group, Myocardial Ischemia and Metabolism Study Section.

Date: February 16–17, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.

Contact Person: Kimm Hamann, Ph.D., Scientific Review Officer, Center for Scientific Review (CSR), NIH, 6701 Rockledge Drive, Room 4118A, MSC 7814, Bethesda, MD 20892, (301) 435–5575, *Hamannkj@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, PAR–10–018: Accelerating the Pace of Drug Abuse Research Using Existing Epidemiology, Prevention, and Treatment Research Data.

Date: February 16–17, 2012.

Time: 10 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Valerie Durrant, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3148, MSC 7770, Bethesda, MD 20892, (301) 827–6390, *durrantv@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Bioengineering Sciences and Technologies AREA Proposals.

Date: February 22–23, 2012.

Time: 9 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Joseph Thomas Peterson, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, (301) 408–9694, *petersonjt@csr.nih.gov*.

Name of Committee: Oncology 1—Basic Translational Integrated Review Group, Cancer Genetics Study Section.

Date: February 23–24, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Wardman Park Washington DC Hotel, 2660 Woodley Road, NW, Washington, DC 20008.

Contact Person: Michael L Bloom, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6187, MSC 7804, Bethesda, MD 20892, (301) 451–0132, *bloomm2@mail.nih.gov*.

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group, Integrative Physiology of Obesity and Diabetes Study Section.

Date: February 23, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Reed A Graves, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6166, MSC 7892, Bethesda, MD 20892, (301) 402–6297, *gravesr@csr.nih.gov*.

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group, Neurotransporters, Receptors, and Calcium Signaling Study Section.

Date: February 23–24, 2012.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Solamar, 435 6th Avenue, San Diego, CA 92101.

Contact Person: Peter B Guthrie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4182, MSC 7850, Bethesda, MD 20892, (301) 435–1239, *guthriep@csr.nih.gov*.

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group, Gene and Drug Delivery Systems Study Section.

Date: February 23–24, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Amy L Rubinstein, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5152, MSC 7844, Bethesda, MD 20892, (301) 408–9754, *rubinsteinal@csr.nih.gov*.

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group, Clinical Neuroscience and Neurodegeneration Study Section.

Date: February 23, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Nikko San Francisco, 222 Mason Street, San Francisco, CA 94102.

Contact Person: Samuel C Edwards, Ph.D., Chief, Brain Disorders and Clinical Neuroscience, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5210, MSC 7846, Bethesda, MD 20892, (301) 435–1246, *edwardss@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Small Business: Medical Imaging.

Date: February 23–24, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Guest Suites Santa Monica, 1707 Fourth Street, Santa Monica, CA 90401.

Contact Person: Leonid V Tsap, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5128, MSC 7854, Bethesda, MD 20892, (301) 435–2507, *tsapl@csr.nih.gov*.

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group, Urologic and Genitourinary Physiology and Pathology.

Date: February 23, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Crowne Plaza Washington National Airport, 1489 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Ryan G Morris, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4205, MSC 7814, Bethesda, MD 20892, (301) 435–1501, *morrisr@csr.nih.gov*.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group, Genetics of Health and Disease Study Section.

Date: February 23–24, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington DC/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Cheryl M Corsaro, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2204, MSC 7890, Bethesda, MD 20892, (301) 435–1045, *corsaroc@csr.nih.gov*.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group, Prokaryotic Cell and Molecular Biology Study Section.

Date: February 23–24, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Michael K Schmidt, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2214, MSC 7890, Bethesda, MD 20892, (301) 404–9958, *mschmidt@mail.nih.gov*.

Name of Committee: Oncology 1—Basic Translational Integrated Review Group, Molecular Oncogenesis Study Section.

Date: February 23–24, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Mandarin Oriental, 1330 Maryland Avenue SW, Washington, DC 20024.

Contact Person: Nywana Sizemore, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6204, MSC 7804, Bethesda, MD 20892, (301) 435–1718, *sizemoren@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Small Business: Risk Prevention and Health Behavior.

Date: February 23–24, 2012.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency, 123 Losoya Street, San Antonio, TX 78205.

Contact Person: Claire E Gutkin, Ph.D., MPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3106, MSC 7808, Bethesda, MD 20892, (301) 594–3139, *gutkincl@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Enabling Bioanalytical and Imaging Technologies.

Date: February 23, 2012.

Time: 11 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Dennis Hlasta, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6185, MSC, Bethesda, MD 20892, (301) 435–1047, *dennis.hlasta@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Small Business: Biomedical Sensing, Measurement and Instrumentation.

Date: February 24, 2012.

Time: 7:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: DoubleTree Suites by Hilton, 1707 Fourth Street, Santa Monica, CA 90401.

Contact Person: Guo Feng Xu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5122, MSC 7854, Bethesda, MD 20892, (301) 237–9870, *xuguofen@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: January 20, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–1676 Filed 1–25–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Modeling and Analysis of Biological Systems Study Section, February 8, 2012, 8 a.m. to February 9, 2012, 5 p.m., Hyatt Regency Bellevue on Seattle, 900 Bellevue Way NE., Bellevue, WA 98004 which was published in the **Federal Register** on January 4, 2012, 77 FR 296.

The meeting will be held at the Renaissance Seattle Hotel, 515 Madison Street, Seattle, WA 98104. The meeting date and time remains the same. The meeting is closed to the public.

Dated: January 19, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–1689 Filed 1–25–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group, Pregnancy and Neonatology Study Section.

Date: February 21, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Michael Knecht, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6176, MSC 7892, Bethesda, MD 20892, (301) 435–1046, *knechtm@csr.nih.gov*.

Name of Committee: Oncology 1—Basic Translational Integrated Review Group, Tumor Cell Biology Study Section.

Date: February 21–22, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Monaco, 700 F Street NW., Washington, DC 20001.

Contact Person: Charles Morrow, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6202, MSC 7804, Bethesda, MD 20892, (301) 451–4467, *morrowcs@csr.nih.gov*.

Name of Committee: Oncology 1—Basic Translational Integrated Review Group, Cancer Molecular Pathobiology Study Section.

Date: February 21–22, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Nikko San Francisco, 222 Mason Street, San Francisco, CA 94102.

Contact Person: Manzoor Zarger, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6208, MSC 7804, Bethesda, MD 20892, (301) 435–2477, *zargerma@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel Member, Conflicts: Lung Development and Pulmonary Hypertension.

Date: February 21–22, 2012.

Time: 9 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: George M Barnas, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4220, MSC 7818, Bethesda, MD 20892, (301) 435–0696, *barnasg@csr.nih.gov*.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group, Genetic Variation and Evolution Study Section.

Date: February 22–23, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Hotel, 2401 M St. NW., Washington, DC.

Contact Person: Ronald Adkins, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2206,

MSC 7890, Bethesda, MD 20892, (301) 435–4511, *ronald.adkins@nih.gov*.

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group, Integrative and Clinical Endocrinology and Reproduction Study Section.

Date: February 22, 2012.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Dianne Hardy, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6175, MSC 7892, Bethesda, MD 20892, (301) 435–1154, *dianne.hardy@nih.gov.*

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group, Respiratory Integrative Biology and Translational Research Study Section.

Date: February 22–23, 2012.

Time: 8:30 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Everett E. Sinnett, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2178, MSC 7818, Bethesda, MD 20892, (301) 435–1016, *sinnett@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Tumor Cell Biology Special Review.

Date: February 22, 2012.

Time: 11 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Monaco, 700 F Street NW., Washington, DC 20001.

Contact Person: Cathleen L. Cooper, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4208, MSC 7812, Bethesda, MD 20892, (301) 443–4512, *cooperc@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Cancer Therapeutics AREA Grant Applications.

Date: February 22, 2012.

Time: 1 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Denise R Shaw, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6158, MSC 7804, Bethesda, MD 20892, (301) 435–0198, *shawdeni@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Surgical Sciences and Continuing Resolution Imaging.

Date: February 22, 2012.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: David L. Williams, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5110, MSC 7854, Bethesda, MD 20892, (301) 435–1174, *williamsdl2@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: January 19, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–1694 Filed 1–25–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel, NIAID Peer Review Meeting.

Date: February 7, 2012.

Time: 1 p.m. to 4:30 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Dharmendar Rathore, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Rm 3134, Bethesda, MD 20892–7616, (301) 435–2766, *rathored@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel, NIAID Investigator Initiated Program Project Applications (P01).

Date: March 1, 2012.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health,, 6700B Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Sujata Vijh, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892, (301) 594–0985, *vijhs@niaid.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 19, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–1685 Filed 1–25–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases, Special Emphasis Panel, Osteoarthritis Initiative.

Date: February 14, 2012.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Charles N. Rafferty, Ph.D., Chief, Scientific Review Branch, National Institute of Arthritis, Musculoskeletal and Skin Diseases, National Institutes of Health, 6701 Democracy Boulevard, Suite 800,

Bethesda, MD 20817, (301) 594–5019, *charles.rafferty@nih.gov.*

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases, Special Emphasis Panel, P50 Centers of Research Translation Review.

Date: March 8–9, 2012.

Time: 8 a.m. to 5 p.m.

Agenda : To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Kan Ma, Ph.D., Scientific Review Officer, National Institute of Arthritis, Musculoskeletal and Skin Diseases, National Institutes of Health, 6701 Democracy Boulevard, Suite 800, Bethesda, MD 20817, (301) 451–4838, *mak2@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: January 19, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–1682 Filed 1–25–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Initial Review Group, Subcommittee I—Career Development.

Date: February 21, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.

Contact Person: Sergei Radaev, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd., Rm 8113, Bethesda, MD 20892, (301) 435–5655, *sradaev@mail.nih.gov.*

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/irg/irg.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: January 19, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–1678 Filed 1–25–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary & Alternative Medicine; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Advisory Council for Complementary and Alternative Medicine, February 3, 2012, 8:30 a.m. to February 3, 2012, 4 p.m., National Institutes of Health, Building 31, 31 Center Drive, Bethesda, MD, 20892 which was published in the **Federal Register** on December 21, 2011, 76 FR 79202.

This meeting has been amended so that the open session will begin at 10 a.m. instead of 10:45 am. The public comment period will be from 3:30 p.m. to 3:45 p.m. The meeting is partially Closed to the public.

Dated: January 20, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–1702 Filed 1–25–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Topics in Bioengineering Sciences and Technologies.

Date: February 9–10, 2012.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Joseph D Mosca, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5158, MSC 7808, Bethesda, MD 20892, (301) 435–2344, *moscajos@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: January 20, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–1699 Filed 1–25–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or 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 grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel, Review of P01 Grant Applications (SEP One).

Date: February 2–3, 2012.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hilton Washington DC/Rockville, 1750 Rockville Pike, Rockville, MD 20852.
Contact Person: Delia Tang, MD, Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd., Room 8123, Bethesda, MD 20892, (301) 496–2330, *tangd@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to scheduling conflicts.

Name of Committee: National Cancer Institute Special Emphasis Panel, NCI SPORE in Breast, Endometrial, and Skin Cancers.
Date: February 8–9, 2012.
Time: 8 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.
Contact Person: David G. Ransom, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd., Rm 8133, Bethesda, MD 20892–8328, (301) 451–4757, *david.ransom@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to scheduling conflicts.

Name of Committee: National Cancer Institute Special Emphasis Panel, Review of P01 Grant Applications (SEP Four).
Date: February 13–14, 2012.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hilton Washington DC/Rockville Hotel & Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20852.
Contact Person: Olivia Bartlett, Ph.D., Chief, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd., Room 8121, Bethesda, MD 20892–7405, 301/594–2501, *op2t@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel, Development of Algorithms for Analysis of In Vivo Images.
Date: February 29, 2012.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate contract proposals.
Place: National Institutes of Health, 6101 Executive Boulevard, Room 707, Rockville, MD 20852, (Telephone Conference Call).
Contact Person: Zhiqiang Zou, M.D., Ph.D., Scientific Review Officer, National Cancer Institute, National Institutes of Health, 6116 Executive Blvd., Room 8050A, MSC 8329, Bethesda, MD 20852, *zouzhiq@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel, Simplified Tissue Microarray Instrument for Clinical and Research Settings.
Date: March 1, 2012.
Time: 12:30 p.m. to 5 p.m.
Agenda: To review and evaluate contract proposals.
Place: National Institutes of Health, 6116 Executive Blvd., Room 607, Rockville, MD 20852, (Telephone Conference Call).
Contact Person: Donald L. Coppock, Ph.D., Scientific Review Officer, Scientifc Review and Logistic Branch, Division of Extramural Activities, NCI, National Institutes of Health, 6116 Executive Blvd., Rm 7151, Bethesda, MD 20892, (301) 451–9385, *donald.coppock@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel, Generation and Qualification of Site-Specific Post-Translationally Modified Proteins for use as Calibrators in Pharmacodynamic (PD) Assays (Topic-312).
Date: March 7, 2012.
Time: 12:15 p.m. to 3:15 p.m.
Agenda: To review and evaluate contract proposals.
Place: National Institutes of Health, 6116 Executive Boulevard, Room 707, Rockville, MD 20852, (Telephone Conference Call).
Contact Person: Marvin L. Salin, Ph.D., Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 7073, Bethesda, MD 20892–8329, (301) 496–0694, *msalin@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel, The Role of Microbial Metabolites in Cancer Prevention and Etiology.
Date: March 14, 2012.
Time: 12 p.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6116 Executive Blvd., Room 607, Rockville, MD 20852, (Telephone Conference Call).
Contact Person: Donald L. Coppock, Ph.D., Scientific Review Officer, Scientifc Review and Logistic Branch, Division of Extramural Activities, NCI, National Institutes of Health, 6116 Executive Blvd., Rm 7151, Bethesda, MD 20892, (301) 451–9385, *donald.coppock@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel, Automated Collection, Storage, Analysis, and Reporting Systems for Dietary Images (Topic-308).
Date: March 15, 2012.
Time: 8 a.m. to 6 p.m.
Agenda: To review and evaluate contract proposals.
Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.
Contact Person: Viatcheslav A Soldatenkov, M.D., Ph.D., Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Blvd. Room 8057, Bethesda, MD 20892–8329, (301) 451–4758, *soldatenkovv@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel, Companion Diagnostics.
Date: March 20–21, 2012.
Time: 8 a.m. to 12 p.m.
Agenda: To review and evaluate contract proposals.
Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.
Contact Person: Jeannette F Korczak, Ph.D., Scientific Review Officer, Resources And Training Review Branch, Division Of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd., Room 8115, Bethesda, MD 20892, (301) 496–9767, *korczakj@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel, Alliance of Glycobiologists for Detection of Cancer (U01).
Date: March 22, 2012.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Lorien Hotel and Spa, 1600 King Street, Alexandria, VA 22314.
Contact Person: Marvin L. Salin, Ph.D., Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 7073, Bethesda, MD 20892–8329, (301) 496–0694, *msalin@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel, Development of Radiation Modulators for use during Radiotherapy, (Topic-291).
Date: March 27–28, 2012.
Time: 8 a.m. to 6 p.m.
Agenda: To review and evaluate contract proposals.
Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.
Contact Person: Viatcheslav A Soldatenkov, M.D., Ph.D., Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Blvd. Room 8057, Bethesda, MD 20892–8329, (301) 451–4758, *soldatenkovv@mail.nih.gov.*

Information is also available on the Institute's/Center's home page: http://deainfo.nci.nih.gov/advisory/sep/sep.htm, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: January 19, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–1690 Filed 1–25–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Agency Information Collection Activities: Post-Award Contract Information

AGENCY: Office of Chief Procurement Officer, DHS.

ACTION: 30-Day Notice and request for comments; Extension without Change, 1600–0003.

SUMMARY: The Department of Homeland Security, Office of Chief Procurement Officer, DHS will submit the following information collection request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). DHS previously published this information collection request (ICR) in the **Federal Register** on August 31, 2011 at 76 FR 54242 for a 60-day public comment period. No comments were received by DHS. The purpose of this notice is to allow additional 30-days for public comments.

DATES: Comments are encouraged and will be accepted until February 27, 2012. This process is conducted in accordance with 5 CFR 1320.10.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to OMB Desk Officer, Department of Homeland Security and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

The Office of Management and Budget 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, e.g., permitting electronic submissions of responses.

FOR FURTHER INFORMATION CONTACT: If additional information is required contact: The Department of Homeland Security (DHS), Office of Chief Procurement Officer, Acquisition Policy and Legislation Office, DHS Attn.: Camara Francis, Department of Homeland Security, Office of the Chief Procurement Officer, Room 3114, Washington, DC 20528, *Camara.Francis@hq.dhs.gov*, (202) 447–5904.

SUPPLEMENTARY INFORMATION: The Department of Homeland Security (DHS) Components and the Office of the Chief Procurement Officer collect information, when necessary in administering public contracts for supplies and services. The information is used to determine compliance with contract terms placed in the contract as authorized by the Federal Property and Administrative Services Act (41 U.S.C. 251 *et seq.*) and the Federal Acquisition Regulation (FAR) (48 CFR chapter 1). Source selection documentation, Government estimate of contract price, contract modifications, Small Business Administration Certificate of Competency, Justification and approvals, determination and finding are examples of the kinds of post-award contract information that is collected are identified in pertinent sections of FAR 4.803, Contents of contract files. The complete FAR can be viewed on the Internet at *http://www.arnet.gov*.

The information requested is used by the Government's contracting officers and other acquisition personnel, including technical and legal staffs to determine contractor's technical and management progress and controls of the firms holding public contracts to determine if the firms are making appropriate progress in work agreed to and are otherwise performing in the Government's best interest. Payment of a firm's invoices (or non-payment) and/or corrective action may result from such reviews. If this information were not collected, the Government would jeopardize its operations by failing to exercise its responsibility for a major internal control in its contracts' post-award phase. Many sources of the requested information use automated word processing systems, databases, spreadsheets, project management and other commercial software to facilitate preparation of material to be submitted, particularly in the submission of periodic (e.g., monthly) reports that describe contractor performance and progress of work . With Governmentwide implementation of e-Government initiatives, it is commonplace within many of DHS's Components for submissions to be electronic.

According to Federal Procurement Data System-Next Generation (FPDS–NG) the number of Post-Contract award information has increased each year over the past two years in annual respondent and burden hours. This increase is the result of a new estimate of awards, which contributes to the Post-Award information that is collected. This collection was previously approved by OMB on January 26, 2009. This collection will be submitted to OMB for review to request approval to extend the collection past the current expiration date of January 31, 2011. There are no proposed changes to the information being collected, instructions, frequency of the collection or the use of the information being collected.

Analysis

Agency: Office of Chief Procurement Officer, DHS.
Title: Post-Award Contract Information.
OMB Number: 1600–0003.
Frequency: On Occasion.
Affected Public: Private Sector.
Number of Respondents: 8,000.
Estimated Time per Respondent: 14 hours.
Total Burden Hours: 336,000.

Dated: January 18, 2012.

Margaret H. Graves,
Deputy Chief Information Officer.

[FR Doc. 2012–1571 Filed 1–25–12; 8:45 am]
BILLING CODE 9110–9B–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Extension of Agency Information Collection Activity Under OMB Review: TSA Customer Comment Card

AGENCY: Transportation Security Administration, DHS.

ACTION: 30-day notice.

SUMMARY: This notice announces that the Transportation Security Administration (TSA) has forwarded the Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0030, abstracted below, to OMB for review and approval of an extension of the currently-approved collection under the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. TSA published a **Federal Register** notice, with a 60-day comment period soliciting comments, of the following collection of information on September 21, 2011 (76 FR 58532). TSA uses a customer comment card to collect passenger comments at airports, including complaints, compliments, and suggestions.

DATES: Send your comments by February 27, 2012. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, OMB. Comments should be addressed to Desk Officer, Department of Homeland Security/TSA, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Joanna Johnson, TSA PRA Officer, Office of Information Technology (OIT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011; telephone (571) 227–3651; email *TSAPRA@dhs.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (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 it displays a valid OMB control number. The ICR documentation is available at *http://www.reginfo.gov*. Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement 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;

(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 using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

Title: TSA Customer Comment Card.

Type of Request: Extension of a currently-approved collection.

OMB Control Number: 1652–0030.

Form(s): TSA Customer Comment Card.

Affected Public: Airline Passengers.

Abstract: The Transportation Security Administration (TSA) is seeking renewal of the TSA Customer Comment Card information collection. The card is being used by TSA at airports to collect customer comments, including complaints, compliments, and suggestions. This collection continues a voluntary program for passengers to provide feedback to TSA regarding their experiences with TSA security procedures. This collection of information allows TSA to evaluate and address customer concerns about security procedures and policies. There has been a correction made to the number of respondents and hour burden since the publishing of the 60-day notice.

Number of Respondents: 150,000.

Estimated Annual Burden Hours: An estimated 12,500 hours annually.

Issued in Arlington, Virginia, on January 20, 2012.

Joanna Johnson,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2012–1608 Filed 1–25–12; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Intent To Request Renewal From OMB of One Current Public Collection of Information: Aircraft Operator Security

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-day notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on one currently approved Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0003, abstracted below, that TSA will submit to OMB for renewal in compliance with the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. Aircraft operators must adopt and implement a TSA-approved security program. These programs require aircraft operators to maintain and update records to ensure compliance with security provisions outlined in 49 CFR part 1544.

DATES: Send your comments by March 26, 2012.

ADDRESSES: Comments may be mailed or delivered to Joanna Johnson, Business Management Office, Office of Information Technology, TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–4220.

FOR FURTHER INFORMATION CONTACT: Joanna Johnson at the above address, or by telephone (571) 227–3651 or facsimile (571) 227–2907.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (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 it displays a valid OMB control number. The ICR documentation is available at *http;//www.reginfo.gov.* Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement 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;

(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 using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

1652–0003; Security Programs for Aircraft Operators, 49 CFR part 1544. The information collected is used to determine compliance with 49 CFR part 1544 and to ensure passenger safety by monitoring aircraft operator security procedures. TSA is seeking to renew its OMB control number, 1652–0003, Aircraft Operator Security. TSA has implemented aircraft operator security standards at 49 CFR part 1544 to require each aircraft operator to which this part applies to adopt and carry out a security program. These TSA-approved security programs establish procedures that aircraft operators must carry out to protect persons and property traveling on flights provided by the aircraft operator against acts of criminal violence, aircraft piracy, and the introduction of explosives, incendiaries, or weapons aboard an aircraft.

This information collection is mandatory for aircraft operators. As part of their security programs, affected aircraft operators are required to maintain and update, as necessary, records of compliance with the security program provisions set forth in 49 CFR part 1544. This regulation also requires affected aircraft operators to submit security program amendments to TSA when applicable and to make their

security programs and associated records available for inspection and copying by TSA to ensure transportation security and regulatory compliance.

The information requested of aircraft operators has increased due to the security measures mandated by the Federal Government since September 11, 2001. The information TSA now collects includes identifying information on aircraft operators' flight crews, passengers and cargo. Specifically, TSA requires aircraft operators to submit the following information: (1) A master crew list of all flight and cabin crew members flying to and from the United States; (2) the flight crew list on a flight-by-flight basis; (3) passenger information on a flight-by-flight basis; (4) total amount of cargo screened; and (5) total amount of cargo screened at 100%. Aircraft operators may provide the information electronically or manually. Under this regulation, aircraft operators must ensure that flight crew members and employees with unescorted access authority to a Security Identification Display Area (SIDA) or who perform screening, checked baggage, or cargo functions submit to and receive a criminal history records check (CHRC). As part of the CHRC process, the individual must provide identifying information, including fingerprints. Additionally, aircraft operators must maintain these records, and records associated with compliance with Security Directives, and make them available to TSA for inspection and copying upon request.

TSA estimates that there will be approximately 800 respondents to the information requirements described above, requiring approximately 1,841,130 hours per year to process.

Issued in Arlington, Virginia, on January 20, 2012.

Joanna Johnson,

Paperwork Reduction Officer, Office of Information Technology.

[FR Doc. 2012–1609 Filed 1–25–12; 8:45 am]

BILLING CODE 9110– 05–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

Outer Continental Shelf (OCS) Scientific Committee (SC); Announcement of Plenary Session

AGENCY: Bureau of Ocean Energy Management (BOEM), Interior.

ACTION: Notice of meeting.

SUMMARY: The OCS Scientific Committee will meet at the Sheraton Reston Hotel in Reston, Virginia. The meeting will serve as a venue to introduce the newest members of the committee to the Environmental Studies Program (ESP) and meet Headquarters and Regional staff.

DATES: Wednesday, February 8, 2012, from 8:30 to 5 p.m.; Thursday, February 9, 2012, from 9 a.m. to 4 p.m.

ADDRESSES: Reston Sheraton Hotel, 11810 Sunrise Valley Drive Reston, Virginia, 20191, telephone (703) 620–9000.

FOR FURTHER INFORMATION CONTACT: A copy of the agenda may be requested from BOEM by emailing Ms. Phyllis Clark at *Phyllis.Clark@boem.gov.* Other inquiries concerning the OCS SC meeting should be addressed to Dr. Rodney Cluck, Executive Secretary to the OCS SC, Bureau of Ocean Energy Management, 381 Elden Street, Mail Stop 4041, Herndon, Virginia 20170–4817, or by calling (703) 787–1087 or via email at *Rodney.Cluck@boem.gov.*

SUPPLEMENTARY INFORMATION: In October 2011, 12 new members were appointed to the Committee. This will be the first of two meetings this year and will serve as a venue to introduce the newest members to the Environmental Studies Program (ESP) and meet Headquarters and Regional staff.

On Wednesday, February 8, the Committee will meet in plenary session from 8:30 a.m. to 11:45 a.m. There will be an election of officers, the recently-appointed Director for BOEM will address the Committee on the general status of BOEM and its activities, and the Chief Environmental Officer will present on new opportunities and challenges. From 1 p.m. to 5 p.m., the Committee will break out into disciplinary breakout groups to learn of BOEM's ongoing studies.

On February 9, the Committee will continue meeting in discipline breakout groups from 9 a.m. to 11:45 p.m. From 1 p.m. to 3:15 p.m., Committee business will be discussed and from 3:15 p.m. to 3:30 p.m., public comments will be welcomed.

The meetings are open to the public. Approximately 40 visitors can be accommodated on a first-come-first-served basis.

Authority: Federal Advisory Committee Act, Public Law 92–463, 5 U.S.C., Appendix I, and the Office of Management and Budget's Circular A–63, Revised.

Dated: January 23, 2012.

Alan Thornhill,

Chief Environmental Officer, Bureau of Ocean Energy Management.

[FR Doc. 2012–1638 Filed 1–23–12; 4:15 pm]

BILLING CODE 4310–VH–P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

[GX12EB00A181000]

Agency Information Collection Activities: Submitted for Office of Management and Budget (OMB) Review; Comment Request

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of an extension of a currently approved information collection (1028–0085).

SUMMARY: To comply with the Paperwork Reduction Act of 1995 (PRA), the U.S. Geological Survey (USGS) is inviting comments on an information collection request (ICR) that we have sent to the Office of Management and Budget (OMB) for review and approval. The ICR concerns the paperwork requirements for the National Land Remote Sensing Education, Outreach and Research Activity (NLRSEORA) and describes the nature of the collection and the estimated burden and cost. As required by the PRA, and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this ICR. This Information Collection is scheduled to expire on February 29, 2012.

DATES: Submit written comments by February 27, 2012.

ADDRESSES: Please submit comments on this information collection directly to the Office of Management and Budget (OMB) Office of Information and Regulatory Affairs, *Attention:* Desk Officer for the Department of the Interior via email [*OIRA_DOCKET@omb.eop.gov*]; or fax (202) 395–5806; and identify your submission as number 1028–0085. Please also submit a copy of your comments to Shari Baloch, USGS Information Collection Clearance Officer, 12201 Sunrise Valley Drive, Reston, VA 20192, MS 807; (703) 648–7199 (fax); or *smbaloch@usgs.gov* (email). Please reference Information Collection number 1028–0085, NLRSEORA in the subject line.

FOR FURTHER INFORMATION CONTACT: To request additional information concerning this ICR, contact Thomas Cecere by email at *tcecere@usgs.gov;* by mail at U.S. Geological Survey, MS 517 National Center, Reston, VA 20192 or by telephone at (703) 648–5551.

SUPPLEMENTARY INFORMATION:

Title: National Land Remote Sensing Education, Outreach and Research Activity (NLRSEORA).

OMB Control Number: 1028–0085.

Abstract: The Land Remote Sensing Education, Outreach and Research Activity (NLRSEORA) is an effort that involves the development of a U.S. National consortium in building the capability to receive, process and archive remotely sensed data for the purpose of providing access to university and State organizations in a ready to use form; and to expand the science of remote sensing through education, research/applications development and outreach in areas such as environmental monitoring, climate change research, natural resource management and disaster analysis. Respondents are submitting proposals to acquire funding for a National (U.S.) program to promote the uses of space-based land remote sensing data and technologies through education and outreach at the State and local level and through university based and collaborative research projects. The information collected will ensure that sufficient and relevant information is available to evaluate and select a proposal for funding. A panel of USGS geography program managers and scientists will review each proposal to evaluate the technical merit, requirements, and priorities identified in the program's call for proposals.

This notice concerns the collection of information that is sufficient and relevant to evaluate and select proposals for funding. We will protect information from respondents considered proprietary under the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR Part 2), and under regulations at 30 CFR 250.197, ''Data and information to be made available to the public or for limited inspection.'' Responses are voluntary. No questions of a ''sensitive'' nature are asked. We intend to release the project abstracts and primary investigators for awarded/funded projects only.

Frequency of Collection: On-occasion.

Affected Public: Non-profit organizations.

Respondent Obligation: Voluntary (necessary to receive benefits).

Estimated Number and Description of Respondents: We expect to receive approximately 10 proposals during the grant application process. We anticipate issuing 1 grant per year. The program is open to non-profit organizations.

Estimated Number of Responses: Approximately 10 applications and two reports per year.

Estimated Completion Time per Response: We expect to receive approximately 10 applications per year, taking each applicant approximately 24 hours to complete, totaling 240 burden hours. We anticipate awarding one (1) grant per year. The grantee will be required to submit an interim Annual Progress Report to the designated USGS Project Officer within 90 days of the end of the project period and a final report on or before 90 working days after the expiration of the agreement. We estimate that it will take approximately 48 hours to complete and submit both reports.

Annual Burden Hours: 288 hours per year.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: We have not identified any ''non-hour cost'' burdens associated with this collection of information.

Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency 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. Until OMB approves a collection of information, you are not obligated to respond.

Comments: To comply with the public consultation process, on October 21, 2011, we published a **Federal Register** notice (76 FR 65529) announcing our intent to submit this information collection to OMB for approval. In that notice we solicited public comments for 60 days, ending on December 20, 2011. We did not receive any public comments in response to the notice.

We again invite comments concerning this information collection on:

(1) Whether or not the collection of information is necessary, including whether or not the information will have practical utility;

(2) the accuracy of our estimate of the burden for this collection of information;

(3) ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) ways to minimize the burden of the collection of information on respondents. Please note that the comments submitted in response to this notice are a matter of public record. 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 OMB in your comment to withhold your personal identifying information from public view, we cannot guarantee that it will be done.

Dated: January 20, 2012.

Bruce Quirk,

Program Coordinator, Land Remote Sensing Program, U.S. Geological Survey.

[FR Doc. 2012–1601 Filed 1–25–12; 8:45 am]

BILLING CODE 4310–AM–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–8103–05; 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 the Bureau of Land Management (BLM) will issue an appealable decision 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 Shageluk, Alaska, and are located in:

Seward Meridian, Alaska

T. 29 N., R. 55 W.,
Secs. 24, 25, and 36.
Containing 1,905.99 acres.
T. 28 N., R. 56 W.,
Sec. 15.
Containing 505.60 acres.
T. 30 N., R. 56 W.,
Sec. 35.
Containing 635 acres.
T. 32 N., R. 56 W.,
Secs. 24, 25, and 33.
Containing 1,776.06 acres.
Aggregating 4,822.65 acres.

Notice of the decision will also be published four times in the *Fairbanks Daily News-Miner.*

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until February 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, by email at *ak.blm.conveyance@blm.gov,* or by telecommunication device (TTD) through the Federal Information Relay Service (FIRS) at 1–(800) 877–8339, 24 hours a day, 7 days a week.

Linda L. Keskitalo,

Land Law Examiner, Land Transfer Adjudication II Branch.

[FR Doc. 2012–1703 Filed 1–25–12; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCON03000 L12320000.AL0000]

Notice of Intent To Collect Fees on Public Land in Mesa County, CO Under the Federal Lands Recreation Enhancement Act

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: Pursuant to applicable provisions of the Federal Lands Recreation Enhancement Act (REA), the Bureau of Land Management's (BLM) Grand Junction Field Office is proposing to begin collecting fees in August of 2012 for overnight camping at the North Fruita Desert Campground within the North Fruita Desert Special Recreation Management Area (SRMA), North of Fruita, within Mesa County, Colorado. The North Fruita Desert was designated as an SRMA by the BLM in the North Fruita Desert Management Plan (August 2004).

DATES: To ensure that comments will be considered, the BLM must receive written comments on the BLM's proposal to collect fees in the North Fruita Desert Campground by February 27, 2012. Effective 6 months after publication of this notice, the BLM's Grand Junction Field Office would initiate fee collection in the North Fruita Desert Campground, unless the BLM publishes a **Federal Register** notice to the contrary.

ADDRESSES: You may submit comments on this fee collection proposal by any of the following methods:

- *Email: m1bailey@blm.gov.*
- *Fax:* (970) 244–3047.
- *Mail:* Michelle Bailey, Assistant Field Manager, BLM, Grand Junction Field Office, 2815 H. Road, Grand Junction, Colorado 81506.

Copies of the fee proposal are available in the Grand Junction Field Office at the above address and online at *http://www.blm.gov/co/st/en/nca/mcnca/what_s_news_.html.*

FOR FURTHER INFORMATION CONTACT: Michelle Bailey, Assistant Field Office Manager, at the address above. 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 North Fruita Desert SRMA offers outstanding opportunities for world class mountain biking. The BLM's overall goal is to maintain the area's recreation experiences, quality social setting, and overnight camping while protecting natural resources requires substantial Federal investment. The BLM is committed to finding the proper balance between public use, reduction of user conflicts, and the protection of resources. The campground qualifies as a site wherein visitors can be charged a fee, authorized under Section 803(h) of REA, 16 U.S.C. 6802(h). In accordance with REA and implementing regulations at 43 CFR part 2930, visitors would obtain an individual Special Recreation Permit to camp within the North Fruita Desert Campground. This fee would be required to be displayed at each campsite. Permits would expire at the beginning of the subsequent calendar day. The suggested fee per campsite, per night is $10.

The BLM's goal for the North Fruita Desert Campground fee program is to ensure that funding is available to maintain the area in a naturally-appearing condition consistent with the recreation setting established by the North Fruita Desert Management Plan, to manage visitor use to provide a quality recreation experience under existing rules and regulations by providing for increased law enforcement presence, to develop additional services such as expanding interpretive/educational programming, and to protect resources. All fees collected would be used for expenses within the campground.

The BLM published the North Fruita Desert Campground Business Plan in August 2008 and updated it in November 2011, which outlines operational goals of the area and the purpose of the fee program. This Business Plan provides management direction for public enjoyment of these public lands through the recreational experience of overnight camping, while minimizing the potential for resource damage from authorized uses. The Plan also provides a market analysis of local recreation sites and sets the basis for the fee proposal. The plan is available online at: *http://www.blm.gov/co/st/en/fo/gjfo.html.* The North Fruita Desert Campground Business Plan addresses recreation opportunities and fees for camping within the SRMA. This plan, prepared pursuant to the REA and the BLM recreation fee program policy, also addresses establishing a permit process and the collection of user fees. This Business Plan establishes the rationale for charging recreation fees. In accordance with the BLM recreation fee program policy, the Business Plan explains the fee collection process and outlines how the fees would be used at the special area. The BLM has notified and involved the public at each stage of the planning process, including the proposal to collect fees, through notifications on-site and several public meetings to present and gather ideas concerning fees within the special area. The Northwest Colorado Resource Advisory Committee (NW RAC) reviewed and recommended the approval of this proposal at its December 1, 2011, meeting. Future adjustments in the fee amount would be made in accordance with the North Fruita Desert Campground Business Plan and through consultation with the NW RAC and the public prior to a fee increase. Fee amounts will be posted on-site and online at the GJFO Web site at: *http://www.blm.gov/co/st/en/fo/gjfo.html.* Copies of the Business Plan will be available at the Grand Junction Field Office.

The BLM welcomes public comments on this proposal. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 16 U.S.C. 6803(b) and 43 CFR 2932.13.

Steven Hall,

Acting State Director.

[FR Doc. 2012–1683 Filed 1–25–12; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAD01000 L12200000.AL 0000]

Meeting of the California Desert District Advisory Council

SUMMARY: Notice is hereby given, in accordance with Public Laws 92–463 and 94–579, that the California Desert District Advisory Council (DAC) to the Bureau of Land Management (BLM), U.S. Department of the Interior, will meet in formal session on Saturday, Feb. 11, 2012, from 8 a.m. to 4:30 p.m. at the Primm Valley Resort, 31900 South Las Vegas Boulevard, Primm, NV 89019. There will be a field trip on Friday, Feb. 10, from 8 a.m. to 4:30 p.m. on BLM-administered lands. Field trip details will be posted on the DAC Web page, *http://www.blm.gov/ca/st/en/info/rac/dac.html,* when finalized. Agenda topics for the Saturday meeting will include updates by council members, the BLM California Desert District manager, five field office managers, and council subgroups. Final agenda items will be posted on the DAC Web page listed above.

SUPPLEMENTARY INFORMATION: All DAC meetings are open to the public. Public comment for items not on the agenda will be scheduled at the beginning of the meeting Saturday morning. Time for public comment may be made available by the council chairman during the presentation of various agenda items, and is scheduled at the end of the meeting for topics not on the agenda.

While the Saturday meeting is tentatively scheduled from 8 a.m. to 4:30 p.m., the meeting could conclude prior to 4:30 p.m. should the council conclude its presentations and discussions. Therefore, members of the public interested in a particular agenda item or discussion should schedule their arrival accordingly.

Written comments may be filed in advance of the meeting for the California Desert District Advisory Council, c/o Bureau of Land Management, External Affairs, 22835 Calle San Juan de Los Lagos, Moreno Valley, CA 92553. Written comments also are accepted at the time of the meeting and, if copies are provided to the recorder, will be incorporated into the minutes.

FOR FURTHER INFORMATION CONTACT: David Briery, BLM California Desert District External Affairs, (951) 697–5220.

Dated: January 10, 2012.

Teresa A. Raml,

California Desert District Manager.

[FR Doc. 2012–1630 Filed 1–25–12; 8:45 am]

BILLING CODE 4310–40–P

INTERNATIONAL TRADE COMMISSION

[DN 2869]

Certain Electronic Devices for Capturing and Transmitting Images, and Components Thereof; Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *In Re Certain Electronic Devices for Capturing and Transmitting Images, and Components Thereof,* DN 2869; the Commission is soliciting comments on any public interest issues raised by the complaint.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov,* and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint filed on behalf of Eastman Kodak Company on January 10, 2011. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic devices for capturing and transmitting images, and components thereof. The complaint names Apple Inc. of Cupertino, CA; High Tech Computer Corp. (a/k/a HTC Corp.) of Taiwan; HTC America, Inc. of Bellevue, WA; and Exedea, Inc. of Houston, TX, as respondents.

The complainant, proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five pages in length, on any public interest issues raised by the complaint. Comments should address whether issuance of an exclusion order and/or a cease and desist order in this investigation would negatively affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the orders are used in the United States;

(ii) Identify any public health, safety, or welfare concerns in the United States relating to the potential orders;

(iii) Indicate the extent to which like or directly competitive articles are produced in the United States or are otherwise available in the United States, with respect to the articles potentially subject to the orders; and

(iv) Indicate whether Complainant, Complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to an exclusion order and a cease and desist order within a commercially reasonable time.

Written submissions must be filed no later than by close of business, eight business days after the date of publication of this notice in the **Federal Register.** There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Submissions should refer to the docket number (''Docket No. 2869'') in a prominent place on the cover page and/or the first page. The Commission's rules authorize filing submissions with the Secretary by

facsimile or electronic means only to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf.* Persons with questions regarding electronic filing should contact the Secretary (202) 205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of sections 201.10 and 210.50(a)(4) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.50(a)(4)).

By order of the Commission.

Issued: January 10, 2012.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2012–1576 Filed 1–25–12; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Second Agreement and Order Regarding Modification of the Consent Decree Under the Clean Water Act

Notice is hereby given that on January 19, 2012, a proposed Second Agreement and Order Regarding Modification of the Consent Decree (''Second Consent Decree Modification'') in *United States and Louisiana* v. *City of Baton Rouge,* Civil Action No. 3:01–cv–00978–FJP–CN, was lodged with the United States District Court for the Middle District of Louisiana.

This action was originally filed in 2001 by the United States and the State of Louisiana under Clean Water Act (''CWA'') Section 301, 33 U.S.C. 1311, seeking civil penalties and injunctive relief for violations related to the publically owned treatment works owned and operated by the City of Baton Rouge and the Parish of East Baton Rouge (collectively ''the City/Parish''). On March 14, 2002, the Court entered a Consent Decree resolving all claims in the Complaint (''the 2002 Consent Decree''). Among other requirements, the 2002 Consent Decree required the City/Parish to complete implementation by January 1, 2015 of a project to improve its sewage collection system including addressing Unauthorized Discharges such as sanitary sewer overflows. Under the proposed Second Consent Decree Modification, the deadline would be extended to January 1, 2018 and the City/Parish would implement additional work including installation of a supervisory control and data acquisition system and installation of emergency generators at over 400 pump stations used in the sewage collection system.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Second Consent Decree Modification. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either emailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States and Louisiana* v. *City of Baton Rouge,* D.J. Ref. 90–5–1–1–2769/1.

During the public comment period, the Second Consent Decree Modification, may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Second Consent Decree Modification may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or emailing a request to ''Consent Decree Copy'' (*EESCDCopy.ENRD@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–5271. If requesting a copy from the Consent Decree Library by mail, please enclose a check in the amount of $7.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if requesting by email or fax, forward a check in that amount to the Consent Decree Library at the address given above.

Maureen M. Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2012–1577 Filed 1–25–12; 8:45 am]

BILLING CODE 4410–15–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978

AGENCY: National Science Foundation.

ACTION: Notice of Permit Applications Received under the Antarctic Conservation Act of 1978.

SUMMARY: The National Science Foundation (NSF) is required to publish a notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978 Public Law 95–541. NSF has published regulations under the Antarctic Conservation Act at Title 45 Part 670 of the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by February 27, 2012. This application may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Room 755, Office of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230.

FOR FURTHER INFORMATION CONTACT: Polly A. Penhale at the above address or (703) 292–7420.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas a requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

The applications received are as follows:

1. Applicant

Permit Application: 2012–012.

Charles D. Amsler, Jr., Department of Biology, University of Alabama, Birmingham, AL 35294–1170.

Activity for Which Permit Is Requested

Take and Import into the U.S.A. The applicant plans to take from the Palmer Station area approximately 20 brown marine algae, 30 green marine algae, 10 red marine algae, and 10 diatom marine algae to sublimate cultures of

filamentous Antarctic macroalgae and diatoms previously isolated in culture but require additional strains, particularly of filamentous green algal endophytes for future study. The applicant will use these samples to understand the interactions of epiphytic and endophytic algae (both filamentous macroalgae and diatoms) with larger macroalgae and with mesoherbivores such as amphipods. The cultures will be maintained at the home university.

Location

Palmer Station, Anvers Island, Antarctic Peninsula.

Dates

April 1, 2012 to July 31, 2013.

Nadene G. Kennedy,

Permit Officer, Office of Polar Programs.

[FR Doc. 2012–1619 Filed 1–25–12; 8:45 am]

BILLING CODE 7555–01–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Certificate of Medical Examination, 3206–0250.

AGENCY: U.S. Office of Personnel Management.

ACTION: Notice and request for comments.

SUMMARY: The U.S. Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on an extension of an already existing information collection request (ICR) 3206–0250, Certificate of Medical Examination. The information collection was previously published in the **Federal Register** on December 29, 2011 at 76 FR 81999 allowing for a 60-day public comment period. No comments were received for this information collection. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until February 27, 2012. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Office of Information and Regulatory Affairs, Office of Management Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: The Optional Form (OF) 178, Certificate of Medical Examination, is used to collect medical information about individuals who are incumbents of positions which require physical fitness/agility testing and/or medical examinations, or who have been selected for such a position contingent upon meeting physical fitness/agility testing and medical examinations as a condition of employment. This information is needed to ensure fair and consistent treatment of employees and job applicants, to adjudicate the medically-based passover of a preference eligible, and to adjudicate claims of discrimination under the Americans with Disabilities Act (ADA).

As required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection 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, 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 submissions of responses.

Analysis

Agency: Employee Services, U.S. Office of Personnel Management.

Title: Certificate of Medical Examination.

OMB Number: 3206–0250.

Affected Public: Federal Government.

Number of Respondents: 45,000.

Estimated Time per Respondent: 3 hours.

Total Burden Hours: 135,000 hours.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2012–1677 Filed 1–25–12; 8:45 am]

BILLING CODE 6325–38–P

POSTAL SERVICE

Board of Governors; Sunshine Act Meeting

DATES AND TIMES: Wednesday, February 8, 2012, at 10 a.m.; and Thursday, February 9, at 8:30 a.m. and 10:30 a.m.

PLACE: Washington, DC, at U.S. Postal Service Headquarters, 475 L'Enfant Plaza SW., in the Benjamin Franklin Room.

STATUS: Wednesday, February 8 at 10 a.m.—Closed; Thursday, February 9 at 8:30 a.m.—Open; and at 10:30 a.m.—Closed.

MATTERS TO BE CONSIDERED:

Wednesday, February 8 at 10 a.m. (Closed)

1. Strategic Issues.
2. Financial Matters.
3. Pricing.
4. Personnel Matters and Compensation Issues.
5. Governors' Executive Session—Discussion of prior agenda items and Board Governance.

Thursday, February 9 at 8:30 a.m. (Open)

1. Approval of Minutes of Previous Meetings.
2. Remarks of the Chairman of the Board.
3. Remarks of the Postmaster General and CEO.
4. Appointment of Committee Members and Committee Reports.
5. Quarterly Report on Financial Performance.
6. Quarterly Report on Service Performance.
7. Tentative Agenda for the March 21, 2012, meeting in Washington, DC.

Thursday, February 9 at 10:30 a.m. (Closed—if needed)

1. Continuation of Wednesday's closed session agenda.

CONTACT PERSON FOR MORE INFORMATION: Julie S. Moore, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260–1000. Telephone (202) 268–4800.

Julie S. Moore,

Secretary.

[FR Doc. 2012–1859 Filed 1–24–12; 4:15 pm]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service.™

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: January 26, 2012.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, (202) 268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on January 19, 2012, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 38 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2012–7, CP2012–15.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–1574 Filed 1–25–12; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, *Copies Available From:* U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213

Extension:

Rule 17Ac2–1, SEC File No. 270–95, OMB Control No. 3235–0084

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the existing collection of information provided for in Rule 17Ac2–1 (17 CFR 240.17Ac2–1) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act'').

Rule 17Ac–2, pursuant to Section 17A(c) of the Exchange Act, generally requires transfer agents to register with their Appropriate Regulatory Agency (''ARA''), whether the Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the Office of Thrift Supervision, and to amend their registrations if the information becomes inaccurate, misleading, or incomplete.

Paragraph 1 of Rule 17Ac2–1, requires transfer agents to file a Form TA–1 application for registration with the Commission where the Commission is their ARA. Transfer agents must also file an amended Form TA–1 application for registration if the existing on their Form TA–1 becomes inaccurate, misleading, or incomplete. The Form TA–1s must be filed with the Commission electronically, absent an exemption, on EDGAR pursuant to Regulation S–T (17 CFR 232).

The Commission receives on an annual basis approximately 190 applications for registration on Form TA–1 from transfer agents required to register with the Commission. Included in this figure are amendments to Form TA–1 as required by Paragraph (c) of Rule 17Ac2–1 to address information that has become inaccurate, misleading, or incomplete. Based on past submissions, the staff estimates that the average number of hours necessary to comply with the requirements of Rule 17Ac2–1 and Form TA–1 is one and one-half hours with a total burden of 285 hours.

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: January 20, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–1587 Filed 1–25–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, *Copies Available From:* Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213

Extension:

Form 2–E under Rule 609 SEC File No. 270–222 OMB Control No. 3235–0233

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information discussed below.

Rule 609 (17 CFR 230.609) under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) requires small business investment companies and business development companies that have engaged in offerings of securities that are exempt from registration pursuant to Regulation E under the Securities Act of 1933 (17 CFR 230.601 to 610a) to report semi-annually on Form 2–E (17 CFR 239.201) the progress of the offering. The form solicits information such as the dates an offering commenced and was completed (if completed), the number of shares sold and still being offered, amounts received in the offering, and expenses and underwriting discounts incurred in the offering. The information provided on Form 2–E assists the staff in monitoring the progress of the offering and in determining whether the offering has stayed within the limits set for an offering exempt under Regulation E.

During the calendar year 2010, there was one filing of Form 2–E by one respondent. The Commission has previously estimated that the total annual burden associated with information collection and Form 2–E preparation and submission is four hours per filing. Based on the Commission's experience with disclosure documents generally, the Commission continues to believe that this estimate is appropriate.

Estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act and are not derived from a comprehensive or even representative survey or study of the costs of Commission rules and forms. The collection of information under rule 609 and Form 2–E is mandatory. The information provided under rule 609 and Form 2–E will not be kept confidential. 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 public may view the background documentation for this information collection at the following Web site, *www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: January 20, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–1589 Filed 1–25–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 12d2–1, OMB Control No. 3235–0081, SEC File No. 270–98.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a requests for extension of the previously approved collections of information for the following rule: Rule 12d2–1 (17 CFR 240.12d2–1).

On February 12, 1935, the Commission adopted Rule 12d2–1,[1] under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Act''), which sets forth the conditions and procedures under which a security may be suspended from trading under Section 12(d) of the Act.[2] Rule 12d2–1 provides the procedures by which a national securities exchange may suspend from trading a security that is listed and registered on the exchange. Under Rule 12d2–1, an exchange is permitted to suspend from trading a listed security in accordance with its rules, and must promptly notify the Commission of any such suspension, along with the effective date and the reasons for the suspension.

Any such suspension may be continued until such time as the Commission may determine that the suspension is designed to evade the provisions of Section 12(d) of the Act and Rule 12d2–2 thereunder.[3] During the continuance of such suspension under Rule 12d2–1, the exchange is required to notify the Commission promptly of any change in the reasons for the suspension. Upon the restoration to trading of any security suspended under Rule 12d2–1, the exchange must notify the Commission promptly of the effective date of such restoration.

The trading suspension notices serve a number of purposes. First, they inform the Commission that an exchange has suspended from trading a listed security or reintroduced trading in a previously suspended security. They also provide the Commission with information necessary for it to determine that the suspension has been accomplished in accordance with the rules of the exchange, and to verify that the exchange has not evaded the requirements of Section 12(d) of the Act and Rule 12d2–2 thereunder by improperly employing a trading suspension. Without Rule 12d2–1, the Commission would be unable to fully implement these statutory responsibilities.

There are 15 national securities exchanges that are subject to Rule 12d2–1. The burden of complying with Rule 12d2–1 is not evenly distributed among the exchanges, however, since there are many more securities listed on the New York Stock Exchange, Inc., the NASDAQ Stock Exchange, and the American Stock Exchange LLC than on the other exchanges.[4] However, for purposes of this filing, the Commission staff has assumed that the number of responses is evenly divided among the exchanges. There are approximately 1,500 responses under Rule 12d2–1 for the purpose of suspension of trading from the national securities exchanges each year, and the resultant aggregate annual reporting hour burden would be, assuming on average one-half reporting hour per response, 750 annual burden hours for all exchanges. The related costs associated with these burden hours are $145,125.

The collection of information obligations imposed by Rule 12d2–1 are mandatory. The response will be available to the public and will not be kept confidential.

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

Background documentation for this information collection may be viewed at the following link: *http://www.reginfo.gov.* Comments should be directed to (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted within 30 days of this notice.

Dated: January 20, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–1617 Filed 1–25–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, *Copies Available From:* Securities and Exchange Commission, Office of Investor Education Advocacy, Washington, DC 20549–0213

Extension:

Rule 17f–2, SEC File No. 270–233, OMB Control No. 3235–0223

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

[1] *See* Securities Exchange Act Release No. 98 (February 12, 1935).

[2] *See* Securities Exchange Act Release No. 7011 (February 5, 1963), 28 FR 1506 (February 16, 1963).

[3] Rule 12d2–2 prescribes the circumstances under which a security may be delisted from an exchange and withdrawn from registration under Section 12(b) of the Act, and provides the procedures for taking such action.

[4] In fact, some exchanges do not file any trading suspension reports in a given year.

Rule 17f–2 (17 CFR 270.17f–2) under the Investment Company Act of 1940 (the ''Act'') (15 U.S.C. 80a–1) is entitled: ''Custody of Investments by Registered Management Investment Company.'' Rule 17f–2 establishes safeguards for arrangements in which a registered management investment company (''fund'') is deemed to maintain custody of its own assets, such as when the fund maintains its assets in a facility that provides safekeeping but not custodial services. The rule includes several recordkeeping or reporting requirements. The fund's directors must prepare a resolution designating not more than five fund officers or responsible employees who may have access to the fund's assets. The designated access persons (two or more of whom must act jointly when handling fund assets) must prepare a written notation providing certain information about each deposit or withdrawal of fund assets, and must transmit the notation to another officer or director designated by the directors. Independent public accountants must verify the fund's assets at least three times a year and two of the examinations must be unscheduled.

The requirement that directors designate access persons is intended to ensure that directors evaluate the trustworthiness of insiders who handle fund assets. The requirements that access persons act jointly in handling fund assets, prepare a written notation of each transaction, and transmit the notation to another designated person are intended to reduce the risk of misappropriation of fund assets by access persons, and to ensure that adequate records are prepared, reviewed by a responsible third person, and available for examination by the Commission's examination staff. The requirement that auditors verify fund assets without notice twice each year is intended to provide an additional deterrent to the misappropriation of fund assets and to detect any irregularities.

The Commission staff estimates that each fund makes 974 responses and spends an average of 252 hours annually in complying with the rule's requirements.[1] Commission staff estimates that on an annual basis it takes: (i) 0.5 hours of fund accounting personnel at a total cost of $82.50 to draft director resolutions;[2] (ii) 0.5 hours of the fund's board of directors at a total cost of $2,000 to adopt the resolution; (iii) 244 hours for the fund's accounting personnel at a total cost of $60,388 to prepare written notations of transactions;[3] and (iv) 7 hours for the fund's accounting personnel at a total cost of $1,155 to assist the independent public accountants when they perform verifications of fund assets.[4] Approximately 243 funds rely upon rule 17f–2 annually.[5] Thus, the total annual hour burden for rule 17f–2 is estimated to be 61,236 hours.[6] Based on the total costs per fund listed above, the total cost of the Rule 17f–2's collection of information requirements is estimated to be $15.5 million.[7]

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms. Complying with the collections of information required by rule 17f–2 is mandatory for those funds that maintain custody of their own assets. Responses will not be kept confidential. 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 control number.

The public may view the background documentation for this information collection at the following Web site, *www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: January 20, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–1588 Filed 1–25–12; 8:45 am]

BILLING CODE 8011–01–P

[1] The 971 responses are: 1 (one) response to draft and adopt the resolution and 973 notations. Estimates of the number of hours are based on conversations with individuals in the mutual fund industry. The actual number of hours may vary significantly depending on individual fund assets.

[2] This estimate is based on the following calculation: 0.5 (burden hours per fund) × $165 (fund senior accountant's hourly rate) = $82.50.

[3] Respondents estimated that each fund makes 974 responses on an annual basis and spent a total of 0.25 hours per response. The fund personnel involved are Fund Payable Manager ($157 hourly rate), Fund Operations Manager ($331 hourly rate) and Fund Accounting Manager ($257 hourly rate). The weighted hourly rate of these personnel is $248. The estimated cost of preparing notations is based on the following calculation: 974 × 0.25 × $248 = $60,388.

[4] This estimate is based on the following calculation: 7 × $165 (fund senior accountant hourly rate) = $1,155.

[5] Based on a review of Form N–17f–2 filings for calendar years 2008–2010, each year approximately 243 funds file Form N–17f–2 with the Commission.

[6] This estimate is based on the following calculation: 243 (funds) × 252 (total annual hourly burden per fund) = 61,236 hours for rule. The annual burden for rule 17f–2 does not include time spent preparing Form N–17f–2. The burden for Form N–17f–2 is included in a separate collection of information.

[7] This estimate is based on the following calculation: $63,625.50 (total annual cost per fund) × 243 funds = $15,460,997.

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, *Copies Available From:* U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213

Extension:

Rule 9b–1, OMB Control No. 3235–0480, SEC File No. 270–429

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the existing collection of information provided for in the following rule: Rule 9b–1 (17 CFR 240.9b–1) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 9b–1 (17 CFR 240.9b–1) sets forth the categories of information required to be disclosed in an options disclosure document (''ODD'') and requires the options markets to file an ODD with the Commission 60 days prior to the date it is distributed to investors. In addition, Rule 9b–1 provides that the ODD must be amended if the information in the document becomes materially inaccurate or incomplete and that amendments must be filed with the Commission 30 days prior to the distribution to customers. Finally, Rule 9b–1 requires a broker-dealer to furnish to each customer an ODD and any amendments, prior to accepting an order to purchase or sell an option on behalf of that customer.

There are 9 options markets that must comply with Rule 9b–1. These respondents work together to prepare a single ODD covering options traded on each market, as well as amendments to

the ODD. These respondents file approximately 3 amendments per year. The staff calculates that the preparation and filing of amendments should take no more than eight hours per options market. Thus, the total compliance burden for options markets per year is 216 hours (9 options markets × 8 hours per amendment × 3 amendments). The estimated cost for an in-house attorney is $354 per hour,[1] resulting in a total cost of compliance for these respondents of $76,464 per year (216 hours at $354 per hour).

In addition, approximately 1,500 broker-dealers must comply with Rule 9b–1. Each of these respondents will process an average of 3 new customers for options each week and, therefore, will have to furnish approximately 156 ODDs per year. The postal mailing or electronic delivery of the ODD takes respondents no more than 30 seconds to complete for an annual compliance burden for each of these respondents of 78 minutes or 1.3 hours. Thus, the total compliance burden per year is 1,950 hours (1,500 broker-dealers × 1.3 hours). The estimated cost for a general clerk of a broker-dealer is $50 per hour,[2] resulting in a total cost of compliance for these respondents of $97,500 per year (1,950 hours at $50 per hour).

The total compliance burden for all respondents under this rule (both options markets and broker-dealers) is 2,166 hours per year (216 + 1,950), and the total compliance cost is $173,964 ($76,464 + $97,500).

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

Background documentation for this information collection may be viewed at the following Web site: *http://www.reginfo.gov*. Comments should be directed to (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted within 30 days of this notice.

Dated: January 20, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–1585 Filed 1–25–12; 8:45 am]

BILLING CODE 8011–01–P

[1] The $354 per hour figure for an Attorney is from SIFMA's *Management & Professional Earnings in the Securities Industry 2010,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[2] The $50 per hour figure for a General Clerk is from SIFMA's *Office Salaries in the Securities Industry 2010,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead. The staff believes that the ODD would be mailed or electronically delivered to customers by a general clerk of the broker-dealer or some other equivalent position.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66203; File No. SR–FINRA–2011–057]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Partial Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Partial Amendment No. 1, To Adopt FINRA Rule 5123 (Private Placements of Securities) in the Consolidated FINRA Rulebook

January 20, 2012.

I. Introduction

On October 5, 2011, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt FINRA Rule 5123. The proposed rule change was published for comment in the **Federal Register** on October 24, 2011.[3] The Commission received 16 comment letters in response to the proposed rule change.[4] On November 17, 2011, FINRA extended the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change, to January 20, 2012. On January 19, 2012, FINRA filed Partial Amendment No. 1 to the proposed rule change and a letter responding to comments.[5] The Commission is publishing this notice and order to solicit comments on Partial Amendment No. 1 to the proposed rule change from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act to determine whether to approve or disapprove the proposed rule change, as modified by Partial Amendment No. 1.

Institution of these proceedings does not indicate that the Commission has reached any conclusions with respect to the proposed rule change, nor does it mean that the Commission will ultimately approve or disapprove the proposed rule change. Rather, as discussed below, the Commission seeks additional input from interested parties on the issues presented by the proposed rule change, as modified by Partial Amendment No. 1, and on FINRA's Response Letter.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 65585 (Oct. 18, 2011), 76 FR 65758 (Oct. 24, 2011) (Notice of Filing of Proposed Rule Change to Adopt New FINRA Rule 5123 (Private Placements of Securities), SR–FINRA–2011–057) (''Notice of Filing''). The comment period closed on November 18, 2011.

[4] *See* Letters from Ryan Adams, Christine Lazaro, Esq., and Lisa Catalano, Esq., St. John's School of Law Securities Arbitration Clinic, dated November 10, 2011 (''St. John's''); Ryan K. Bakhtiari, President, Public Investors Arbitration Bar Association, dated November 14, 2011 (''PIABA''); David T. Bellaire, Esq., Financial Services Institute, Inc., dated November 14, 2011 (''FSI''); Robert E. Buckholz, Chair, Committee on Securities Regulation, New York City Bar Association, dated November 9, 2011 (''NYC Bar''); Richard B. Chess, President, Real Estate Investment Securities Association, dated November 14, 2011 (''REISA''); Alicia M. Cooney, Managing Director, Monument Group (''Monument Group''), dated January 12, 2012 (Monument Group); Martel Day, Chairman, Investment Program Association, dated November 14, 2011 (''IPA''); Jack E. Herstein, President, North American Securities Administrators Association, Inc., dated November 17, 2011 (''NASAA''); Joan Hinchman, Executive Director, National Society of Compliance Professionals, dated November 14, 2011 (''NSCP''); William A. Jacobson, Associate Clinical Professor, and Carolyn L. Nguyen, Cornell Law School, dated November 14, 2011 (''Cornell''); Stuart J. Kaswell, Executive Vice President, Managed Funds Association, dated November 14, 2011 (''MFA''); William H. Navin, Senior Vice President, The Options Clearing Corporation, dated November 9, 2011 (''OCC''); Jeffrey W. Rubin, Chair, Federal Regulation of Securities Committee, American Bar Association, dated November 14, 2011 (''ABA''); Sullivan & Cromwell LLP, dated November 10, 2011 (''S&C''); Osamu Watanabe, Deputy General Counsel, Moelis & Co., dated November 28, 2011 (''Moelis''); and Donald S. Weiss, K&L Gates LLP, dated November 14, 2011 (''K&L Gates'') . Comment letters are available at www.sec.gov.

[5] *See* Letter from Stan Macel, FINRA, to Elizabeth Murphy, Secretary, SEC, dated January 19, 2012 (''Response Letter''). The text of proposed Partial Amendment No. 1 and FINRA's Response Letter are 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. FINRA's Response Letter is also available on the Commission's Web site at *www.sec.gov.*

II. Description of the Proposed Rule Change and Summary of Comments

FINRA is proposing to adopt FINRA Rule 5123, which, prior to Partial Amendment No. 1, would have required that members and associated persons that offer or sell any applicable private placement (as described in the proposed rule change), or participate in the preparation of a private placement memorandum (''PPM''), term sheet or other disclosure documents in connection with any such private placement, provide relevant disclosures to each investor prior to sale describing the anticipated use of offering proceeds, and the amount and type of offering expenses and offering compensation. If any issuer's disclosure documents did not contain the requisite information about the offering expenses and use of proceeds, the proposed rule change would have required the member to create and provide to any potential investor a separate disclosure document containing this information. FINRA Rule 5123 also would have required that each participating member file the PPM, term sheet or other disclosure document, and any exhibits thereto, with FINRA no later than 15 calendar days after the date of the first sale, and any material amendments to such document, or any amendments to any disclosures mandated by the proposed rule change, also were required to be filed no later than 15 calendar days after the date such document was provided to any investor or prospective investor, as discussed further below.

While some commenters expressed support for the goals of the proposed rule change,[6] the remaining commenters expressed a broad range of concerns, such as: its scope, as derived from the definition of private placement; the broker-dealer disclosure requirements; the filing requirements; the exemptions; and whether the proposed rule change is consistent with FINRA's regulatory oversight and authority. In particular:

- Several commenters argued that definition of private placement[7] in the proposed rule change is overbroad and could be interpreted to apply to any offer or sale of securities for which an exemption from registration is claimed under the Securities Act of 1933 (''Securities Act''), including public offerings and secondary market trading.[8] For example, commenters stated that, due to the fact that it is not expressly limited to ''non-public'' offerings, the proposed definition is broader than the definition of ''private placement'' in FINRA Rule 5122 (Private Placements of Securities Issued by Members), which applies to member private offerings.[9] The ABA, NYC Bar, and S&C suggested narrowing the scope of FINRA Rule 5123 to specific types of ''non-public'' offerings, or referring back to the definition of ''private placement'' in FINRA Rule 5122.
- Several commenters suggested that the requirement that each member provide applicable disclosure documentation to each investor in a private placement prior to a sale could be interpreted to require a FINRA member to have primary responsibility for preparing disclosure documents in the event that an issuer does not prepare them.[10] Two commenters suggested that in some cases members may not have access to all necessary information from issuers[11] and one of these two also stated that it may be impractical and inefficient for members to be charged with gathering and providing the required information.[12] One commenter suggested that the production of a disclosure document by a FINRA member would increase the liability of the FINRA member in the offering.[13] Another commenter suggested, as an alternative, that the proposed rule change prohibit a member from participating in a private placement if the issuer does not provide the mandated disclosures.[14]
- Two commenters argued that by requiring members to provide disclosures regarding private placements, the proposed rule change would be contrary to the intent of Congress and/or the federal securities laws, which do not otherwise prescribe these disclosures for many types of private placements.[15]
- Three commenters stated that the proposed rule change could significantly affect the ability of many issuers to raise capital.[16] The ABA and MFA also stated that they believe that the proposed rule change is inconsistent with the Exchange Act.
- Commenters expressed concerns regarding exemptions, in most cases advocating to broaden proposed exemptions or to add new exemptions. Two commenters urged FINRA to adopt an explicit exemption for merger and acquisition transactions.[17] The ABA suggested that FINRA exempt employees ''of the issuer or its affiliates'' and define affiliates to have the same meaning as in FINRA Rule 5121(f)(1). Cornell urged more clarity regarding the term ''affiliate,'' noting that different definitions of the term exist in the federal securities laws.[18] A few commenters urged FINRA to adopt additional exemptions for ''knowledgeable employees'' of a private fund, as defined in Rule 3c–5 of the Investment Company Act of 1940.[19] MFA asked that other ''sophisticated investors'' that are purchasers of private funds be exempt from the requirements of the proposed rule change. In addition, Moelis suggested an exemption for ''employees of the broker dealer or its affiliates, who are accredited investors.'' Monument Group asked for an exemption either for ''all offers of private funds by registered independent placement agents,'' or alternatively for all ''offers to accredited investors.''[20] Monument Group also stated that, as proposed, the inclusion of a single purchaser who proved to be a ''mere accredited investor'' of an offering would cause the loss of the exemption for private placement offerings offered solely to ''institutional accounts, as defined in NASD Rule 3110(c)(4),'' as well as to ''qualified purchasers, as defined in Section 2(a)(51)(A)'' of the Investment Company Act of 1940.
- Several commenters stated that a single filing for each offering, rather than by each member, would be sufficient for the regulatory purposes of the proposed rule change and that the firm making the filing could be tasked with disclosing the other members of the selling group in offerings in which more than one firm participated.[21]

FINRA responded to the comments in its Response Letter and filed Partial Amendment 1.[22]

III. Description of Partial Amendment No. 1

FINRA's proposed changes in response to comments, as set forth in Partial Amendment No. 1, are summarized below.

First, FINRA is proposing to amend proposed FINRA Rule 5123 to clarify that the term ''private placement'' in the proposed rule change would mean a non-public offering of securities conducted in reliance on an available exemption from registration under the Securities Act. Accordingly, the proposed rule's private placement definition would be consistent with

[6] Cornell; FSI; NASAA; PIABA; St. John's. Two of these commenters suggested FINRA members provide additional disclosure: NASAA recommended that the rule require members to provide additional risk disclosures to investors; Cornell urged FINRA to adopt a provision in the Proposed Rule to require a member to disclose any affiliation between the issuer and the member.

[7] *See* proposed FINRA Rule 5123(a).

[8] ABA; NYC Bar; S&C. *See also* NASAA (seeking clarification as to the application of the Proposed Rule to secondary transactions of private placements). The ABA stated that the concept of a ''non-public offering'' is well understood to mean a primary offering of securities that is exempt from registration under the Securities Act by reason of Section 4(2) thereof and the rules of the Commission thereunder (including Rule 506 of Regulation D). The NYC Bar stated that exemptions pursuant to Sections 3(b), 4(2) and 4(5) of the Securities Act are traditionally viewed as being ''private placement exemptions.''

[9] FINRA Rule 5122(a)(4) defines ''private placement'' as a ''*non-public* offering of securities conducted in reliance on an available exemption from registration under the Securities Act'' (emphasis added).

[10] ABA; NSCP; NYC Bar; REISA.

[11] ABA; NYC Bar.

[12] ABA.

[13] REISA.

[14] NYC Bar.

[15] ABA; MFA.

[16] ABA; MFA; REISA.

[17] ABA; NYC Bar.

[18] *See* Cornell (noting the differing definitions of ''affiliate'' in Securities Act Rule 144 and Exchange Act Rule 12b–2).

[19] ABA; K&L Gates; *see also* MFA.

[20] Monument Group.

[21] ABA; FSI; IPA; NYC Bar; REISA; S&C.

[22] *See supra,* note 5.

FINRA Rule 5122 and would not apply to securities offered pursuant to the following provisions:

- Securities Act Sections 4(1), 4(3) and 4(4) (which generally exempt secondary transactions);
- Securities Act Sections 3(a)(2) (offerings by banks), 3(a)(9) (exchange transactions with an existing holder, where no one is paid to solicit the exchange), 3(a)(10) (securities subject to a fairness hearing), or 3(a)(12) (securities issued by a bank or bank holding company pursuant to reorganization or similar transactions); or
- Section 1145 of the Bankruptcy Code (securities issued in a court-approved reorganization plan that are not otherwise entitled to the exemption from registration afforded by Securities Act Section 3(a)(10)).[23]

Second, FINRA is proposing to amend the filing and disclosure requirements of the proposed rule change for those private placements for which a disclosure document includes a description of the anticipated use of offering proceeds, the amount and type of offering expenses, and the amount and type of compensation provided or to be provided to sponsors, finders, consultants, and members and their associated persons in connection with the offering. Members would be required to provide, prior to any sale, the disclosure document to each investor other than those investors in a private placement that would be subject to an exemption, as provided by the proposed rule change, as amended. Each member participating in the offering or a member designated to make the filing on behalf of all members identified in the filing would also be required to file such document with FINRA no later than 15 calendar days after the date of first sale.

Third, FINRA is proposing to amend the filing and disclosure requirements of the proposed rule change for those private placements for which there is no disclosure document. If no disclosure document is used, the participating member (or a designated member acting on behalf of the member) would, however, be required to make a notice filing, identifying the private placement and the participating members and stating that no disclosure document was used, with FINRA no later than 15 calendar days after the date of first sale. The proposed rule change as amended would not prohibit a member from participating in such private placements. The proposed rule change would not require the member to make any additional disclosure to investors in such offerings.

Fourth, FINRA is proposing to add supplementary material to the proposed rule change that would clarify that the rule would not require delivery of multiple copies of a disclosure document to a single customer. Specifically, the proposed rule change would require an affected member to deliver disclosure documents only to persons to whom it sells shares in the private placement.

IV. Proceedings To Determine Whether To Approve or Disapprove SR–FINRA–2011–057 and Grounds for Disapproval Under Consideration

In view of the issues raised by the proposed rule change, the Commission has determined to institute proceedings pursuant to Section 19(b)(2) of the Exchange Act to determine whether to approve or disapprove FINRA's proposed rule change.[24] Institution of such proceedings appears appropriate at this time in view of the legal and policy issues raised by the proposed rule change. As noted above, institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to comment on the proposed rule change and provide the Commission with arguments to support the Commission's analysis as to whether to approve or disapprove the proposed rule change.

The Commission is asking that commenters address the changes that FINRA proposes in Partial Amendment No. 1, the comments received on the Notice of Filing, and FINRA's Response Letter, in addition to any other comments they may wish to submit about the proposed rule change. The Commission requests comment, in particular, on the following aspects of the proposed rule change, as modified by Partial Amendment No. 1:

(1) the categories of offerings that would be subject to the proposed rule change under the proposed definition of ''private placement;''

(2) the potential impact on investors purchasing private placement securities through a broker-dealer subject to the proposed rule change;

(3) the potential impact on members of having to comply with the proposed rule change, including any burdens associated with implementing the obligations of the proposed rule change; and

(4) the potential impact on competition and capital formation, including: (a) Whether members would continue to participate in private placements subject to the proposed rule change; (b) whether the proposed rule change would encourage issuers to utilize unregistered firms to effect their covered offerings; and (c) whether the proposed rule change would affect access to capital, the costs of capital raising or the cost of capital for issuers.

Pursuant to Section 19(b)(2)(B) of the Exchange Act,[25] the Commission is providing notice of the grounds for disapproval under consideration. In particular, Section 15A(b)(6) of the Exchange Act[26] 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.

The Commission believes FINRA's proposed rule change, as amended, raises questions as to whether it is consistent with the requirements of Section 15A(b)(6) of the Exchange Act, including whether FINRA's proposed rule change, as amended, would prevent fraudulent and manipulative acts, promote just and equitable principles of trade, and protect investors and the public interest and also whether the proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, to fix minimum profits, to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members, or to regulate any matters not related to the purposes of the Exchange Act or the administration of FINRA.

The Commission also believes FINRA's proposed rule change, as amended, raises questions as to whether it is consistent with the findings that the Commission must make as set forth in Section 3(f) of the Exchange Act, including whether FINRA's proposed rule change, as amended, would promote efficiency, competition, and capital formation.

V. Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues

[23] *See* NYC Bar; S&C (advocating that the proposed rule not apply to these categories of securities).

[24] 15 U.S.C. 78s(b)(2). Section 19(b)(2)(B) of the Exchange Act provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. The time for conclusion of the proceedings may be extended for up to an additional 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding or if the self-regulatory organization consents to the extension.

[25] 15 U.S.C. 78s(b)(2)(B).

[26] 15 U.S.C. 78*o*–3(b)(6).

identified above, as well as any others they may have identified with the proposed rule change, as amended. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change, as modified by Partial Amendment No. 1, is inconsistent with Section 15A(b)(6) or any other provision of the Exchange Act, or the rules and regulations thereunder.

Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[27]

Interested persons are invited to submit written data, views, and arguments by [insert date 30 days from publication in the **Federal Register**] concerning Partial Amendment No. 1 and regarding whether the proposed rule change, as modified by Partial Amendment No. 1, should be approved or disapproved. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by March 12, 2012. 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–2011–057 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–2011–057. 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 such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available.

All submissions should refer to File Number SR–FINRA–2011–057 and should be submitted on or before February 27, 2012. Rebuttal comments should be submitted by March 12, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Kevin M. O'Neil,

Deputy Secretary.

[FR Doc. 2012–1581 Filed 1–25–12; 8:45 am]

BILLING CODE 8011–01–P

[27] Section 19(b)(2) of the Exchange Act, as amended by the Securities Acts Amendments of 1975, Public Law 94–29, 89 Stat. 97 (1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[28] 17 CFR 200.30–3(a)(12); 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66209; File No. SR–Phlx–2012–02]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Reformatting the Fee Schedule

January 20, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 9, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to relocate various fees within the Fee Schedule and provide more detail in the Table of Contents in order to group fees with other similar types of fees.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/,* at the principal office of the Exchange and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to relocate various fees within the Fee Schedule and add more detail to the Table of Contents to group fees so that those fees may be easily located within the Fee Schedule. The Exchange is not proposing any substantive amendments, but rather proposes to merely rearrange text within the Fee Schedule and add detail to the Table of Contents.

Specifically, the Exchange is proposing revisions to the Table of Contents, Section IV, entitled ''PIXL Pricing'', Section VI, entitled ''Access Service, Cancellation, Membership, Regulatory and other Fees'', and Section VIII, entitled, ''Other Member Fees,'' as specified below.

Table of Contents

The Exchange proposes to amend the title of Section IV ''PIXL Pricing'' to ''Other Transaction Fees'' and also add three subsections: (1) A. PIXL Pricing; (2) B. Cancellation Fee; and (3) C. Options Regulatory Fee. The Exchange

is proposing to amend the title of Section VI ''Access Service, Cancellation, Membership, Regulatory and other Fees'' to ''Member Fees'' and also add three subsections: (1) A. Permit and Registration Fees; (2) B. Streaming Quote Trader (''SQT'') Fees; and (3) C. Remote Streaming Quote Trader (''RSQT'') Fees. The Exchange also proposes to amend Section VII, which is currently reserved, as ''Other Member Fees'' and also add four subsections: (1) A. Options Trading Floor Fees; (2) B. Port Fees; (3) C. FINRA Fees; and (4) D. Appeal Fees.

Section IV. PIXL Pricing

The Exchange proposes to rename Section IV as ''Other Transaction Fees.'' The PIXL Pricing will remain in this Section as subsection A. The Exchange also proposes to add a subsection B for Cancellation Fees and a subsection C for the Options Regulatory Fees. The Cancellation Fees and the Options Regulatory Fees are currently located in Section VI, Access Service, Cancellation, Membership, Regulatory, and other Fees. The Exchange believes that these transaction fees are better suited to newly titled Section IV, Other Transaction Fees, because these fees would be located with other transaction fees in the front portion of the Fee Schedule.

Section VI. Access Service, Cancellation, Membership, Regulatory and Other Fees

The Exchange proposes to rename Section VI as ''Membership Fees.'' Currently Section VI contains numerous types of Fees including the: Cancellation Fee, Real-time Risk Management Fee, Options Regulatory Fee, Permit and Registration Fees,[3] Streaming Quote Trader (''SQT'') Fees, Remote Streaming Quote Trader (''RSQT'') Fees, Options Trading Floor Fees,[4] Port Fees,[5] FINRA Fees[6] and Appeal Fees.[7] The Exchange proposes to relocate the Cancellation Fee and the Options Regulatory Fee to newly named Section IV, Other Transaction Fees, as mentioned above. The Exchange proposes to create a subsection A for Permit and Registration Fees, a subsection B for SQT Fees and a subsection C for RSQT Fees. All other fees, including the Options Trading Floor Fees, Port Fees, FINRA Fees and Appeal Fees, will be relocated to a newly titled Section VII.

Section VII. Reserved

The Exchange proposes to rename Section VII, which is currently reserved, as ''Other Member Fees.'' The Exchange proposes to relocate the Options Trading Floor Fees,[8] Port Fees,[9] FINRA Fees[10] and Appeal Fees[11] from Section VI. The Exchange proposes to group these fees into four subsections: A subsection A for Options Floor Fees, a subsection B for Port Fees, a subsection C for FINRA Fees and a subsection D for Appeal Fees for ease of reference.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[12] in general, and furthers the objectives of Section 6(b)(5) of the Act[13] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by organizing its Rules in such a way as to make them easy to locate by grouping transaction fees with other transaction fees and creating other categories of fees, such as Options Trading Floor Fees, Port Fees and Appeals Fees, which provide members an ability to view fees, which may be applicable to them, in one section or subsection of the Fee Schedule. The Exchange believes that also enhancing the Table of Contents, by renaming certain sections and adding subsections, provides greater clarity to the Fee Schedule and allows members to readily locate fees within the Fee Schedule.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[14] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–Phlx–2012–02 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 No. SR–Phlx–2012–02. 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

[3] The Permit and Registration Fees include the: Permit Fee, Application Fee, Application Fee for Lapsed Applications, Transfer of Affiliation Fee, Account Fee, Initiation Fee, Inactive Nominee Fee and Clerk Fee.

[4] The Options Trading Floor Fees include the: Trading/Administrative Booths; Specialist Post Fee, Floor Facility Fees, Computer Equipment Services, Repairs and Replacements, Computer Relocation Requests and Controller Space Fee.

[5] Port Fees include the: Order Entry Port Fee; Active SQF Port Fee and Real-Time Risk Management Fee, which is noted herein.

[6] FINRA Fees include the: Continuing Education Fee, CRD Processing Fee, Disclosure Processing Fee; Annual System Processing Fee and Fingerprint Card Processing Fees.

[7] The Appeal Fees include the: Review/Process Subordinated Loans Fees, Forum Fee Pursuant to Rule 60 and the Review Fee Pursuant to Rule 124.

[8] *See* note 4.

[9] *See* note 5.

[10] *See* note 6.

[11] *See* note 7.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–Phlx–2012–02 and should be submitted on or before February 16, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–1584 Filed 1–25–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66210; File No. SR–C2–2012–003]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Complex Order Price Check Parameter Features

January 20, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 9, 2012, the C2 Options Exchange, Incorporated (''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend its complex order processing rules to update existing price check protection features and include some additional ones. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/RuleFilings.aspx*), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange has in place various price check parameter features that are designed to prevent incoming orders from automatically executing at potentially erroneous prices. These price check parameter features are designed to help maintain a fair and orderly market. The Exchange is proposing to amend its complex order processing rules under Rule 6.13, *Complex Order Execution,* to update existing price check protection features to provide additional clarity on the operation of the functionality and to include some additional features. The Exchange believes the below-described price check parameter revisions will enhance the existing functionality and assist with the maintenance of fair and orderly markets by helping to mitigate the potential risks associated with an order drilling through multiple price points (thereby resulting in executions at prices that are extreme and potentially erroneous) and complex orders trading at prices that are inconsistent with particular complex order strategies (thereby resulting in executions at prices that are extreme and potentially erroneous).

First, the Exchange is proposing to include descriptive headings in the rule text for each of the existing price check parameters. The Exchange is also proposing to break the description of the existing same expiration strategy price check parameters into two separate paragraphs instead of a single paragraph. We believe these changes will make it easier for users to read and understand the operation of these price protection features. These changes are simply non-substantive formatting changes and do not impact the operation of the various features.

Second, the market width parameter under Rule 6.13.04(a) currently provides that the complex order book (''COB'') will not automatically execute eligible complex orders that are market orders if the width between the Exchange's best bid and best offer (''BBO'') are not within an acceptable price range. In addition, the rule text currently provides that such market complex orders will be cancelled.

The Exchange is proposing to revise this provision to provide that the Exchange may determine to apply these price check parameters to market orders and/or marketable limit orders. However, whereas market orders that are subject to this price protection feature are cancelled, marketable limit orders would be held in the system. Any such orders held in the system would not be eligible to automatically execute until after the market width parameter condition is resolved. In addition, while being held in the system, such orders would be displayed in the COB as applicable. This functionality for marketable limit order is currently in use but not expressly covered in the rules. The Exchange believes that extending the same price check logic to not automatically execute such marketable limit orders but to continue to hold such orders in the system is reasonable and appropriate because, as with market orders, this feature should help to prevent executions of such limit orders at extreme and potentially erroneous prices. In contrast to market orders, marketable limit orders are able to be held in the system because they have a price associated with them. The Exchange also notes that applying market width price check logic to market orders and/or marketable limit orders is consistent with other existing price check parameters that apply to both market orders and marketable limit complex orders.[5] In addition, the

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[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See, e.g.,* Rule 6.17, *Price Check Parameters* (which provides, among other things, that the

Exchange is proposing to correct a typographical error by changing the minimum acceptable price range specified in the rule text for orders in option series where the bid is less than $2 from $0.37 to $0.375.[6]

Third, the debit-to-credit (credit-to-debit) parameters under Rule 6.13.04(b) currently provide that (i) a market order that would be executed at a net credit price after receiving a partial execution at a net debit price would not be automatically executed (the ''debit-to-credit'' parameter), and (ii) a market order that would be executed at a net debit price after receiving a partial execution at a net credit price would not be automatically executed (the ''credit-to-debit'' parameter). The Exchange is proposing to eliminate the debit-to-credit parameter because it not possible for such a scenario to occur and therefore the parameter is unnecessary. (Because orders are executed at the best available price and then the next best price, a market order would never execute at a net debit price then at a net credit price.)

Fourth, the Exchange is proposing to change the existing same expiration strategy price check parameters to distinguish between its application to limit orders and to market orders. The Exchange is also proposing to eliminate a provision that would make this price check parameter feature available to ratio orders should the Exchange determine to do so. As the term implies, the ''same expiration strategy'' price protection parameters apply to certain complex order strategies where all the option series have the same expiration.[7] The functionality is designed to detect scenarios where (i) a limit order is entered at a net credit price when it clearly should have been entered at a net debit price (or vice versa) and (ii) a market order would be executed at a net debit price when it clearly should be executed at a net credit price (but not vice versa).[8]

Currently the rule text provides that, if the conditions for this price check parameter exist when a complex order is routed to the COB, then the order will be rejected. The rule text also currently provides that, to the extent the parameters are triggered once an order is resting in COB or after an incoming order receives a partial execution, such a complex order will be cancelled. The provision does not distinguish between limit orders and market orders. The Exchange is proposing to amend the text to separately describe how the two categories of orders are processed.

With respect to limit orders, proposed changes to the text provide that incoming limit orders will be rejected under this parameter only if the conditions exist when the order is first routed to COB. The provisions about resting orders and partial executions are not applicable to limit orders because incoming limit orders that are priced at a net price that meets the conditions are rejected outright upon routing to COB and never get to the point where they are resting or partially executed. With respect to market orders, proposed changes to the text provide that, to the extent the parameters are triggered when an incoming market order is routed to COB or after an incoming market order is subject to a complex order RFR auction (''COA''), any part of the market order that may be executed within an acceptable price range will be executed automatically and the part of the order that would execute at a net debit price will be cancelled. (A market order would never rest in COB, so that provision will be removed from the rule text.) The following examples illustrate this price check parameter:

Example 1: Assume a complex order to buy 50 Jan 45 XYZ calls and sell 50 Jan 50 XYZ calls is entered with a limit that is a net credit price (*i.e.,* the net sale proceeds from the Jan 50 calls are larger than the net purchase cost from the Jan 45 calls). Such an order would appear to be erroneously priced as a net credit—it should instead be a net debit—because normally a person would expect that the Jan 50 calls would not cost more than the Jan 45 calls. As a result, upon routing to COB, such a limit order would be rejected.

Example 2: Assume a butterfly spread to buy 50 Jan 45 XYZ calls, sell 100 Jan 50 XYZ calls and buy 50 Jan 55 XYZ calls is entered at a net credit price (*i.e.,* the net sale proceeds from the Jan 50 calls are more than the net purchase cost from the Jan 45 and 55 calls). Such an order would appear to be erroneously priced as a net credit—it should instead be a net debit—because normally a person would expect that selling the middle 50 strike would result in less than the cost of buying the upper 55 and lower 45 strikes. As a result, upon routing to COB, such a limit order would be rejected.

Example 3: Assume a market order to buy 50 Jan 45 XYZ calls and sell 50 Jan 40 XYZ calls is entered. Also assume that the Jan 45 XYZ calls are quoted $4.00–$4.10 for 10 contracts and the next available offer is $4.30 for 100 contracts, and that the Jan 40 XYZ calls are quoted $4.50–$4.60 for 10 contracts and the next available bid is $4.20 for 100 contracts. Under this scenario, the incoming market order would receive an execution for 10 spreads at a net credit price of $0.40 each (*i.e.,* the net sale proceeds from the Jan 40 Series are larger than the net purchase cost from the Jan 45 Series). When the series decrement, the net execution price would become a net *debit* price of $0.10 each (*i.e.,* the net sale proceeds from the Jan 40 Series are less than the net purchase cost from the Jan 45 Series). Such an execution would appear to be erroneous because normally a person in this scenario would expect to execute the vertical spread at a net credit price. As a result, upon routing to COB, 10 contracts would execute at a net credit price of $0.40 each and the remaining 40 contracts would be cancelled.

Example 4: Assume a market order to buy 50 Jan 45 XYZ calls and sell 50 Jan 40 XYZ calls is routed to COA. Also assume that at the end of the COA the Jan 45 XYZ calls are quoted $4.00–$4.10 for 10 contracts and the next available offer is $4.30 for 100 contracts, and that the Jan 40 XYZ calls are quoted $4.50–$4.60 for 10 contracts and the next available bid is $4.20 for 100 contracts. To the extent the market order can execute at prices within the price check parameter, then that part of the order would execute (*i.e.,* 10 vertical spreads will execute at a net credit price of $0.40). To the extent that the price check parameters are triggered at the conclusion of COA, then that part of the market order would be cancelled (*i.e.,* 40 vertical spreads will cancel).

As noted above, the Exchange is also proposing to delete a provision in the rule that provides that the Exchange may determine to make the same expiration strategy price check parameters available to applicable ratio orders (as such applicable ratios are determined by the Exchange on a class-by-class basis). The Exchange has not activated this feature for ratio orders and has no intention to do so at this time. Therefore, the Exchange is proposing to delete this provision from the rule at this time.[9]

Finally, fifth, the Exchange is proposing to codify a price check parameter for orders processed via COA, which is currently in use but not

Exchange will not automatically execute eligible orders that are marketable if the width between the national best bid and offer is not within an acceptable price range (as determined by the Exchange on a series by series basis for market orders and/or marketable limit orders and announced to Trading Permit Holders via Regulatory Circular).

[6] The $0.375 amount is same as the acceptable price range parameters set forth in Rule 6.17.

[7] *See* Rule 6.13.04(c).

[8] A same expiration strategy market order that would result in an execution at a net credit price (*i.e.,* the net sale proceeds from the series being sold are more than the net purchase cost from the series being bought) but that would normally execute at a net debit price (*i.e.,* the net sale proceeds from the series being sold are less than the net purchase cost from the series being bought) would be a favorable execution for the market order and would not trigger this price check parameter. In making the changes to the rule text, the Exchange is correcting a typographical error, which correction clarifies that the same expiration strategy parameter does not apply to market orders that would execute at a net credit.

[9] In the future, should the Exchange would determine to apply this price check parameter feature to ratio orders, the Exchange would address it through a separate rule change filing.

expressly covered in the rules. Specifically, the Exchange may determine on a class-by-class basis (and announce via Regulatory Circular) that COA will not automatically execute a COA-eligible order that is marketable if the execution would be at a price that is not within an acceptable percentage distance from the derived net price of the individual series legs at the start of COA. For purposes of this provision, the ''acceptable percentage distance'' will be a percentage determined by the Exchange on a class-by-class basis and it shall be not less than 3 percent. The Exchange believes a 3 percent level is reasonable and appropriate because a marketable order that would deviate from the derived net market by that percentage or more may be indicative of an extreme or potentially erroneous price, and a broker would generally want to evaluate the order further before receiving an automatic execution. The Exchange also believes that a 3 percent minimum is reasonable and appropriate in comparison to other price check parameters it currently has available.[10] To the extent the parameters under this provision are triggered, such a complex order will be cancelled.

For example, the Exchange could determine that the acceptable percentage distance is 5%. Assume at the start of COA the individual leg market in Series A is $1.00–$1.20 and in series B is $2.00–$2.20 and the derived leg market is $0.80 (net debit)–$1.20 (net credit). The acceptable percentage distance would be $0.04 (5% × $0.80) for orders to buy Series A and sell series B and $0.06 (5% × $1.20) for orders to sell Series A and buy series B. As a result, COA would execute a COA-eligible order at prices ranging from $0.84 (net debit)—$1.26 (net credit), but not an order priced at a net debit of $0.85 or more or a net credit of $1.27 or more.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act[11] in general and furthers the objectives of Section 6(b)(5) of the Act[12] in particular in that it should promote just and equitable principles of trade, serve to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest. The Exchange believes the complex order price check parameters assist in the automatic execution and processing of orders that are subject to the Exchange's complex order processing. The Exchange also believes these price check parameters assist with the maintenance of fair and orderly markets by helping to mitigate the potential risks associated with complex orders drilling through multiple price points (thereby resulting in executions at prices that are extreme and potentially erroneous) and complex orders trading at prices that are inconsistent with particular complex order strategies (thereby resulting in executions at prices that are extreme and potentially erroneous). In this regard, for example, the Exchange notes that the acceptable percentage distance parameter is designed to mitigate the potential risks of executions at prices that are not within an acceptable percentage distance from the derived net market price of the individual series legs. The Exchange also notes that the extension of the BBO market width logic to include marketable limit orders is designed to help prevent executions of such limit orders at extreme and potentially erroneous prices in a manner consistent with the existing logic utilized for market orders. The Exchange also believes that the proposed changes to the rule text will make it easier for users to read and understand the operation of the price check parameters, and will better and more fully describe the operation of the parameters.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[13] and Rule 19b–4(f)(6) thereunder.[14] At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule 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–C2–2012–003 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–C2–2012–003. 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

[10] The ''acceptable percentage distance'' price check parameter for complex orders is adapted from the ''acceptable tick distance'' parameter set forth in Rule 6.17, which provides that the acceptable tick distance shall not be less than 2 minimum increment ticks.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6).

printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–C2–2012–003 and should be submitted on or before February 16, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–1628 Filed 1–25–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66207; File No. SR–CBOE–2012–004]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Automatic Execution and Complex Order Price Check Parameter Features

January 20, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 9, 2012, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend its automatic execution and complex order processing rules to update existing price check parameter and order handling features and include some additional ones. The text of the proposed rule change is available on the Exchange's Web site (*www.cboe.org/Legal*), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange has in place various price check parameter features that are designed to prevent incoming orders from automatically executing at potentially erroneous prices. These price check parameter features are designed to help maintain a fair and orderly market. The Exchange believes that the price check parameter features assist with the maintenance of fair and orderly markets by helping to mitigate the potential risks associated with orders drilling through multiple price points (thereby resulting in executions at prices that are extreme and potentially erroneous) and complex orders trading at prices that are inconsistent with particular complex order strategies (thereby resulting in executions at prices that are extreme and potentially erroneous). The Exchange is proposing to amend its automatic execution and complex order processing rules to update existing price check protection and order handling features to provide additional clarity on the operation of the functionality and to include some additional features.

With respect to the CBOE Hybrid System Automatic Execution Feature, the Exchange is proposing to amend Rule 6.13 in various respects. By way of background, orders eligible for automatic execution through the CBOE Hybrid System may be automatically executed in accordance with Rule 6.13, Rule 6.13A, 6.14 or 6.14A, as applicable.[5] Under the Rule 6.13, the Exchange designates eligible order size, eligible order type, eligible order origin code (*i.e.,* public customer orders, non-Market-Maker broker-dealer orders, and Market-Maker broker-dealer orders), and classes in which the automatic execution feature shall be activated.[6] In addition, other conditions may apply. For example, the Exchange may establish price check parameters that prevent orders from automatically executing outside acceptable price ranges or acceptable tick distances.[7] Orders that are not eligible for automatic execution generally route on a class-by-class basis to PAR or, at the order entry firm's discretion, to the order entry firm's booth.

As for the proposed changes to Rule 6.13, first, the Exchange is proposing to delete unnecessary cross references within the rule in order to make the text consistent and easier to read.[8] Second, currently the rule is silent on what happens when an order that would otherwise route to PAR is not eligible for PAR. Therefore, the Exchange is proposing to provide that, in instances where an order would route to PAR but the order is not eligible for PAR, then the remaining balance of the order will be cancelled. For example, assume an order entry firm has chosen to route its orders that are not eligible for automatic execution to PAR (and the order entry firm has also not specified that its orders can route to a booth if PAR is unavailable). With this configuration, if an order is routed by that firm to the

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] SAL or the ''Simple Auction Liaison'' is a feature within the Hybrid System that auctions marketable orders for price improvement over the national best bid or offer (''NBBO'') as provided in Rule 6.13A. HAL or the ''Hybrid Agency Liaison'' is a feature within the Hybrid System that provides automated order handling in designated classes trading on the Hybrid System for qualifying orders that are not automatically executed. For example, eligible orders in classes that are multiply traded are not automatically executed on CBOE at prices that are inferior to the NBBO and instead may route to HAL. The original version of HAL is described in Rule 6.14. The second version of HAL, referred to as HAL2, is described in Rule 6.14A.

[6] *See* Rule 6.13(b)(i).

[7] *See* Rule 6.13(b)(v) and (vi).

[8] In particular, various provisions within the rule text provide that certain orders will be routed to PAR or, at the order entry firm's discretion, to the order entry firm's booth. Some of those provisions contain the phrase ''pursuant to subparagraph (b)(i)(B) above,'' (*see, e.g.,* existing Rule 6.13(b)(v)) while other provisions do not (*see, e.g.,* existing Rule 6.13(b)(iii)). The Exchange believes this cross-reference is unnecessary. For consistency and easier reading, the Exchange is proposing to delete the cross-reference.

CBOE Hybrid System but the order is not eligible for automatic execution or book entry (*e.g.,* because an incoming order is marketable and would execute at a price outside an acceptable price range), then: (i) The order would route to PAR so the order can be manually addressed, or (ii) if it is not eligible to route to PAR (*e.g.,* because the particular order type is not eligible for PAR[9] and the order entry firm has not specified that its orders can route to a booth if PAR is unavailable), then the remaining balance of the order will be cancelled.[10] Third, currently the rule describes that the price check parameters are available in classes where HAL or HAL2 is activated and, depending on the particular version of HAL, differing price check features apply.[11] Thus, the rule currently addresses two categories of options classes: HAL classes and HAL2 classes. For classes where HAL is activated, an acceptable BBO price range parameter may be applied. For classes where HAL2 is activated, an acceptable NBBO price range parameter and/or an acceptable tick distance parameter may be applied.[12] The rule does not specify which features would be available in the instance where neither HAL nor HAL2 is activated. Therefore, the Exchange is proposing to provide that, for classes where neither HAL nor HAL2 is activated, the acceptable NBBO price range parameter and/or acceptable tick distance parameter may be applied (*i.e.,* the same price check features applicable to HAL2 classes may apply to classes where neither HAL nor HAL2 is activated). The Exchange notes that HAL is not currently activated in any options classes and the related the price check parameter logic is therefore not currently being utilized. In addition, making it clear that the price check parameter features applicable to HAL2 classes to non-HAL/HAL2 classes is also consistent with how the Exchange's automated technology is currently configured and operating.

With respect to the complex order process, the Exchange is proposing to amend Rule 6.53C, Complex Orders on the Hybrid System, to update the price check parameters in various respects. First, currently the rule is silent on what happens when a complex order attempts to route to PAR but is not eligible for PAR. Therefore, similar to the changes noted above for Rule 6.13, the Exchange is proposing to amend Rule 6.53C.08 to provide that, in instances where a complex order would normally route to PAR if a complex order price check parameter is triggered but the order is not eligible to route to PAR, then the remaining balance of the complex order will be cancelled.

Second, the Exchange is proposing to replace specific references in Rule 6.53C.08 to routing orders to BART (the booth automated routing terminal) and an order entry firm's booth printer with a general reference to an order entry firm's booth. The Exchange no longer utilizes the particular system that it had referred to as BART and believes that the general reference to routing an order to an order entry firm's booth is more accurate for its rules.

Third, the Exchange is proposing to include descriptive headings in the rule text for each of the existing price check parameters. The Exchange is also proposing to break the description of the existing same expiration strategy price check parameters into two separate paragraphs instead of a single paragraph. We believe these changes will make it easier for users to read and understand the operation of these price protection features. These changes are simply non-substantive formatting changes and do not impact the operation of the various features.

Fourth, the market width parameter under Rule 6.53C.08(a) currently provides that the complex order book (''COB'') will not automatically execute eligible complex orders that are market orders if the width between the Exchange's best bid and best offer are not within an acceptable price range. The rule text provides that the acceptable price range is no less than 1.5 times the corresponding bid/ask differential requirements determined by the Exchange on a class-by-class basis pursuant to Rule 8.7(b)(iv). In addition, the rule text currently provides that such market complex orders route on a class-by-class basis to PAR, BART or, at the order entry firm's discretion, to the order entry firm's booth.

The Exchange is proposing to revise this provision in various respects. As discussed above, the Exchange is proposing to make it clear that the remaining balance of a complex order will be cancelled if it would normally route to PAR but is not eligible and to delete references to BART. In addition, the Exchange is proposing to provide that the Exchange may determine to apply these price check parameters to market orders and/or marketable limit orders. However, whereas market orders that are subject to this price protection feature route to PAR, a booth or are cancelled, marketable limit orders would be held in the Hybrid System. Any such orders held in the Hybrid System would not be eligible to automatically execute until after the market width parameter condition is resolved. In addition, while being held in the Hybrid System, such orders would be displayed in the COB as applicable. This functionality for marketable limit orders is currently in use but not expressly covered in the rules. The Exchange believes that extending the same price check logic to not automatically execute such marketable limit orders but to continue to hold such orders in the Hybrid System is reasonable and appropriate because, as with market orders, this feature should help to prevent executions of such limit orders at extreme and potentially erroneous prices. In contrast to market orders, marketable limit orders are able to be

[9] For example, reserve orders (which are limit orders that have both a displayed size as well as an additional non-displayed size amount) and CBOE–Only orders (which are orders to buy or sell that are to be executed in whole or in part on the Exchange without routing to another market center and that are to be cancelled if routing would be required under CBOE Rules) are currently not eligible to route to PAR.

[10] The Exchange notes that other exchanges have features where orders that are not eligible for automatic execution are automatically cancelled or rejected. *See, e.g.,* International Securities Exchange (''ISE'') Rule 714 (which provides in part that non-customer orders that are not automatically executed will be rejected automatically by the ISE's all electronic trading system). By comparison, because CBOE has a ''hybrid system'' that combines both electronic and open outcry trading, CBOE's process of routing orders that are not automatically executed by the Hybrid System to PAR or a booth provides for an additional, alternative means for an order to be manually addressed rather than simply be cancelled.

[11] HAL or the ''Hybrid Agency Liaison'' is a feature within the Hybrid System that provides automated order handling in designated classes trading on the Hybrid System for qualifying orders that are not automatically executed. The original version of HAL is described in Rule 6.14. The second version of HAL, referred to as HAL2, is described in Rule 6.14A.

[12] For classes on which HAL (Rule 6.14) is activated, the CBOE Hybrid System will not automatically execute eligible orders that are marketable if the width between the Exchange's best bid and best offer is not within an acceptable price range (as determined by the Exchange on a series-by-series basis for market orders and/or marketable limit orders and announced to the Trading Permit Holders via Regulatory Circular) (the ''acceptable BBO price range'' parameter). For classes on which HAL2 (Rule 6.14A) is activated, the CBOE Hybrid System will not automatically execute eligible orders that are marketable if (1) the width between the national best bid and national best offer is not within an acceptable price range (as determined by the Exchange on a series-by-series basis for market orders and/or marketable limit orders and announced to the Trading Permit Holders via Regulatory Circular) (the ''acceptable NBBO price range'' parameter), or (2) the execution would follow an initial partial execution on the Exchange and would be at a subsequent price that is not within an acceptable tick distance from the initial execution (as determined by the Exchange on a series by series and premium basis for market orders and/or marketable limit orders and announced to the Trading Permit Holders via Regulatory Circular) (the ''acceptable tick distance'' parameter). *See* Rules 6.13(b)(v)—(vi).

held in the Hybrid System because they have a price associated with them. The Exchange also notes that applying market width price check logic to market orders and/or marketable limit orders is consistent with other existing price check parameters that apply to both market orders and marketable limit complex orders.[13] In addition, rather than cross reference corresponding bid/ask differential requirements, the Exchange is proposing to specify the minimum acceptable price range within Rule 6.53C.08(a). Specifically, the acceptable price range will be no less than: $0.375 between the bid and offer for each option contract for which the bid is less than $2, $0.60 where the bid is at least $2 but does not exceed $5, $0.75 where the bid is more than $5 but does not exceed $10, $1.20 where the bid is more than $10 but does not exceed $20, and $1.50 where the bid is more than $20.[14]

Fifth, the debit-to-credit (credit-to-debit) parameters under Rule 6.53C.08(b) currently provide that (i) a market order that would be executed at a net credit price after receiving a partial execution at a net debit price would not be automatically executed (the ''debit-to-credit'' parameter), and (ii) a market order that would be executed at a net debit price after receiving a partial execution at a net credit price would not be automatically executed (the ''credit-to-debit'' parameter). The Exchange is proposing to eliminate the debit-to-credit parameter because it is not possible for such a scenario to occur and therefore the parameter is unnecessary. (Because orders are executed at the best available price and then the next best price, a market order would never execute at a net debit price then at a net credit price.)

Sixth, the Exchange is proposing to change the existing same expiration strategy price check parameters to distinguish between its application to limit orders and to market orders. The Exchange is also proposing to eliminate a provision that would make this price check parameter feature available to ratio orders should the Exchange determine to do so. As the term implies, the ''same expiration strategy'' price protection parameters apply to certain complex order strategies where all the option series have the same expiration.[15] The functionality is designed to detect scenarios where (i) a limit order is entered at a net credit price when it clearly should have been entered at a net debit price (or vice versa) and (ii) a market order would be executed at a net debit price when it clearly should be executed at a net credit price (but not vice versa).[16]

Currently the rule text provides that, if the conditions for this price check parameter exist when a complex order is routed to COB, then the order will be rejected. The rule text also currently provides that, to the extent the parameters are triggered once an order is resting in COB or after an incoming order receives a partial execution, such a complex order will route on a class-by-class basis to PAR, BART, or at the order entry firm's discretion to the order entry firm's booth printer. The provision does not distinguish between limit orders and market orders. The Exchange is proposing to amend the text to separately describe how the two categories of orders are processed.

With respect to limit orders, the proposed changes to the text provide that incoming limit orders will be rejected under this parameter only if the conditions exist when the order is first routed to COB. The provisions about resting orders and partial executions are not applicable to limit orders because incoming limit orders that are priced at a net price that meets the conditions are rejected outright upon routing to COB and never get to the point where they are resting or partially executed. With respect to market orders, proposed changes to the text provide that, to the extent the parameters are triggered when an incoming market order is routed to COB or after an incoming market order is subject to COA, any part of the market order that may be executed within an acceptable price range will be executed automatically and the part of the order that would execute at a net debit price will route on a class-by-class basis to PAR or, at the order entry firm's discretion, to the order entry firm's booth. If an order is not eligible to route to PAR, then the remaining balance will be cancelled. (A market order would never rest in COB, so that provision will be removed from the rule text.)[17] The following examples illustrate this price check parameter:

Example 1: Assume a complex order to buy 50 Jan 45 XYZ calls and sell 50 Jan 50 XYZ calls is entered with a limit that is a net credit price (*i.e.,* the net sale proceeds from the Jan 50 calls are larger than the net purchase cost from the Jan 45 calls). Such an order would appear to be erroneously priced as a net credit—it should instead be a net debit—because normally a person would expect that the Jan 50 calls would not cost more than the Jan 45 calls. As a result, upon routing to COB, such a limit order would be rejected.

Example 2: Assume a butterfly spread to buy 50 Jan 45 XYZ calls, sell 100 Jan 50 XYZ calls and buy 50 Jan 55 XYZ calls is entered at a net credit price (*i.e.,* the net sale proceeds from the Jan 50 calls are more than the net purchase cost from the Jan 45 and 55 calls). Such an order would appear to be erroneously priced as a net credit—it should instead be a net debit—because normally a person would expect that selling the middle 50 strike would result in less than the cost of buying the upper 55 and lower 45 strikes. As a result, upon routing to COB, such a limit order would be rejected.

Example 3: Assume a market order to buy 50 Jan 45 XYZ calls and sell 50 Jan 40 XYZ calls is entered. Also assume that the Jan 45 XYZ calls are quoted $4.00–$4.10 for 10 contracts and the next available offer is $4.30 for 100 contracts, and that the Jan 40 XYZ calls are quoted $4.50–$4.60 for 10 contracts and the next available bid is $4.20 for 100 contracts. Under this scenario, the incoming market order would receive an execution for 10 spreads at a net credit price of $0.40 each (*i.e.,* the net sale proceeds from the Jan 40 Series are larger than the net purchase cost from the Jan 45 Series). When the series decrement, the net execution price would become a net *debit* price of $0.10 each (*i.e.,* the net sale proceeds from the Jan 40 Series are less than the net purchase cost from the Jan 45 Series). Such an execution would appear to be erroneous because normally a person in this scenario would expect to execute the vertical spread at a net credit price. As a result, upon routing to COB, 10 contracts would execute at a net credit price of $0.40 each and the remaining 40 contracts would route on a class-by-

[13] *See, e.g.,* Rule 6.13(vi) (which provides, among other things, that the Exchange will not automatically execute eligible orders that are marketable if the width between the NBBO is not within an acceptable price range (as determined by the Exchange on a series by series basis for market orders and/or marketable limit orders and announced to Trading Permit Holders via Regulatory Circular).

[14] These amounts are equal to 1.5 times the bid/ask differential requirements that the Exchange had in its rules at the time the price check parameters were adopted and are the same as the acceptable price range parameters set forth in Rule 6.13(b)(v)–(vi).

[15] *See* Rule 6.53C.08(c).

[16] A same expiration strategy market order that would result in an execution at a net credit price (*i.e.,* the net sale proceeds from the series being sold are more than the net purchase cost from the series being bought) but that would normally execute at a net debit price (*i.e.,* the net sale proceeds from the series being sold are less than the net purchase cost from the series being bought) would be a favorable execution for the market order and would not trigger this price check parameter.

[17] As discussed above, the Exchange is also proposing to delete the references to BART and booth printers.

class basis to PAR, or at the order entry firm's discretion, to the order entry firm's booth. If the market order is not eligible to route to PAR, then the remaining balance would be cancelled.

Example 4: Assume a market order to buy 50 Jan 45 XYZ calls and sell 50 Jan 40 XYZ calls is routed to COA. Also assume that at the end of the COA the Jan 45 XYZ calls are quoted $4.00–$4.10 for 10 contracts and the next available offer is $4.30 for 100 contracts, and that the Jan 40 XYZ calls are quoted $4.50–$4.60 for 10 contracts and the next available bid is $4.20 for 100 contracts. To the extent the market order can execute at prices within the price check parameter, then that part of the order would execute (*i.e.,* 10 vertical spreads will execute at a net credit price of $0.40 each). To the extent that the price check parameters are triggered at the conclusion of COA, then that part of the market order would route on a class-by-class basis to PAR, or at the order entry firm's discretion, to the order entry firm's booth (*i.e.,* 40 vertical spreads will route). If the market order is not eligible to route to PAR, then the remaining balance would be cancelled.

As noted above, the Exchange is also proposing to delete a provision in the rule that provides that the Exchange may determine to make the same expiration strategy price check parameters available to applicable ratio orders (as such applicable ratios are determined by the Exchange on a class-by-class basis). The Exchange has not activated this feature for ratio orders and has no intention to do so at this time. Therefore, the Exchange is proposing to delete this provision from the rule at this time.[18]

Finally, seventh, the Exchange is proposing to codify a price check parameter for orders processed via COA, which is currently in use but not expressly covered in the rules. Under this parameter the Exchange may determine on a class-by-class basis (and announce to Trading Permit Holders via Regulatory Circular pursuant to Rule 6.53C.01) that COA will not automatically execute a COA-eligible order that is marketable if the execution would be at a price that is not within an acceptable percentage distance from the derived net price of the individual series legs that existed at the start of COA. For purposes of this provision, the ''acceptable percentage distance'' will be a percentage determined by the Exchange on a class-by-class basis and it shall be not less than 3 percent. The Exchange believes a 3 percent level is reasonable and appropriate because a marketable order that would deviate from the derived net market by that percentage or more may be indicative of an extreme or potentially erroneous price, and a broker would generally want to evaluate the order further before receiving an automatic execution. The Exchange also believes that a 3 percent minimum is reasonable and appropriate in comparison to other price check parameters it currently has available.[19] To the extent the parameters under this provision are triggered, such a complex order would route on a class-by-class basis to PAR, or, at the order entry firm's discretion, to the order entry firm's booth. Again, as discussed above, if an order is not eligible to route to PAR, then the remaining balance will be cancelled.

For example, the Exchange could determine that the acceptable percentage distance is 5%. Assume at the start of COA the individual leg market in Series A is $1.00–$1.20 and in series B is $2.00–$2.20 and the derived leg market is $0.80 (net debit)–$1.20 (net credit). The acceptable percentage distance would be $0.04 (5% × $0.80) for orders to buy Series A and sell series B and $0.06 (5% × $1.20) for orders to sell Series A and buy series B. As a result, COA would execute a COA-eligible order at prices ranging from $0.84 (net debit)–$1.26 (net credit), but not an order priced at a net debit of $0.85 or more or a net credit of $1.27 or more.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act[20] in general and furthers the objectives of Section 6(b)(5) of the Act[21] in particular in that it should promote just and equitable principles of trade, serve to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest. The Exchange believes that the complex order price check parameters described in Rule 6.53C assist in the automatic execution and processing of orders that are subject to the Exchange's complex order processing. The Exchange also believes these price check parameters assist with the maintenance of fair and orderly markets by helping to mitigate the potential risks associated with orders drilling through multiple price points (thereby resulting in executions at prices that are extreme and potentially erroneous) and complex orders trading at prices that are inconsistent with particular complex order strategies (thereby resulting in executions at prices that are extreme and potentially erroneous). In this regard, for example, the Exchange notes that the acceptable percentage distance parameter is designed to mitigate the potential risks of executions at prices that are not within an acceptable percentage distance from the derived net market price of the individual series legs. The Exchange also notes that the extension of the BBO market width logic to include marketable limit orders is designed to help prevent executions of such limit orders at extreme and potentially erroneous prices in a manner consistent with the existing logic utilized for market orders. The Exchange also believes that the proposed changes to the rule text will make it easier for users to read and understand the operation of the complex order price check parameters, and will better and more fully describe the operation of the parameters. In addition, the Exchange believes the proposed revisions to Rule 6.13 will better and more fully describe the operation of the Hybrid System automatic execution feature, in particular the processing of orders that are not eligible for routing to PAR and the price check parameter protections that are applicable for non-HAL/HAL2 classes.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the

[18] In the future, should the Exchange would determine to apply this price check parameter feature to ratio orders, the Exchange would address it through a separate rule change filing.

[19] The ''acceptable percentage distance'' price check parameter for complex orders is adapted from the ''acceptable tick distance'' parameter set forth in Rule 6.13(b)(vi), which provides that the acceptable tick distance shall not be less than 2 minimum increment ticks.

[20] 15 U.S.C. 78f(b).

[21] 15 U.S.C. 78f(b)(5).

Commission may designate if consistent with the protection of investors and the public interest, provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [22] and Rule 19b–4(f)(6) thereunder.[23] At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2012–004 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2012–004. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2012–004 and should be submitted on or before February 16, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–1627 Filed 1–25–12; 8:45 am]

BILLING CODE 8011–01–P

[22] 15 U.S.C. 78s(b)(3)(A).

[23] 17 CFR 240.19b–4(f)(6).

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66208; File No. SR–Phlx–2012–06]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Real-Time Risk Management Fee and Other Clarifying Amendments

January 20, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 10, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Real-Time Risk Management Fee to further clarify the application of the Fee. The Exchange also proposes to relocate the FLEX and Cabinet Options Transaction Fees within Section II of the Exchange's Fee Schedule and add clarifying text.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqtrader.com/micro.aspx?id=PHLXfilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to memorialize the Exchange's practice of limiting the assessment of the Real-time Risk Management Fee to two (2) ports. The Exchange also proposes to add language to clarify the types of ports that are subject to this fee.

The Exchange initially filed to adopt a real-time, trade information fee (Real-time Risk Management Fee) for members receiving option trading information on-line (i.e., electronically) from the Exchange.[3] The purpose of the fee was to provide members and member organizations with option trade information electronically on a real-time basis. Members and member organizations were able to log on to an interface with AUTOM to receive options (among other information) transaction information real-time. When adopted, the Exchange limited the assessment of the Real-Time Risk Management Fee to two ports.[4] The Exchange has not assessed any member or member organization in excess of two

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 43719 (December 13, 2000), 65 FR 80975 (December 22, 2000) (SR–Phlx–00–97). The Exchange initially assessed $.0025 per contract and later raised this fee to $.003 per contract. *See also* Securities Exchange Act Release No. 61685 (March 10, 2010), 75 FR 13187 (March 18, 2010) (SR–Phlx–2010–39).

[4] *See* Securities Exchange Act Release No. 43719 (December 13, 2000), 65 FR 80975 (December 22, 2000) (SR–Phlx–00–97). The information included symbol, volume, price, time and clearing information.

ports since this Fee was adopted in 2000.[5] The Exchange proposes to memorialize this practice in its Fee Schedule. The port may be either a Specialized Quote Feed (''SQF'')[6] Port or a Clearing Trade Interface (''CTI'')[7] Port. The member/member organization is assessed up to two ports. The Exchange proposes to add the following language to the Fee Schedule: ''$.003 per contract for members and member organizations receiving information on a real-time basis up to a maximum of two ports, which may be either an SQF Port or a CTI Port'' (new language in bold), to memorialize its current practice.

The Exchange also proposes to relocate the FLEX[8] and Cabinet[9] Options transaction fees within Section II of the Fee Schedule, entitled ''Equity Option Fees,'' and add additional text to clarify that the transaction fees for FLEX[10] and Cabinet[11] Options are not in addition to the Options Transaction Charges. The Exchange also proposes to include text concerning the waiver of facilitation orders, currently in Section II in another part of Section II which addresses other facilitation waivers. The Exchange believes that relocating this text and adding a sentence which states ''Cabinet and FLEX Option Fees above are not in addition to the Options Transaction Charges'' will add more clarity to the Fee Schedule.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act[12] in general, and furthers the objectives of Section 6(b)(4) of the Act[13] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members.

The Exchange believes that amending the Fee Schedule to memorialize the Exchange's practice of not assessing the Real-time Risk Management Fee on more than two ports is reasonable because this practice will be clearly stated on the Fee Schedule. Also, the Exchange believes that it is reasonable to clearly note the types of ports that are subject to this Fee. The Exchange also believes that this amendment is equitable and not unfairly discriminatory because the Exchange is uniformly assessing the Real-time Risk Management Fee on all members and member organizations. Every member or member organization will not be assessed the Real-time Risk Management Fee in excess of two ports, either an SQF Port or a CTI Port.

The Exchange believes that its proposal to relocate the Cabinet and FLEX Options section within Section II of the Fee Schedule and add more clarity concerning the assessment of these fees is reasonable, equitable and not unfairly discriminatory because the amendments will further clarify the application of Section II fees. The proposed amendments are not substantive. The Exchange believes the amendments would create a more user-friendly Fee Schedule.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[14] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and

[5] It was always the intent of the Exchange to limit this Fee to two ports, although the initial filing does not state this limitation, this has always been the practice of the Exchange.

[6] SQF is an interface that allows specialists, streaming quote traders and remote streaming quote traders to connect and send quotes into Phlx XL. SQF 6.0 allows participants to access information in a single feed available to all participants, rather than through accessing multiple feeds. The information available includes execution reports and other relevant data. Non quoting firms may also receive relevant information available over SQF by connecting to the SQF interface, but they may not send quotes. The set of data offered over this data feed is administrative in nature or is used to attract liquidity to the Exchange in response to an auction. Participants who write interfaces to the Phlx system use the administrative data to determine the current state of the trading system. For example, this data displays which symbols are trading on the Phlx, the current state of an options symbol (*i.e.,* open for trading, trading, halted or closed from trading), as well as similar information regarding complex order strategies. This administrative data also includes the definition of complex order strategies. *See* Securities Exchange Act Release No. 63034 (October 4, 2010), 75 FR 62441 (October 8, 2010) (SR–Phlx–2010–124).

[7] CTI provides Exchange members with real-time clearing trade updates. The updates include the members clearing trade messages on a low latency, real-time basis. The trade messages are routed to a member's connection containing certain information. The information includes, among other things, the following: (i) The Clearing Member Trade Agreement or ''CMTA'' or The Options Clearing Corporation or ''OCC'' number; (ii) Exchange badge or house number; and (iii) the Exchange internal firm identifier. The administrative and market event messages include, but are not limited to: System event messages to communicate operational-related events; options directory messages to relay basic option symbol and contract information for options traded on the Exchange; complex strategy messages to relay information for those strategies traded on the Exchange; and trading action messages to inform market participants when a specific option or strategy is halted or released for trading on the Exchange. The information related to complex order strategy messages includes information that lists the legs and the leg ratios, which uniquely defines this strategy for an underlying. In addition, the interface contains an indicator which distinguishes electronic and non-electronic delivered orders. This information will be available to members on a real-time basis. *See* Securities Exchange Act Release No. 62155 (May 24, 2010), 75 FR 30081 (May 28, 2010) (SR–Phlx–2010–67).

[8] A FLEX option is a customized option that provides parties to the transaction with the ability to fix terms including the exercise style, expiration date, and certain exercise prices. *See* Exchange Rule 1079. FLEX Options are a trademark of the Chicago Board Options Exchange.

[9] An ''accommodation'' or ''cabinet'' trade refers to trades in listed options on the Exchange that are worthless or not actively traded. Cabinet trading is generally conducted in accordance with Exchange Rules, except as provided in Exchange Rule 1059 entitled ''Accommodation Trading'', which sets forth specific procedures for engaging in cabinet trading below $ 1 per option contract. Cabinet or accommodation trading of option contracts is intended to accommodate persons wishing to effect closing transactions in those series of options dealt in on the Exchange for which there is no auction market.

[10] FLEX transaction fees are $0.10 per contract side for all participants, except Customers. Specifically, the Exchange assess a $.10 transaction charge on Professionals, Specialists, Registered Options Traders, Streaming Quote Traders, Remote Streaming Quote Traders, Broker-Dealers and Firms. Customers are not assessed a transaction charge for FLEX Options. *See* Securities Exchange Act Release No. 62379 (June 25, 2010), 75 FR 38163 (July 1, 2010) (SR–Phlx–2010–87).

[11] Cabinet transaction fees are $ 0.10 per contract side for all participants, except Customers. Specifically, the Exchange assess a $.10 transaction charge on Professionals, Specialists, Registered Options Traders, Streaming Quote Traders, Remote Streaming Quote Traders, Broker-Dealers and Firms. Customers are not assessed a transaction charge for Cabinet Options. *See* Securities Exchange Act Release No. 65740 (November 18, 2011), 76 FR 72744 (November 25, 2011) (SR–Phlx–2011–150).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4).

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

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 No. SR–Phlx–2012–06 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 No. SR–Phlx–2012–06. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–Phlx–2012–06 and should be submitted on or before February 13, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–1583 Filed 1–25–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66201; File No. SR–NYSEArca–2011–86]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change To List and Trade the Accuvest Global Opportunities ETF Under NYSE Arca Equities Rule 8.600

January 20, 2012.

I. Introduction

On November 16, 2011, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the Accuvest Global Opportunities ETF (''Fund'') under NYSE Arca Equities Rule 8.600. The proposed rule change was published for comment in the **Federal Register** on December 7, 2011.[3] The Commission received no comments on the proposal. This order grants approval of the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to list and trade the Shares of the Fund pursuant to NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares on the Exchange. The Shares will be offered by AdvisorShares Trust (''Trust''), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.[4] The investment adviser to the Fund is AdvisorShares Investments, LLC (''Adviser''). Accuvest Global Advisers is the Fund's sub-adviser (''Sub-Adviser'') and provides day-to-day portfolio management of the Fund. Foreside Fund Services, LLC is the principal underwriter and distributor of the Fund's Shares. The Exchange states that neither the Adviser nor the Sub-Adviser is affiliated with a broker-dealer.[5]

Description of the Fund

The Fund will seek long-term capital appreciation in excess of global equity benchmarks such as the MSCI All Country World Index. The Fund will be a ''fund-of-funds'' that seeks to achieve its investment objective by investing primarily in other U.S.-listed exchange-traded products (''Underlying ETPs'').[6] The Sub-Adviser will seek to achieve the Fund's investment objective by investing in Underlying ETPs that provide diversified exposure to select economies around the world. The Sub-Adviser will rank countries on a monthly basis using its proprietary country ranking model in order to determine their relative attractiveness. The Sub-Adviser then will endeavor to invest in Underlying ETPs that individually or in combination correspond generally to the price and yield performance of the specific countries (or regions) identified as most attractive by the model. The Fund's portfolio will be invested only in countries with the highest ranking as

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[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 65862 (December 1, 2011), 76 FR 76457 (''Notice'').

[4] The Trust is registered under the Investment Company Act of 1940 (''1940 Act''). On May 9, 2011, the Trust filed with the Commission Post-Effective Amendment No. 25 to Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a) and under the 1940 Act relating to the Fund (File Nos. 333–157876 and 811–22110) (''Registration Statement''). In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 29291 (May 28, 2010) (File No. 812–13677) (''Exemptive Order'').

[5] *See* Commentary .06 to NYSE Arca Equities Rule 8.600. The Exchange represents that in the event (a) the Adviser or the Sub-Adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, it will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

[6] Underlying ETPs include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)); Portfolio Depositary Receipts (as described in NYSE Arca Equities Rule 8.100); Trust Issued Receipts (as described in NYSE Arca Equities Rule 8.200); Commodity-Based Trust Shares (as described in NYSE Arca Equities Rule 8.201); Currency Trust Shares (as described in NYSE Arca Equities Rule 8.202); Commodity Index Trust Shares (as described in NYSE Arca Equities Rule 8.203); Trust Units (as described in NYSE Arca Equities Rule 8.500); Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600), and closed-end funds. The Underlying ETPs all will be listed and traded in the United States on registered exchanges. The Underlying ETPs in which the Fund may invest will primarily be index-based exchange-traded funds that hold substantially all of their assets in securities representing a specific index.

identified by the Sub-Adviser's proprietary country ranking process.

The Fund intends to invest primarily in the securities of Underlying ETPs consistent with the requirements of Section 12(d)(1) of the 1940 Act, or any rule, regulation or order of the Commission or interpretation thereof. The Fund will only make such investments in conformity with the requirements of Section 817 of the Internal Revenue Code of 1986, as amended (''Code'').[7]

The Fund, through its investment in Underlying ETPs, may invest in equity securities, which represent ownership interests in a company or partnership and consist of common stocks, preferred stocks, warrants to acquire common stock, securities convertible into common stock, investments in master limited partnerships and American Depositary Receipts (''ADRs''), as well as Global Depositary Receipts (''GDRs,'' and together with ADRs, collectively, ''Depositary Receipts'').[8] The Fund, through its investment in Underlying ETPs, may invest in closed-end funds, pooled investment vehicles that are registered under the 1940 Act and whose shares are listed and traded on U.S. national securities exchanges. The Fund, through its investment in Underlying ETPs, may invest in shares of real estate investment trusts, which are pooled investment vehicles that invest primarily in real estate or real estate related loans.

The Underlying ETPs in which the Fund will invest will primarily hold substantially all of their assets in securities representing a country (or region) specific index. The Underlying ETPs may invest in complex securities such as equity options, index options, repurchase agreements, foreign currency contracts, swaps, and futures contracts.

Investment Process and Portfolio Construction

The Sub-Adviser has developed its proprietary country ranking model around the premise that in the long run, country-specific effects are the most important drivers of global equity returns. Through its country ranking model, the Sub-Adviser ranks countries on a monthly basis in order to determine their relative merit.

The Sub-Adviser will use a four step process to create its portfolio allocations:

1. Qualify Countries: In order to determine which countries are to be included in the country ranking model, the Sub-Adviser will apply two consistent criteria. All qualified countries (a) must be part of the MSCI All Country World Index and (b) have a liquid Underlying ETP that tracks the performance of its equity market.

2. Analyze Factor Data: The Sub-Adviser will collect and analyze monthly factor data on every qualified country in the model. Currently, the Sub-Adviser uses nearly 40 factors that are classified within fundamental (*e.g.,* short-term earnings growth), momentum (*e.g.,* 3 month local price momentum), risk (*e.g.,* change in 30-day standard deviation), and valuation (*e.g.,* earnings growth) factor groups.

3. Rank Countries: Each month the Sub-Adviser will use the weighted individual factor scores for each country in the model to assign each country a relative attractiveness score. This monthly score will be used to rank countries from most attractive to least attractive.

4. Create Portfolio: The Sub-Adviser will create the portfolio based on the underlying attractiveness score of each country in the model. The most attractive five to six countries will receive allocations in the portfolio, and the Sub-Adviser will purchase single country Underlying ETPs that represent investments in those countries' equity markets. No single country Underlying ETP may receive more than a 25% allocation at purchase price.

Other Investments

To respond to adverse market, economic, political, or other conditions,[9] the Fund may invest 100% of its total assets, without limitation, in high-quality, short-term debt securities and money market instruments. The Fund may be invested in these instruments for extended periods, depending on the Sub-Adviser's assessment of market conditions. These short-term debt securities and money market instruments include shares of other mutual funds, commercial paper, certificates of deposit, bankers' acceptances, U.S. Government securities, repurchase agreements,[10] and bonds that are BBB or higher. The Fund may also invest a substantial portion of its assets in such instruments at any time to maintain liquidity or pending selection of investments in accordance with its policies.

While under normal market conditions the Fund will primarily invest in Underlying ETPs, the Fund may, to a limited extent, invest directly in other investments. The Fund, or the Underlying ETPs in which it invests, may invest in U.S. government securities. The Fund may invest in exchange-traded notes (''ETNs'').[11] The Fund, or the Underlying ETPs in which it invests, may invest in U.S. Treasury zero-coupon bonds.[12]

The Fund will seek to qualify for treatment as a regulated investment company under Subchapter M of the Code. The Fund may not (i) with respect to 75% of its total assets, purchase securities of any issuer (except securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities or shares of investment companies) if, as a result, more than 5% of its total assets would be invested in the securities of such issuer, or (ii) acquire more than 10% of the outstanding voting securities of any one issuer. In addition, the Fund may not invest 25% or more of its total assets

[7] 26 CFR 1.817–5.

[8] ADRs and GDRs are certificates evidencing ownership of shares of a foreign issuer. Depositary Receipts may be sponsored or unsponsored. These certificates are issued by depositary banks and generally trade on an established market in the United States or elsewhere. The underlying shares are held in trust by a custodian bank or similar financial institution in the issuer's home country. The depositary bank may not have physical custody of the underlying securities at all times and may charge fees for various services.

[9] Adverse market conditions would include large downturns in the broad market value of two or more times current average volatility, where the Sub-Adviser views such downturns as likely to continue for an extended period of time. Adverse economic conditions would include significant negative results in factors deemed critical at the time by the Sub-Adviser, including significant negative results regarding unemployment, Gross Domestic Product, consumer spending, or housing numbers. Adverse political conditions would include events such as government overthrows or instability, where the Sub-Adviser expects that such events may potentially create a negative market or economic condition for an extended period of time.

[10] The Fund may enter into repurchase agreements with financial institutions, which may be deemed to be loans. The Fund follows certain procedures designed to minimize the risks inherent in such agreements. These procedures include effecting repurchase transactions only with large, well-capitalized, and well-established financial institutions whose condition will be continually monitored by the Sub-Adviser. In addition, the value of the collateral underlying the repurchase agreement will always be at least equal to the repurchase price, including any accrued interest earned on the repurchase agreement. In the event of a default or bankruptcy by a selling financial institution, the Fund will seek to liquidate such collateral. In addition, the Fund may enter into reverse repurchase agreements without limit as part of the Fund's investment strategy. Reverse repurchase agreements involve sales by the Fund of portfolio assets concurrently with an agreement by the Fund to repurchase the same assets at a later date at a fixed price.

[11] ETNs are debt obligations of investment banks which are traded on exchanges and the returns of which are linked to the performance of market indexes.

[12] These securities are U.S. Treasury bonds which have been stripped of their unmatured interest coupons, the coupons themselves, and receipts or certificates representing interests in such stripped debt obligations and coupons. Interest is not paid in cash during the term of these securities, but is accrued and paid at maturity.

in the securities of one or more issuers conducting their principal business activities in the same industry or group of industries (this limitation does not apply to investments in securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities, or shares of investment companies). The Fund will not invest 25% or more of its total assets in any investment company that so concentrates.

The Fund will not purchase illiquid securities, including Rule 144A securities and loan participation interests. Further, in accordance with the Exemptive Order, the Fund will not invest in options contracts, futures contracts, or swap agreements. The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. Except for Underlying ETPs that may hold non-U.S. issues, the Fund will not otherwise invest in non-U.S. issues.

Additional information regarding the Trust, Fund, Shares, Fund's investment strategies, risks, creation and redemption procedures, fees, portfolio holdings and disclosure policies, distributions and taxes, availability of information, trading rules and halts, and surveillance procedures, among other things, can be found in the Notice and the Registration Statement, as applicable.[13]

III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act and the rules and regulations thereunder applicable to a national securities exchange.[14] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[15] which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission notes that the Fund and the Shares must comply with the requirements of NYSE Arca Equities Rule 8.600 to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,[16] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association (''CTA'') high-speed line, and for the Underlying ETPs, will be available from the national securities exchanges on which they are listed. In addition, the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Core Trading Session.[17] On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio, as defined in NYSE Arca Equities Rule 8.600(c)(2), that will form the basis for the Fund's calculation of the net asset value (''NAV'') at the end of the business day.[18] The Fund will calculate NAV once each business day as of the regularly scheduled close of trading on the New York Stock Exchange (normally 4 p.m. Eastern Time). In addition, information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. The Fund's Web site will also include a form of the prospectus for the Fund, information relating to NAV, and other quantitative and trading information. Moreover, a basket composition file, which includes the security names and share quantities required to be delivered in exchange for Fund Shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the NYSE via the National Securities Clearing Corporation.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.[19] In addition, the Exchange will halt trading in the Shares under the specific circumstances set forth in NYSE Arca Equities Rule 8.600(d)(2)(D), and may halt trading in the Shares if trading is not occurring in the securities and/or the financial instruments comprising the Disclosed Portfolio of the Fund, or if other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.[20] The Exchange will consider the suspension of trading in or removal from listing of the Shares if the Portfolio Indicative Value is no longer calculated or available or the Disclosed Portfolio is not made available to all market participants at the same time.[21] The Exchange represents that neither the Adviser nor the Sub-Adviser is affiliated with a broker-dealer.[22]

[13] *See* Notice and Registration Statement, *supra* notes 3 and 4, respectively.

[14] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[17] According to the Exchange, several major market data vendors display and/or make widely available Portfolio Indicative Values published on the CTA or other data feeds.

[18] On a daily basis, the Adviser will disclose on the Fund's Web site for each portfolio security or other financial instrument of the Fund the following information: Ticker symbol (if applicable), name of security or financial instrument, number of shares or dollar value of financial instruments held in the portfolio, and percentage weighting of the security or financial instrument in the portfolio. The Web site information will be publicly available at no charge.

[19] *See* NYSE Arca Equities Rule 8.600(d)(1)(B).

[20] With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

[21] *See* NYSE Arca Equities Rule 8.600(d)(2)(C)(ii).

[22] *See supra* note 5 and accompanying text. The Commission notes that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Adviser and Sub-Adviser and their related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers

Continued

Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.[23] The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. The Commission also notes that the Exchange is able to obtain information with respect to the Underlying ETPs from the U.S. exchanges, which are members of the Intermarket Surveillance Group, listing and trading such Underlying ETPs.

The Exchange further represents that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) The Exchange's surveillance procedures applicable to derivative products, which include Managed Fund Shares, are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. All Underlying ETPs will be listed on national securities exchanges, all of which are members of the Intermarket Surveillance Group.

(4) Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit (''ETP'') Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (a) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (d) how information regarding the Portfolio Indicative Value is disseminated; (e) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(5) For initial and/or continued listing, the Fund will be in compliance with Rule 10A–3 under the Act,[24] as provided by NYSE Arca Equities Rule 5.3.

(6) The Fund will not: (a) Purchase illiquid securities, including Rule 144A securities and loan participation agreements; (b) pursuant to the terms of the Exemptive Order, invest in options contracts, futures contracts, or swap agreements; and (c) except for Underlying ETPs that may hold non-U.S. issues, otherwise invest in non-U.S. issues.

(7) The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage.

(8) A minimum of 100,000 Shares of the Fund will be outstanding at the commencement of trading on the Exchange.

This approval order is based on the Exchange's representations.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act[25] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[26] that the proposed rule change (SR–NYSEArca–2011–86) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–1582 Filed 1–25–12; 8:45 am]

BILLING CODE 8011–01–P

Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[23] *See* NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

[24] *See* 17 CFR 240.10A–3.

[25] 15 U.S.C. 78f(b)(5).

[26] 15 U.S.C. 78s(b)(2).

[27] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 7774]

Review and Amendment of the Designation of al-Qa'ida in Iraq, et al. as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act

In the Matter of the Review and Amendment of the Designation of al-Qa'ida in Iraq, aka Jam'at al Tawhid wa'al-Jihad, aka The Monotheism and Jihad Group, aka The al-Zarqawi Network, aka al-Tawhid, aka Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn, aka The Organization of al-Jihad's Base of Operations in Iraq, aka al-Qaida of Jihad in Iraq, aka al-Qaida in Iraq, aka al-Qaida in Mesopotamia, aka al-Qaida in the Land of the Two Rivers, aka al-Qaida of the Jihad in the Land of the Two Rivers, aka al-Qaida of Jihad Organization in the Land of the Two Rivers, aka al-Qaida Group of Jihad in Iraq, aka al-Qaida Group of Jihad in the Land of the Two Rivers, aka The Organization of Jihad's Base in the Country of the Two Rivers, aka The Organization Base of Jihad/Country of the Two Rivers, aka The Organization of al-Jihad's Base in the Land of the Two Rivers, aka The Organization Base of Jihad/Mesopotamia, aka The Organization of al-Jihad's Base of Operations in the Land of the Two Rivers, aka Tanzeem qa'idat al Jihad/Bildad al Raafidaini, as a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act.

Based upon a review of the Administrative Record assembled in this matter pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, the Secretary of State concludes that the circumstances that were the basis for the 2004 designation of the aforementioned organization as a foreign terrorist organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation, and that there is a sufficient factual basis to find that al-Qa'ida in Iraq, also known under the aliases listed above, uses or has used an additional alias, namely, Islamic State of Iraq.

Therefore, the Secretary of State hereby determines that the designation of the aforementioned organization as a foreign terrorist organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained, and in addition, effective upon the date of publication in the **Federal Register**, the Secretary of State hereby amends the 2004 designation of al-Qa'ida in Iraq as a foreign terrorist organization, pursuant to § 219(b) of the INA (8 U.S.C. 1189(b)), to include the following new alias and other possible transliterations thereof: Islamic State of Iraq.

Dated: January 11, 2012.

Hillary Rodham Clinton,

Secretary of State.

[FR Doc. 2012–1538 Filed 1–25–12; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF STATE

[Public Notice 7775]

Amendment of the Designation of al-Qa'ida in Iraq, et al. as a Specially Designated Global Terrorist Entity Pursuant to Executive Order 13224

In the Matter of the Amendment of the Designation of al-Qa'ida in Iraq, aka Jam'at al Tawhid wa'al-Jihad, aka The Monotheism and Jihad Group, aka The al-Zarqawi Network, aka al-Tawhid, aka Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn, aka The Organization of al-Jihad's Base of Operations in Iraq, aka al-Qaida of Jihad in Iraq, aka al-Qaida in Iraq, aka al-Qaida in Mesopotamia, aka al-Qaida in the Land of the Two Rivers, aka al-Qaida of the Jihad in the Land of the Two Rivers, aka al-Qaida of Jihad Organization in the Land of the Two Rivers, aka al-Qaida Group of Jihad in Iraq, aka al-Qaida Group of Jihad in the Land of the Two Rivers, aka The Organization of Jihad's Base in the Country of the Two Rivers, aka The Organization Base of Jihad/Country of the Two Rivers, aka The Organization of al-Jihad's Base in the Land of the Two Rivers, aka The Organization Base of Jihad/Mesopotamia, aka The Organization of al-Jihad's Base of Operations in the Land of the Two Rivers, aka Tanzeem qa'idat al Jihad/Bildad al Raafidaini, as a Specially Designated Global Terrorist entity pursuant to Executive Order 13224.

Based upon a review of the Administrative Record assembled in this matter pursuant to Executive Order 13224 and in consultation with the Attorney General and the Secretary of the Treasury, the Secretary of State concludes that there is a sufficient factual basis to find that al-Qa'ida in Iraq, also known under the aliases listed above, uses or has used an additional alias, namely, Islamic State of Iraq.

Therefore, the Secretary of State hereby amends the 2004 designation of al-Qa'ida in Iraq as a Specially Designated Global Terrorist entity, pursuant to Executive Order 13224, to include the following new alias and other possible transliterations thereof: Islamic State of Iraq.

Dated: January 11, 2012.

Hillary Rodham Clinton,

Secretary of State.

[FR Doc. 2012–1537 Filed 1–25–12; 8:45 am]

BILLING CODE 4710–10–P

DEPARTMENT OF THE TREASURY

Departmental Offices; Submission for OMB Review, Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, on behalf of itself and the United States Bureau of Engraving and Printing (BEP) and as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on an proposed extension to an information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). The BEP intends to request approval from the Office of Management and Budget (OMB) for extension of an existing information collection, titled ''Owner's Affidavit of Partial Destruction of Mutilated Currency.'' The current information collection is assigned OMB Number 1520–0001. The information collection requests owners of partially destroyed U.S. currency to complete a notarized affidavit (BEP Form 5283) for each redemption claim submitted when substantial portions of notes are missing.

DATES: Written comments should be received on or before March 26, 2012 to be assured of consideration.

ADDRESSES: Comments regarding this information collection should be addressed to the BEP Contact listed below and to the Treasury Department PRA Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue NW., Washington, DC 20220.

FOR FURTHER INFORMATION CONTACT: Copies of the submission(s) may be obtained by contacting Sonya White, Deputy Chief Counsel, United States Department of the Treasury, Bureau of Engraving and Printing, 14th and C Streets SW., Washington, DC 20228, by telephone at (202) 874–8184, or by email at *sonya.white@bep.gov.*

SUPPLEMENTARY INFORMATION:

Title: Owner's Affidavit of Partial Destruction of Mutilated Currency.''

OMB Control Number: 1520–0001.

Abstract: The Congressional Act of March 17, 1862, authorized the Secretary of the Treasury to redeem or replace damaged U.S. currency under such regulations as he or she might prescribe. The authority has been delegated to the Office of Currency Standards, and is guided by Treasury Department Circular 55 which states an affidavit form will be requested from the remitters of damaged currency when substantial portions are missing from the notes presented to the Treasury for redemption. Treasury's Mutilated Currency Examiners use the information stated in the affidavit to make a fair and equitable determination of the redemption value of such damaged currency.

Type of Review: Extension.

Affected Public: Individuals and households.

Respondent's Obligation: Voluntary.

Estimated Number of Respondents: Approximately 150 per year. The BEP will conduct the majority of its information collection activities at conferences and meeting of organizations of blind and visually impaired persons. The BEP is able to estimate the number of attendees at such conferences and meetings. The BEP, however, only collects information from volunteers who stop by its information booth, and who care to take the time responding to questions. It is difficult, therefore, to estimate the actual number of respondents from whom BEP may be able to collect information in a year.

Estimated Average Time per Respondent: 36 minutes per response.

Estimated Total Annual Burden Hours: Approximately 90 burden hours.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval. All comments will become a matter of public record. The public is invited to submit written comments concerning: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical uses; (b) the accuracy of the above estimate of the burden of the proposed information collection; (c) ways to enhance the quality, usefulness, and clarity of the information to be collected; and (d) ways to minimize the reporting and/or record keeping burdens on respondents, including the use of automated collection techniques or other forms of information technology.

Treasury Department PRA Clearance Officer: Robert Dahl, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue NW., Washington, DC 20220.

BEP Contact: Sonya White, Deputy Chief Counsel, United States Department of the Treasury, Bureau of Engraving and Printing, Room 419–A, 14th and C Streets SW., Washington, DC 20228.

Robert Dahl,

Treasury Department PRA Clearance Officer.

[FR Doc. 2012–1578 Filed 1–25–12; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

United States Mint

Prices for 2012 Infantry Soldier Silver Dollar and 2012 Star-Spangled Banner Commemorative Coin Program Products

AGENCY: United States Mint, Department of the Treasury.

ACTION: Notice.

SUMMARY: The United States Mint is announcing pricing for the 2012 Infantry Soldier Silver Dollar and 2012 Star-Spangled Banner Commemorative Coin Program products. Prices for the silver products are in the table below. The attached grid is the pricing for products that include gold coins based on the market price of gold.

Product	Introductory price	Regular price
2012 Infantry Soldier Proof Silver Dollar	$54.95	$59.95.
2012 Infantry Soldier Uncirculated Silver Dollar	$49.95	$54.95.
2012 Infantry Soldier Silver Dollar Defenders of Freedom Set	N/A	$61.95.
2012 Star-Spangled Banner Proof $5 Gold Coin	See Attached Grid	See Attached Grid.
2012 Star-Spangled Banner Uncirculated $5 Gold Coin	See Attached Grid	See Attached Grid.
2012 Star-Spangled Banner Proof Silver Dollar	$54.95	$59.95.
2012 Star-Spangled Banner Uncirculated Silver Dollar	$49.95	$54.95.
2012 Star-Spangled Banner Two-Coin Set*	See Attached Grid	See Attached Grid.

*The 2012 Star-Spangled Banner Two-Coin Set includes a proof $1 gold coin as well as a proof silver dollar.

A $10 surcharge for each 2012 Infantry Soldier Silver Dollar sold is authorized to be paid to the National Infantry Foundation.

A $35 surcharge for each gold coin sold and a $10 surcharge for each silver dollar sold under the 2012 Star-Spangled Banner Commemorative Coin Program are authorized to be paid to the Maryland War of 1812 Bicentennial Commission.

FOR FURTHER INFORMATION CONTACT: B. B. Craig, Associate Director for Sales and Marketing; United States Mint; 801 9th Street NW., Washington, DC 20220; or call (202) 354–7500.

Authority: 31 U.S.C. 5111, 5112 & 9701

Dated: January 19, 2012.

Richard A. Peterson,

Deputy Director, United States Mint.

PRICING OF NUMISMATIC COMMEMORATIVE PRODUCTS CONTAINING .2431 FTO GOLD COINS WITH SURCHARGE OF $35

Average price of gold	Commemorative gold proof	Commemorative gold proof—introductory price	Commemorative gold uncirculated	Commemorative gold uncirculated—introductory price	Star-spangled banner 2–Coin set *	Star-spangled banner 2–coin set—Introductory price *
$500.00 to $549.99	$230.55	$225.55	$220.55	$215.55	$280.55	$275.55
$550.00 to $599.99	242.70	237.70	232.70	227.70	292.70	287.70
$600.00 to $649.99	254.85	249.85	244.85	239.85	304.85	299.85
$650.00 to $699.99	267.00	262.00	257.00	252.00	317.00	312.00
$700.00 to $749.99	279.15	274.15	269.15	264.15	329.15	324.15
$750.00 to $799.99	291.30	286.30	281.30	276.30	341.30	336.30
$800.00 to $849.99	303.45	298.45	293.45	288.45	353.45	348.45
$850.00 to $899.99	315.60	310.60	305.60	300.60	365.60	360.60
$900.00 to $949.99	327.75	322.75	317.75	312.75	377.75	372.75
$950.00 to $999.99	339.90	334.90	329.90	324.90	389.90	384.90
$1,000.00 to $1,049.99	352.05	347.05	342.05	337.05	402.05	397.05
$1,050.00 to $1,099.99	364.20	359.20	354.20	349.20	414.20	409.20
$1,100.00 to $1,149.99	376.35	371.35	366.35	361.35	426.35	421.35
$1,150.00 to $1,199.99	388.50	383.50	378.50	373.50	438.50	433.50
$1,200.00 to $1,249.99	400.65	395.65	390.65	385.65	450.65	445.65
$1,250.00 to $1,299.99	412.80	407.80	402.80	397.80	462.80	457.80
$1,300.00 to $1,349.99	424.95	419.95	414.95	409.95	474.95	469.95
$1,350.00 to $1,399.99	437.10	432.10	427.10	422.10	487.10	482.10
$1,400.00 to $1,449.99	449.25	444.25	439.25	434.25	499.25	494.25
$1,450.00 to $1,499.99	461.40	456.40	451.40	446.40	511.40	506.40
$1,500.00 to $1,549.99	473.55	468.55	463.55	458.55	523.55	518.55
$1,550.00 to $1,599.99	485.70	480.70	475.70	470.70	535.70	530.70
$1,600.00 to $1,649.99	497.85	492.85	487.85	482.85	547.85	542.85
$1,650.00 to $1,699.99	510.00	505.00	500.00	495.00	560.00	555.00
$1,700.00 to $1,749.99	522.15	517.15	512.15	507.15	572.15	567.15
$1,750.00 to $1,799.99	534.30	529.30	524.30	519.30	584.30	579.30
$1,800.00 to $1,849.99	546.45	541.45	536.45	531.45	596.45	591.45
$1,850.00 to $1,899.99	558.60	553.60	548.60	543.60	608.60	603.60
$1,900.00 to $1,949.99	570.75	565.75	560.75	555.75	620.75	615.75
$1,950.00 to $1,999.99	582.90	577.90	572.90	567.90	632.90	627.90
$2,000.00 to $2,049.99	595.05	590.05	585.05	580.05	645.05	640.05
$2,050.00 to $2,099.99	607.20	602.20	597.20	592.20	657.20	652.20
$2,100.00 to $2,149.99	619.35	614.35	609.35	604.35	669.35	664.35
$2,150.00 to $2,199.99	631.50	626.50	621.50	616.50	681.50	676.50

PRICING OF NUMISMATIC COMMEMORATIVE PRODUCTS CONTAINING .2431 FTO GOLD COINS WITH SURCHARGE OF $35—Continued

Average price of gold	Commemorative gold proof	Commemorative gold proof—introductory price	Commemorative gold uncirculated	Commemorative gold uncirculated—introductory price	Star-spangled banner 2–Coin set *	Star-spangled banner 2–coin set—Introductory price *
$2,200.00 to $2,249.99	643.65	638.65	633.65	628.65	693.65	688.65
$2,250.00 to $2,299.99	655.80	650.80	645.80	640.80	705.80	700.80
$2,300.00 to $2,349.99	667.95	662.95	657.95	652.95	717.95	712.95
$2,350.00 to $2,399.99	680.10	675.10	670.10	665.10	730.10	725.10
$2,400.00 to $2,449.99	692.25	687.25	682.25	677.25	742.25	737.25
$2,450.00 to $2,499.99	704.40	699.40	694.40	689.40	754.40	749.40
$2,500.00 to $2,549.99	716.55	711.55	706.55	701.55	766.55	761.55
$2,550.00 to $2,599.99	728.70	723.70	718.70	713.70	778.70	773.70
$2,600.00 to $2,649.99	740.85	735.85	730.85	725.85	790.85	785.85
$2,650.00 to $2,699.99	753.00	748.00	743.00	738.00	803.00	798.00
$2,700.00 to $2,749.99	765.15	760.15	755.15	750.15	815.15	810.15
$2,750.00 to $2,799.99	777.30	772.30	767.30	762.30	827.30	822.30
$2,800.00 to $2,849.99	789.45	784.45	779.45	774.45	839.45	834.45
$2,850.00 to $2,899.99	801.60	796.60	791.60	786.60	851.60	846.60
$2,900.00 to $2,949.99	813.75	808.75	803.75	798.75	863.75	858.75
$2,950.00 to $2,999.99	825.90	820.90	815.90	810.90	875.90	870.90

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Food and Nutrition Service

7 CFR Parts 210 and 220

Nutrition Standards in the National School Lunch and School Breakfast Programs; Final Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 210 and 220

[FNS–2007–0038]

RIN 0584–AD59

Nutrition Standards in the National School Lunch and School Breakfast Programs

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Final rule.

SUMMARY: This final rule updates the meal patterns and nutrition standards for the National School Lunch and School Breakfast Programs to align them with the Dietary Guidelines for Americans. This rule requires most schools to increase the availability of fruits, vegetables, whole grains, and fat-free and low-fat fluid milk in school meals; reduce the levels of sodium, saturated fat and *trans* fat in meals; and meet the nutrition needs of school children within their calorie requirements. These improvements to the school meal programs, largely based on recommendations made by the Institute of Medicine of the National Academies, are expected to enhance the diet and health of school children, and help mitigate the childhood obesity trend.

DATES: *Effective date:* This rule is effective March 26, 2012.

Compliance date: Compliance with the provisions of this rule must begin July 1, 2012, except as otherwise noted on the implementation table provided in the preamble under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: William Wagoner or Marisol Aldahondo-Aponte, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service at (703) 305–2590.

SUPPLEMENTARY INFORMATION:

Executive Summary

This final rule modifies several key proposed requirements to respond to commenter concerns and facilitate successful implementation of the requirements at the State and local levels. The rule phases in many of the changes to help ensure that all stakeholders—the children, the schools, and their supply chains—have time to adapt. Most notably, this final rule provides additional time for implementation of the breakfast requirements and modifies those requirements in a manner that reduces the estimated costs of breakfast changes, as compared to the proposed rule. As a result, the final rule is estimated to add $3.2 billion to school meal costs over 5 years, considerably less than the estimated cost of the proposed rule.

When considered in the context of other related provisions of the Healthy Hunger-Free Kids Act (HHFKA) of 2010, sufficient resources are expected to be available to school food authorities to cover the additional costs of updated meal offerings to meet the new standards.

Specifically, in addition to improving nutritional quality, the HHFKA mandated that beginning July 1, 2011, revenue streams for a la carte foods relative to their costs be at least as high as the revenue streams for Program meals compared to their costs. Consequently schools should receive over $1 billion a year in new food revenues beginning in School Year 2011–2012. That will help schools work toward implementing the new standards effective the following year, *i.e.,* July 1, 2012. In addition, USDA estimates that the ''School Food Authorities revenues'' rule will increase participation in school meal programs by 800,000 children.

In addition, the six-cent per lunch performance-based reimbursement increase included in the HHFKA will provide additional revenue beginning October 1, 2012. The Congressional Budget Office estimated about $1.5 billion over 5 years will be provided in performance-based funding.

I. Background

The Richard B. Russell National School Lunch Act (NSLA) in Section 9(a)(4), 42 U.S.C. 1758(a)(4), requires that school meals reflect the latest ''Dietary Guidelines for Americans'' (Dietary Guidelines). In addition, section 201 of the Healthy, Hunger-Free Kids Act of 2010 (Pub. L. 111–296, HHFKA) amended Section 4(b) of the NSLA, 42 U.S.C. 1753(b), to require the Department of Agriculture (USDA) to issue regulations to update the meal patterns and nutrition standards for school lunches and breakfasts based on the recommendations issued by the Food and Nutrition Board of the National Research Council of the National Academies of Science, part of the Institute of Medicine (IOM). On January 13, 2011, USDA published a proposed rule in the **Federal Register** (76 FR 2494) to update the meal patterns and nutrition standards for the National School Lunch Program (NSLP) and the School Breakfast Program (SBP) to align them with the 2005 Dietary Guidelines.

The proposed rule sought to increase the availability of fruits, vegetables, whole grains, and fat-free and low-fat fluid milk in the school menu; reduce the levels of sodium, saturated fat and *trans* fat in school meals; and meet the nutrition needs of school children within their calorie requirements. The intent of the proposed rule was to provide nutrient-dense meals (high in nutrients and low in calories) that better meet the dietary needs of school children and protect their health. The proposed changes, designed for meals offered to school children in grades Kindergarten (K) to 12, were largely based on the IOM recommendations set forth in the report ''School Meals: Building Blocks for Healthy Children'' (October 2009).

In summary, the January 2011 proposed rule sought to improve lunches and breakfasts by requiring schools to:

- Offer fruits and vegetables as two separate meal components;
- Offer fruit daily at breakfast and lunch;
- Offer vegetables daily at lunch, including specific vegetable subgroups weekly (dark green, orange, legumes, and other as defined in the 2005 Dietary Guidelines) and a limited quantity of starchy vegetables throughout the week;
- Offer whole grains: half of the grains would be whole grain-rich upon implementation of the rule and all grains would be whole-grain rich two years post implementation;
- Offer a daily meat/meat alternate at breakfast;
- Offer fluid milk that is fat-free (unflavored and flavored) and low-fat (unflavored only);
- Offer meals that meet specific calorie ranges for each age/grade group;
- Reduce the sodium content of meals gradually over a 10-year period through two intermediate sodium targets at two and four years post implementation;
- Prepare meals using food products or ingredients that contain zero grams of *trans* fat per serving;
- Require students to select a fruit or a vegetable as part of the reimbursable meal;
- Use a single food-based menu planning approach; and
- Use narrower age/grade groups for menu planning.

In addition, the proposed rule sought to improve school meals by requiring State agencies (SAs) to:

- Conduct a nutritional review of school lunches and breakfasts as part of the administrative review process;
- Determine compliance with the meal patterns and dietary specifications based on a review of menu and

production records for a two-week period; and

- Review school lunches and breakfasts every 3 years, consistent with the HHFKA.

The 2010 Dietary Guidelines were released on January 31, 2011, after USDA published the proposed rule. On March 21, 2011 USDA issued a Notice in the **Federal Register** (76 FR 15225) seeking public comment on the need to modify the proposed rule to reflect the 2010 Dietary Guidelines recommendations to consume red-orange vegetables and protein subgroups: (1) Seafood; (2) meat, poultry and eggs, and (3) nuts, seeds, and soy products. The public comments to the Notice (76 FR 15225) were added to the proposed rule docket and all comments associated with the proposed rule were considered in preparing this final rule.

USDA received a total of 133,268 public comments during the comment period January 13–April 13, 2011. This total included several single submissions with thousands of comments. The types of comments received included 7,107 unique letters, 122,715 form letters from 159 mass mail campaigns, 3,353 non-germane letters, and 93 duplicates. Comments were analyzed using computer software that facilitated the identification of the key issues addressed by the commenters, as well as by USDA policy officials.

Although USDA considered all comments, the description and analysis in this final rule preamble focuses on the most frequent comments and those that influenced revisions to the proposed rule, and discusses modifications made to the proposed rule in response to public input. USDA greatly appreciates the public comments as they have been essential in developing a final rule that is expected to improve school meals in a sound and practical manner. To view all public comments on the proposed rule go to *www.regulations.gov* and search for public submissions under docket number FNS–2007–0038. A Summary of Public Comments is available as supporting material under the docket folder summary.

Note: This final rule does not update the Pre-K school meal patterns. These are under review and will be updated in a future rulemaking amending regulations implementing the USDA's Child and Adult Care Food Program. However, two provisions in this final rule, menu planning approach and fluid milk requirements, impact Pre-K meals as discussed later in this preamble.

II. Public Comments and USDA Response

USDA received comments from nutrition, health, and child advocates at the national, state and local levels; SAs that administer the school meal programs; school districts/boards; schools; school food service staff; superintendents, principals, and teachers; food manufacturers and distributors; food industry representatives; food service management companies; academia; nutritionists/dietitians; community organizations; parents and students; and many other interested groups and individuals. Overall, the comments provided were generally more supportive of the proposed rule than opposed. Comments from nutrition, health and child advocates; community organizations; academia; and parents favor the proposed rule, citing concern about the national childhood obesity problem and the increased likelihood of preventable diseases such as cardiovascular disease, high blood pressure, high cholesterol, stroke, and type 2 diabetes, all of which increase the cost of healthcare nationally. Many comments enthusiastically supported the increase in fruits, vegetables, whole grains, fat-free milk/low-fat milk in the school menus, and most other proposed changes designed to improve the nutritional quality of school meals.

Comments from SAs and school food authorities (SFAs), food industry, industry representatives, food service management companies, and others in the public and private sectors associated with the operation of the school meals programs also supported improving school meals but voiced strong concerns about some aspects of the proposed rule. The proposed food quantities, meat/meat alternate component at breakfast, weekly vegetable subgroup requirement at lunch, starchy vegetables limit, sodium reductions, whole grains requirement, and frequency of administrative review were the parts of the proposal that prompted most of their concerns. Program operators also raised concerns about the rule cost and implementation timeline, the impact of the proposed changes on student participation in the meal programs, and the potential for increased plate waste if meals are not acceptable to students. A number of commenters suggested that USDA conduct additional research or pilot test the proposed changes before implementation. All of the above concerns are more prevalent in the SBP than the NSLP. Schools that operate the SBP voiced significant concern about the estimated 50 cents increase in food and labor costs for each reimbursable breakfast in FY 2015, when all the requirements will be in place as stated in the proposed rule.

USDA has taken into consideration the different views expressed by commenters and seeks to be responsive to the concerns raised by stakeholders, especially those responsible for the management and day to day operation of the school meal programs. At the same time, we are mindful that the overweight and obesity epidemic affecting many children in America requires that all sectors of our society, including schools, help children make significant changes in their diet to improve their overall health and become productive adults. This final rule makes significant improvements to the NSLP and SBP to facilitate successful implementation of the requirements at the State and local levels. This final rule modifies several key proposed requirements to respond to commenter concerns as well as to address requirements of the Consolidated and Further Continuing Appropriations Act, 2012, Public Law 112–55. Most notably, this final rule provides additional time for implementation of the SBP requirements and modifies those requirements in a manner that reduces the estimated costs of breakfast changes, as compared to the proposed rule.

No changes to the SBP meal pattern take effect immediately upon publication of this final rule, except limiting flavor to fat-free milk, and requiring the service of only fat-free and low-fat milk (the latter is a statutory requirement codified in the NSLA in the HHFKA. See the discussion on ''Milk'' for further details). Furthermore, this rule introduces selected requirements into the SBP beginning SY 2013–2014 (the second year of implementation) to ease the estimated increase in breakfast costs and minimize impact on SBP operations. This approach is intended to enable program operators to concentrate on improving school lunches first and then focus on the breakfast changes. It also allows USDA to meet the statutory requirement to offer meals that reflect the Dietary Guidelines while being responsive to the concerns raised by program operators and other stakeholders. However, SFAs that are able to implement the new meal requirements concurrently in the SBP and NSLP are encouraged to do so with SA approval.

Section G of the Regulatory Impact Analysis discusses in greater detail the key differences between the proposed and final rules. Most of the estimated reduction in cost is due to the policy changes discussed above, including the

phased in breakfast meal pattern requirements and the elimination of a separate meat component at breakfast, as well as more modest changes to the lunch meal pattern requirements' grain and vegetable components. In addition to these policy changes, lower food inflation since preparation of the proposed rule cost estimate contributes to the reduction in the cost of the final rule compared to the proposed rule.

The following is a summary of the key public comments on the proposed rule and USDA's response. Public comments unrelated to the specific provisions of the rule (*e.g.,* standards for cholesterol, dietary fiber, artificial sweeteners, caffeine) are not discussed here but are addressed in the Summary of Public Comments. For a more detailed discussion of the public comments see the Summary of Public Comments posted online at *www.Regulations.gov*.

Menu Planning Approach

Proposed Rule: Follow a single Food-Based Menu Planning (FBMP) approach.

Comments: Nutrition, health and child advocates; community organizations; academia; parents; and SAs support the FBMP approach because it helps children easily identify the key food groups necessary for a well-balanced meal. According to a health advocate, FBMP also minimizes the opportunity to offer unhealthy foods that have been fortified to meet the nutrient requirements. SAs support a single menu planning approach as it supports a more cost effective delivery of training and technical assistance resources.

However, a number of SFAs that currently use the Nutrient Standard Menu Planning (NSMP) and some school advocacy organizations, trade associations, food manufacturers, nutritionists, and other commenters suggested that NSMP be allowed as an option. SFAs that use NSMP claimed that they would still have to conduct a nutrient analysis to assess if they are meeting the new dietary specifications (calories, sodium, and saturated fat levels). Several commenters also claimed that NSMP schools are better able to control costs and that changing to FBMP would result in increased training costs. Some stated that eliminating NSMP decreases menu planning flexibility and menu variety.

USDA Response: To ensure that school meals reflect the key food groups recommended by the Dietary Guidelines, this final rule establishes FBMP as the single menu planning approach for the NSLP (including for Pre-K meals) in SY 2012–2013. A single food-based menu planning approach simplifies menu planning, serves as a teaching tool to help children choose a balanced meal, and assures that students nationwide have access to key food groups recommended by the Dietary Guidelines. It also makes it easier for schools to communicate the meal improvements to parents and the community-at-large. Simplifying program management, training and monitoring is expected to result in program savings. Over 70 percent of the program operators currently use FBMP, and training and technical assistance resources will be available to help all schools successfully transition to the new meal patterns.

In response to commenters' concerns about the estimated cost increase of the breakfast meal, this final rule gives those SBP program operators not currently using FBMP additional time to convert to this planning approach. SBP operators who are not currently using FBMP may continue with their current menu planning approach through SY 2012–2013. However, all SBP operators must use a single FBMP approach beginning SY 2013–2014 (the second year of implementation).

This final rule sets forth the new food-based meal patterns in 7 CFR 210.10 for lunches and § 220.8 for breakfasts. In order to accommodate the extended implementation for non-FBMP operators, this final rule creates a new § 220.23 that restates the nutrition standards and menu planning approaches that apply to all SBP operators in SY 2012–2013 only. Individual SFAs wishing to adopt the provisions of § 220.8 prior to the required implementation date specified therein may do so with the approval of the SA.

Accordingly, this final rule implements the proposed FBMP approach and codifies the proposal under § 210.10(a)(1)(i) of the regulatory text for the NSLP and § 220.8(a)(1) for the SBP. Menu planning approaches applicable to the SBP in SY 2012–2013 are under § 220.23(a)(5).

Age/Grade Groups

Proposed Rule: Plan lunches and breakfasts using age/grade groups K–5, 6–8, and 9–12.

Comments: A number of nutrition, health and child advocates; and dietitians agreed that the proposed age/grade groups would result in more age-appropriate school meals. They also supported the provision allowing schools to serve the same breakfast and lunch meal patterns for students in grades K through 8, provided that the meals meet the calorie, saturated fat, and sodium standards for each the of the age/grade groups.

Several commenters argued the proposed meal patterns offer too much food, especially for young children. Some commenters recommended different age/grade groups, and an SA recommended that USDA retain the current age/grade groups. Some SFAs requested flexibility in the use of the age/grade groups (*e.g.,* a one-grade level leeway). A number of commenters expressed concerns regarding use of the age/grade groups in the SBP, as schools generally serve K–12 students in the same line.

USDA Response: This final rule requires schools to use the age/grade groups K–5, 6–8, and 9–12 to plan menus in the NSLP upon implementation of this rule in SY 2012–2013. These age/grade groups reflect predominant school grade configurations and are consistent with the IOM's Dietary Reference Intake (DRI) groupings. This rule allows reasonable flexibility in the use of the age/grade groups and permits a school to use one meal pattern for students in grades K through 8 as food quantity requirements for groups K–5 and 6–8 overlap. In such a case, the school continues to be responsible for meeting the calorie, saturated fat, and sodium standards for each of the age/grade groups receiving the school meals. The following example illustrates this concept:

Example: A school could offer all students in grade groups K–5 and 6–8 the same lunch choices for the fruit, vegetable, grains, meat/meat alternate, and milk components because the quantity requirements are the same or overlap. Similarly, the calorie requirements for grades K–5 (550–650 average calories per week) and grades 6–8 (600–700 average calories per week) overlap. Therefore, a school could offer both grade groups a range of 600–650 average calories per week to meet the requirement for each grade group. While the saturated fat and *trans* fat requirement are the same for both grade groups, the school must carefully consider the sodium requirements. The school would have to comply with the lower sodium standard that was developed for age/grades K–5 but would also meet the requirement for students in age/grades 6–8.

In the SBP, the new age/grade groups take effect in SY 2013–2014 (the second year of implementation) to ease the burden on program operators. Until then, schools have the option to continue the age/grade group K–12 for planning breakfasts. Meals planned for the age/grade group K–12 must meet the nutrition standards developed for that

age/grade group, which have been moved from § 220.8 to a new § 220.23 of the regulatory text.

Accordingly, this final rule implements the proposed age/grade groups and codifies the proposal under § 210.10(c)(1) of the regulatory text for the NSLP and § 220.8(c)(1) for the SBP. Age/grade groups applicable to the SBP in SY 2012–2013 are under § 220.23(b) for nutrient standards menu planning, and under § 220.23(g) for food based menu planning.

Meal Components

Fruits

Proposed Rule: Offer fruit as a separate food component at lunch daily. Increase the fruit and vegetable amounts at lunch and double the minimum required fruit quantity at breakfast. Allow schools to offer a non-starchy vegetable in place of fruit/fruit juice at breakfast. Allow frozen fruit without added sugar only.

Comments: There is general support for the proposal to establish fruit as separate food component. Stakeholders such as nutrition, health and child advocates supported the proposal because they are concerned that children are not consuming the recommended intake of fruits. One major health advocate noted that it is possible to significantly increase the quantity of fruits and vegetables in the school menu in a cost effective way, stating that many schools already exceed the current NSLP meal requirements, and noting that of thousands of schools participating in the Alliance for a Healthier Generation's Healthy School Program, 85 percent provide at least one fruit (fresh, canned, or frozen in fruit juice or light syrup) at breakfast and 72 percent provide at least four non-fried, no-added-sugars fruit or vegetable options daily.

However, many commenters opposed the proposed minimum required fruit quantities, and were particularly concerned about the fruit requirement for breakfast. A number of commenters stated that one cup of fruit at breakfast is too much for young children to consume at one time and will result in significant plate waste. Commenters also emphasized that students usually have very little time to eat breakfast at school and are concerned about the logistics of offering more food through alternative breakfast delivery methods such as Breakfast in the Classroom or on the bus. In general, these commenters argued that the proposal to double the amount of fruit at breakfast would contribute to higher costs for food, labor, equipment, and storage.

Regarding the types of fruit to be offered, several commenters supported the proposed limitation on added sugar in frozen fruit to limit the sources of discretionary calories. Some commenters recommended a prohibition on canned fruit in light syrup. Some program operators asked how to credit whole fresh fruit, and other commenters requested that the quantities in the meal patterns be changed from cups to servings to better account for fresh whole fruit. A few suggested that USDA adopt the HealthierUS School Challenge Gold Level requirement to serve fresh fruit twice per week with school meals.

USDA Response: This final rule establishes fruits and vegetables as separate food components in the NSLP and adds a fruits requirement at lunch beginning SY 2012–2013. The intent of the new requirements is to promote the consumption of these fruits, as recommended by the Dietary Guidelines. Fruits (and vegetables) that are prepared without added solid fats, sugars, refined starches, and sodium are nutrient rich foods and supply important nutrients that are under-consumed by school children in the United States (including potassium and dietary fiber) with relatively little calories.

This rule also gives program operators additional time to meet the required minimum fruit quantity increase in the SBP. Schools are required to offer 1 cup of fruit to all age/grade groups at breakfast beginning in SY 2014–2015 (the third year of implementation). This modification gives program operators more time to prepare for this important change to SBP menus. This rule also gives schools the option to offer vegetables in place of all or part of the required fruit component for menu flexibility and as a potential cost control measure. However, the first two cups per week of any such substitution must be from the dark green, red/orange, beans and peas (legumes) or other vegetable subgroups. These vegetable subgroups have been identified as being under-consumed by school children, according to the IOM report. Starchy vegetables may also be offered in substitution of fruits, once the first two cups offering of non-starchy vegetables have been met. This change to the proposed rule allows schools flexibility and the option to offer vegetables in place of fruit in accordance with the substitution protocol specified here.

Although schools must offer the full amount of the required food component, to minimize the potential for food waste in the NSLP and SBP, all students are allowed to select ½ cup of fruit for a reimbursable meal under Offer versus Serve (OVS), instead of requiring them to take the full fruit component. This change in the application of OVS with regard to the fruits and vegetables components is further discussed in ''Standards for Meals Selected by the Student (Offer versus Serve).''

Schools may meet the fruit component at lunch and breakfast by offering fruit that is fresh; canned in fruit juice, water, or light syrup; frozen without added sugar, or dried. Through its USDA Foods Programs, USDA offers schools a range of fresh, frozen without added sugar, dried and canned fruits. Although 100 percent juice can be offered, no more than half of the per-meal fruit component may be juice because it lacks dietary fiber and when consumed in excess can contribute extra calories. Schools should offer fresh fruit whenever possible.

Although some commenters suggested that the meal patterns set the fruit and other food requirements as servings rather than cups, this final rule does not adopt this suggestion, as a serving can be any amount of food determined by the menu planner and does not ensure uniformity. The 2005 Dietary Guidelines recommended amounts were given in cups and ounce equivalents (oz. eq.), which are standard defined amounts. Menu planners must continue to use the *Food Buying Guide for Child Nutrition Programs* to determine how to credit whole fruit. USDA will update the *Food Buying Guide* as soon as possible, and will also develop other technical assistance resources as needed.

Accordingly, this final rule implements the proposed fruit requirements, with modifications, and codifies them under § 210.10(c) for the NSLP and under § 220.8(c) for the SBP. Fruit requirements applicable to the SBP in SY 2012–2013 are under § 220.23(g).

Vegetables

Proposed Rule: Offer vegetables as a separate food component at lunch daily. Increase the variety of vegetables over the week to include the following subgroups: dark green, orange, legumes, and other as defined in the Dietary Guidelines. Limit starchy vegetables at lunch to 1 cup per week for all age/grade groups. Allow non-starchy vegetables in place of fruit at breakfast.

Comments: Nutrition, health and child advocates; community organizations; academia; and parents welcomed the proposal to divide fruits and vegetables into two separate components and expressed support for the proposed weekly vegetable requirements. Some of these

commenters stated the proposed increase in vegetable variety and quantity should positively impact overall consumption.

State and local program operators, however, suggested that the vegetable subgroups be encouraged, rather than required (similar to the approach in the HealthierUS School Challenge guidelines). Some commenters stated that the vegetable subgroup requirements are too complicated. Others argued that children will not eat vegetables they are not familiar with and, therefore, the vegetable subgroup requirements will result in plate waste. Several commenters expressed concern that procuring some vegetable subgroups will be difficult and costly during specific times of the year in certain parts of the country. Others requested clarification regarding when beans should be considered a legume versus a meat alternate.

Many State and local program operators opposed the starchy vegetable limit. They argued that all vegetables should be encouraged, and that a limit on starchy vegetables will lead to a decrease in vegetable consumption, or a decrease in participation in the NSLP. Some suggested that the weekly limit only apply to potatoes. Several suggested that instead of limiting starchy vegetables, USDA should prohibit French fries or deep-fried preparation methods for all vegetables. Others requested gradual introduction of the weekly limit on starchy vegetables. Many program operators argued that white potatoes are inexpensive and would need to be replaced by more expensive fruits and vegetables, which will be a costly strain on school/state budgets. A few asked that starchy vegetables in mixed dishes, such as soups, not count towards the weekly starchy vegetable limit.

Nutrition and health advocates favored allowing non-starchy vegetables in place of fruit in the SBP. However, numerous commenters opposed disallowing starchy vegetables at breakfast. These commenters, including SFAs, food industry, and some parents, stated that starchy vegetables such as potatoes are affordable and popular, and complement many breakfast dishes. They also noted that potatoes supply potassium and other minerals, vitamins and fiber, and are naturally low in fat and sodium. Many stakeholders suggested that USDA ease the proposed restrictions on starchy vegetables.

Program operators also addressed the use of salad bars to meet the vegetable requirement. They stated that salad bars are good ways to serve a wide variety of fruits and vegetables and are an effective strategy to increase children's consumption of these food groups. However, they expressed concern that the proposed vegetable requirements increase challenges with or could discourage the use of self-serve salad bars. Schools asked how to determine if the required foods/portions are being served.

USDA Response: This final rule establishes vegetables as a separate food component in the NSLP, and requires schools to offer all the vegetable subgroups identified by the 2010 Dietary Guidelines (dark green, red/orange, beans and peas (legumes), starchy, and other) over the course of the week at minimum required quantities as part of the lunch menus in SY 2012–2013. As required by the Consolidated and Further Continuing Appropriations Act, 2012, Public Law 112–55 (FY 2012 Agriculture Appropriations Act), we are removing the proposed rule limit on starchy vegetables, and instead requiring schools to offer at least minimum quantities of all vegetable subgroups in the NSLP over the course of the week. This change encourages consumption from all vegetable subgroups, and is consistent with the Dietary Guidelines' recommendation to increase variety in vegetable consumption. In addition, to be consistent with the 2010 Dietary Guidelines classification of vegetable subgroups, this final rule expands the proposed orange vegetable subgroup to include red/orange vegetables. USDA asked commenters about this change in the vegetable subgroups in the Notice published by USDA in the **Federal Register** (76 CFR 15225) on March 21, 2011 and there was no public opposition.

This final rule also allows schools the option to offer vegetables in place of all or part of the fruits requirement at breakfast beginning July 1, 2014. This is consistent with the Dietary Guidelines' recommendation to eat a variety of vegetables, especially dark green, red and orange vegetables, and beans and peas (legumes). This recommendation is applicable to the school meals because most vegetables and fruits are major contributors of nutrients that are under-consumed in the United States, including potassium and dietary fiber. Consumption of vegetables and fruits is also associated with reduced risk of many chronic diseases, including obesity, heart attack, stroke, and cancer. By providing more and a variety of vegetables in a nutrient-dense form (without added solid fats, sugars, refined starches, and sodium), schools help students obtain important nutrients and maintain a healthy weight.

This final rule does not implement the proposed rule limitation on servings of starchy vegetables offered as part of the lunch and breakfast reimbursable meals. This change is in response to commenters' concerns and the requirements of the FY 2012 Agriculture Appropriations Act, which specifically prevented USDA from adopting the IOM recommendation for setting maximum limits on starchy vegetables, providing for fiscal year 2012 USDA appropriations. Therefore, schools are allowed to offer any vegetable subgroup identified by the 2010 Dietary Guidelines to meet the vegetables component required for each reimbursable school meal. The vegetable quantities in the lunch meal pattern have been modified to reflect this change to the proposal while remaining consistent with the Dietary Guidelines' focus on increasing the intake of vegetables that are under-consumed.

Commenters asked USDA to clarify when to credit beans and peas (legumes) toward the vegetable component. Local menu planners decide how to incorporate beans and peas (legumes) into the school meal but may not offer one serving of beans and peas (legumes) to meet the requirements for both vegetables and meat/meat alternate components. Beans and peas (legumes) can be credited toward the vegetable component because they are excellent sources of dietary fiber and nutrients such as folate and potassium. These nutrients are often low in the diets of many Americans. Because of their high nutrient content and low cost, USDA encourages menu planners to include beans and peas (legumes) in the school menu regularly, either as a vegetable or as a meat alternate (as discussed later). Some foods commonly referred to as beans and peas (*e.g.,* green peas, green lima beans, and green (string) beans) are not considered part of the beans and peas subgroup because their nutrient profile is dissimilar. More information on the use and categorization of beans and peas (legumes) is available online at *http://www.choosemyplate.gov/foodgroups/proteinfoods_beanspeas.html.*

In response to commenter questions about how to use salad bars to meet the new meal requirements, the Department would like to emphasize that schools may continue to use salad bars to enhance the variety of vegetables in the school menu. See FNS memorandum SP 02–2010—Revised (January 21, 2011) for more information on how salad bars can be used effectively as part of the reimbursable meals. The memorandum is available online at *http://www.fns.usda.gov/cnd/governance/*

Policy-Memos/2011/SP02–2011revised_os.pdf.

As with the proposed rule, this final rule allows schools to use fresh, frozen, and canned products to meet the vegetable requirement. Schools have access to nutritious vegetable choices through USDA Foods. For example, USDA Foods offers only reduced sodium canned vegetables at no more than 140 mg of sodium per half-cup serving, which is in line with the 2010 Dietary Guidelines. Schools also have the option to order frozen vegetables with no added salt, including green beans, carrots, corn, peas, and sweet potatoes.

Accordingly, this final rule implements the proposed vegetables requirements, with modifications, and codifies them under § 210.10(c) for the NSLP and under § 220.8(c) for the SBP. Vegetable requirements applicable to the SBP in SY 2012–2013 are under § 220.23(g).

Grains

Proposed Rule: Offer at least a daily serving of grains at breakfast and lunch. When this rule is initially implemented, at least half of the grains offered during the week must be whole grain-rich. Two years after implementation, all grains offered during the week must be whole grain-rich. In addition, allow schools the option to offer up to one serving of a grain-based dessert daily to meet part of the weekly grains requirement.

Comments: Many commenters, primarily nutrition and health advocates, and parents, favored introducing a whole grains requirement in the NSLP and SBP. A number of program operators, however, objected to the final whole grains requirement (that all grains offered must be whole grain-rich), and stated that the initial requirement (at least half of grains offered must be whole grain-rich) is sufficient. These commenters asserted that prohibiting all refined grains would restrict many grains that children and adolescents enjoy such as white rice and white bread. Other program operators that objected to the final whole grains requirement expressed concern with the timeline and the higher food costs associated with using only whole grain-rich products, which they argued are generally more expensive than refined grain products. Many commenters asked that USDA clarify the criteria schools must use to identify whole grain-rich products.

USDA Response: While children generally eat enough total grains, most of the grains they consume are refined grains rather than whole grains. Whole grains (*e.g.,* whole-wheat flour, oatmeal, whole cornmeal, and brown rice) are a source of nutrients such as iron, magnesium, selenium, B vitamins, and dietary fiber. Evidence suggests that eating whole grains in nutrient dense forms may lower body weight and reduce the risk of cardiovascular disease. Currently, schools may offer enriched or whole grains, and are allowed to offer enriched, refined grains only. Therefore, this final rule establishes a minimum whole grain-rich requirement in the NSLP and SBP to help children increase their intake of whole grains and benefit from the important nutrients they provide.

For the NSLP, the whole grain requirement takes effect upon implementation of the rule. Therefore, in SY 2012–2013 and SY 2013–2014 (the first two years of implementation) whole grain-rich products must make up half of all grain products offered to students. During this time only, refined-grain foods that are enriched may be included in the lunch menu. In SY 2014–2015 (the third year of implementation) and beyond, schools must offer only whole grain-rich products.

In the SBP, this final rule provides that schools must offer the weekly grain ranges and half of the grains as whole grain-rich beginning July 1, 2013 (SY 2013–2014, the second year of implementation). All grains offered in the SBP must be whole grain-rich in SY 2014–2015 (the third year of implementation) and beyond. Once schools meet the daily minimum grain quantity required (1 oz. eq. for all age-grade groups) for breakfast, they are allowed to offer a meat/meat alternate in place of grains. The meat/meat alternate can count toward the weekly grains requirement (credited as 1 oz. eq. of meat/meat alternate is equivalent to 1 oz. eq. of grain). This modification is intended to retain the flexibility that menu planners currently have to offer a combination of grains and meats/meat alternates at breakfast. This final rule eliminates the proposed provision to require a meat/meat alternate daily at breakfast due to the cost concerns voiced by program operators. (For more details, please see the discussion on meat/meat alternate.)

In this final rule, to receive credit in the meal programs, a whole grain-rich food must contain at least 51 percent whole grains and the remaining grain content of the product must be enriched. Because current labeling regulations and practices may limit the school's ability to determine the actual whole grain content of many grain products, schools would use both elements of the following criterion to identify whole grain-rich foods. This is consistent with USDA's approach on whole grains in the HealthierUS School Challenge (HealthierUS School Challenge Whole-Grains Resource, *http://teamnutrition.usda.gov/healthierUS/NFSMI/lesson2handouts.pdf*). Therefore, until the whole grain content of food products is required on a product label by the Food and Drug Administration (FDA), schools must evaluate a grain product according to forthcoming FNS guidance as follows:

Element #1. A serving of the food item must meet portion size requirements for the Grains/Breads component as defined in FNS guidance.

And

Element #2. The food must meet at least *one* of the following:

a. The whole grains per serving (based on minimum serving sizes specified for grains/breads in FNS guidance) must be ≥ 8 grams. This may be determined from information provided on the product packaging or by the manufacturer, if available. Also, manufacturers currently may apply for a Child Nutrition Label for qualifying products to indicate the number of grains/breads servings that are whole grain-rich.

b. The product includes the following Food and Drug Administration (FDA)-approved whole grain health claim on its packaging. ''Diets rich in whole grain foods and other plant foods and low in total fat, saturated fat and cholesterol may reduce the risk of heart disease and some cancers.''

c. Product ingredient listing lists whole grain first, specifically:

I. *Non-mixed dishes (e.g., breads, cereals):* Whole grains must be the primary ingredient by weight (a whole grain is the first ingredient in the list).

II. *Mixed dishes (e.g., pizza, corn dogs):* Whole grains must be the primary grain ingredient by weight (a whole grain is the first grain ingredient in the list).

For foods prepared by the school food service, the recipe is used as the basis for a calculation to determine whether the total weight of whole grain ingredients exceeds the total weight of non-whole grain ingredients.

Several commenters noted that the industry standard of identity for whole grain products is 14.75 grams, while the IOM recommendations for school meals were based on 16 grams per serving. They suggested that schools be permitted to round up to the nearest quarter on gram equivalents in products. USDA will continue to provide SAs and schools guidance on this subject.

Many program operators expressed concern about the increased quantity of

food offered to children. The weekly grains quantity for the NSLP is reduced to 8–9 oz. eq. for age/grade group K–5, to 8–10 oz. eq. for age/grade group 6–8, and to 10–12 oz. eq. for age/grade group 9–12. This grains requirement still reflects the Dietary Guidelines' recommendation to increase consumption of whole grains as half of all grains offered must be whole grain-rich during the first two years of implementation, and all grains must be whole grain-rich thereafter.

Commenters also expressed concerns regarding the cost and availability of whole grain-rich products. USDA would like to emphasize that such products are now available through USDA Foods, including: brown rice; parboiled brown rice; rolled oats; whole-wheat flour; whole-grain kernel corn; and whole-grain rotini, spaghetti, and macaroni.

This final rule modifies the provision in the proposed rule to allow schools the option to meet part of the weekly grains requirement with grain-based desserts. USDA had proposed to allow up to one serving of grain-based dessert per day to allow additional opportunities to incorporate whole grains in the lunch menu. However, the 2010 Dietary Guidelines cite grain-based desserts as a significant source of solid fats and added sugars in Americans' diets. Therefore, this final rule reduces the number of allowable grain-based desserts from five to two per school week, as recommended by several commenters.

Accordingly, this final rule implements the proposed grains requirements and codifies them under § 210.10(c) for the NSLP and under § 220.8(c) for the SBP. Grains requirements applicable to the SBP in SY 2012–2013 are under § 220.23(g).

Meats/Meat Alternates

Proposed Rule: Offer a meat/meat alternate at lunch and breakfast daily to meet weekly requirements. Solicit comments on whether or not the meat/meat alternate component should include the three protein food subgroups recommended by the 2010 Dietary Guidelines: (1) Seafood; (2) meat, poultry, and eggs; and (3) nuts, seeds, and soy products. Solicit comments on whether or not tofu should be an allowable meat alternate and a methodology for crediting commercially prepared tofu.

Comments: A few commenters, primarily health advocates, expressed support for the overall meat/meat alternate requirement. They supported the proposed rule's emphasis on lean sources of protein and on lower-sodium meats/meat alternates. Several commenters, however, indicated that applying a weekly meat/meat alternate requirement, rather than a daily source of protein, might decrease the estimated meal cost and increase menu planning flexibility.

Many of the public comments focused on the proposed requirement to offer a meat/meat alternate daily at breakfast. Commenters who favored the proposal stated that a breakfast with a meat/meat alternate would provide greater satiety and help increase the protein intake for children that do not drink milk. They said the protein requirement would result in a more nutritious and balanced breakfast.

However, many school districts expressed concerns about offering a daily meat/meat alternate at breakfast. Several of these commenters argued that there is insufficient scientific support for the proposed meat/meat alternate requirement at breakfast. Others asserted that the daily requirement would be costly, create logistical difficulties and food safety challenges for schools, make it difficult for schools to achieve the new sodium limits, and discourage new breakfast modalities and school participation in the SBP. Some also noted that children in most schools have very limited time to eat breakfast and offering more food would result in increased plate waste.

A few commenters also expressed concerns about the availability of meat/meat alternate products that will enable schools to offer meals that meet the dietary specifications for sodium, saturated fat, and *trans* fat. A commenter asked whether USDA Foods is able to provide low-sodium processed meats, cheeses, and other meat/meat alternate products.

Commenters had different opinions on whether or not the meal pattern should require that schools offer the specific protein food subgroups identified in the 2010 Dietary Guidelines. Those in favor stated that it would diversify students' diet and provide health benefits. Those against it said that requiring protein food subgroups would be cost-prohibitive to many schools and that it might not be feasible in certain geographical areas. They also indicated that many parents do not recognize nuts, seeds, and soy products as a substitute for meats.

Many commenters suggested that USDA allow schools to offer tofu as a meat/meat alternate. A range of stakeholders, including SAs, nutrition professionals, advocacy organizations, and individual commenters, expressed support for allowing commercially prepared tofu in the school meal programs. Some commenters suggested a methodology for crediting commercially prepared tofu as a meat alternate. The predominant approach suggested is that USDA credit tofu based on the grams of protein per ounce equivalent.

USDA Response: This final rule implements the meat/meat alternate requirements for the NSLP as proposed. Schools must offer at least a minimum amount of meat/meat alternate daily (2 oz eq. for students in grades 9–12, and 1 oz eq. for younger students), and provide a weekly required amount for each age/grade group. Offering a meat/meat alternate daily as part of the school lunch supplies protein, B vitamins, vitamin E, iron, zinc, and magnesium to the diet of children, and also teaches them to recognize the components of a balanced meal. Menu planners are encouraged to offer a variety of protein foods (*e.g.,* lean or extra lean meats, seafood, and poultry; beans and peas; fat-free and low-fat milk products; and unsalted nuts and seeds) to meet the meat/meat alternate requirement.

The Department is mindful of the cost and operational concerns expressed by schools and other stakeholders regarding the proposed meat/meat alternate component in the SBP. Previously, schools have had the flexibility to offer one serving each of grains and meat/meat alternate, or two servings of either one at breakfast. We have seen a steady increase in the number of schools participating in the SBP and more schools are offering breakfast in the classroom and other creative delivery options. Therefore, this final rule retains some flexibility offered by the grains and meat/meat alternate combination available in the current SBP meal pattern, and does not require a daily meat/meat alternate in the SBP. Menu planners may offer a meat/meat alternate in place of grains after the minimum daily grains requirement is met. For example, for the K–5 age-grade group, the SBP minimum daily grain requirement is 1 oz. eq. As long as at least 1 oz. eq. of grain is served as part of the breakfast menu, a meat/meat alternate may also be served. The meat/meat alternate may count toward meeting the weekly grains requirement. For crediting, 1 oz. eq. of meat/meat alternate is equivalent to 1 oz. eq. of grains.

As suggested by many stakeholders, this final rule gives schools the option to offer commercially prepared tofu as a meat alternate in the NSLP and SBP. This provision, which is codified under § 210.10(c)(2)(i)(D) of the regulatory text for the NSLP, allows schools to diversify the sources of protein available to students and better meet the dietary

needs of vegetarians and culturally diverse groups in schools. Although tofu does not have an FDA standard of identity, the Dietary Guidelines recognize plant-based sources of protein such as tofu. USDA will continue to provide SAs and schools guidance on this issue.

USDA wishes to clarify that schools have the option to offer mature beans and dry peas (*e.g.,* kidney beans, pinto beans, black beans, garbanzo beans/chickpeas, black-eyed peas, split peas and lentils) as meat alternates. Mature beans and peas dry longer on the plant, fix more nitrogen, and have a higher protein content, which makes them nutritionally comparable to protein foods. They are also excellent sources of other nutrients such as iron and zinc. Because beans and peas are similar to meats, poultry, and fish in their contribution of these nutrients, they can be credited as a meat alternate.

Note that a serving of beans and peas must not be offered as a meat alternate and as a vegetable in the same meal. Some foods commonly referred to as beans and peas (*e.g.,* green peas, green lima beans, and green (string) beans) are not considered part of the beans and peas subgroup because their nutrient profile is dissimilar. For more information about the use and categorization of beans and peas see *http://www.choosemyplate.gov/foodgroups/proteinfoods_beanspeas.html.*

Schools also have discretion to offer ready-to-eat foods such as cold cuts, cheese, and yogurt to meet the meat/meat alternate component. Regardless of the protein foods offered, schools must plan all meals with the goal to meet the dietary specifications for sodium, saturated fat, *trans* fat, and calories. When selecting protein foods that are affordable and easy to prepare, we strongly encourage menu planners to use low-fat and low-sodium products that contribute to improved nutrient intake and health benefits (*e.g.,* fat-free/low-fat yogurt and unsalted nuts and seeds).

To support school meal improvements, USDA Foods has reduced the upper salt limit on mozzarella cheese from 2 percent to 1.6 percent. The current range for mozzarella is 130–175 mg of sodium per 28 g (1 oz.) serving. The sodium in processed and blended cheeses has been reduced from 450 milligrams or more, to between 200 and 300 milligrams per 28 g (1 oz.) serving, which is closer to the sodium levels found in natural cheeses.

USDA had solicited comments on whether schools should be required to offer the protein food subgroups recommended by the 2010 Dietary Guidelines. In response to program operators' concerns, this final rule does not require the three protein food subgroups recommended by the 2010 Dietary Guidelines. However, USDA is developing technical assistance to assist schools in offering students a variety of protein foods consistent with the Dietary Guidelines.

Accordingly, this final rule implements the proposed meat/meat alternate requirements, with modifications, and codifies them under § 210.10(c) for the NSLP and under § 220.8(c) for the SBP. Meat/meat alternate requirements applicable to the SBP in SY 2012–2013 are under § 220.23(g).

Fluid Milk

Proposed Rule: Offer plain or flavored fat-free milk and unflavored low-fat milk (1 percent milk fat or less), and include variety that is consistent with Dietary Guidelines recommendations.

Comments: Many parents and nutrition and health advocates favored the proposed requirement to limit flavor to fat-free milk. They believe that saturated fat and sugar in children's diets can be reduced by restricting milk choices to fat-free and low-fat, and by limiting flavor to fat-free milk. Several commenters stated that schools have already limited flavor to fat-free milk and student acceptability has been good. Some commenters recommended a total ban on flavored milk and argued that several states are in the process of banning flavored milk.

However, more commenters stated that flavored low-fat (1 percent or ½ percent) milk should be allowed. Many of these cited a lack of availability of flavored fat-free milk. Others were concerned that poor student acceptability of flavored fat-free milk could result in lower milk consumption or participation in the school meal programs. Some commenters said that the amount of extra calories and fat in low-fat flavored milk is not significant enough to warrant allowing only flavored fat-free milk. A few asked that USDA phase in the limit on flavored milk, and others suggested that USDA set a maximum level of added sugar in flavored milk instead of allowing flavor only in fat-free milk.

Several commenters addressed the need to accommodate lactose-intolerant students and, others requested USDA to clarify milk variety in school meals. Also, although the proposed rule did not address meal variations for special dietary reasons, some commenters discussed the nutrition standards for non-dairy milk substitutes (*e.g.,* soy drinks) and other miscellaneous topics related to the milk component, including OVS.

USDA Response: This final rule allows flavor in fat-free milk only, and fat-free and low-fat choices only (consistent with Dietary Guidelines recommendations and the NSLA as amended by the HHFKA). Flavored low-fat (1 percent or ½ percent) milk is not allowed in the NSLP or the SBP upon implementation of the rule in SY 2012–2013 because it contributes added sugars and fat to the meal and would make it more difficult for schools to offer meals that meet the limits on calories and saturated fat. We anticipate that the new calorie limits will lead menu planners to select milk with the lowest levels of added sugar. Implementing calorie maximums gives menu planners more flexibility than limiting added sugar.

Schools already have the option to offer lactose-free and reduced-lactose milk (fat-free and/or low-fat) as part of the reimbursable meal. Offering lactose free/reduced milk (fat-free or low-fat) is allowed and counts toward the milk variety requirement established by in the NSLA by the HHFKA. For the NSLP and SBP, variety (at least two choices of milk) can be accomplished by offering different allowable fat levels (fat-free and low-fat) and milk flavor in fat-free milk only. For additional guidance on milk variety, please see the FNS memorandum SP–29–2011, Child Nutrition Reauthorization: Nutrition Requirements for Fluid Milk, dated April 14, 2011.)

The milk fat restriction established by this final rule also applies to the meals for children in the age group 3–4 even though the meal patterns for preschoolers will be updated later through a separate rule. The amendments made to the NSLA by the HHFKA require fat-free and low-fat milk for all school lunches. Although this change was not addressed in the proposed rule due to the timing of publication, USDA notified program operators of this requirement for all school meals through implementation memorandum SP–29–2011. The milk flavor restriction also extends to the milk offered to children in age group 3–4.

As requested by commenters, we wish to clarify that this final rule does not change the nutrition standards for the optional non-dairy drinks offered to students with special dietary needs (not disabilities) in place of milk at the request from parents. Those products (*e.g.,* soy, rice and almond drinks) are offered as meal exceptions on a case by

case basis and are not intended for general consumption with the school meal. The nutrition standards for non-dairy milk substitutes for children without disabilities were established through a separate final rule ''Fluid Milk Substitutions in the School Nutrition Program,'' which was published in the **Federal Register** (73 FR 52903) on September 12, 2008. Those standards do not include fat or flavor/sugar restrictions.

We also wish to clarify that although fluid milk must be offered with every school meal, students may decline milk under OVS. In addition, water may not be offered in place of fluid milk as part of the reimbursable meal, but must be available in the food service area for students who wish to drink it in accordance with the NSLA as amended by the HHFKA and as discussed in the memorandum ''SP–28–2011 Revised Child Nutrition Reauthorization 2010: Water Availability During National School Lunch Program Meal Service'' dated July 12, 2011.

Accordingly, this final rule implements the proposed milk requirements and codifies them under § 210.10(d) for the NSLP and under § 220.8(d) for the SBP.

Dietary Specifications

Calories

Proposed Rule: Offer lunches and breakfasts that supply, on average over the school week, a number of calories that is within the established minimum and maximum levels for each age/grade group.

Comments: Many commenters agreed in general with the proposal to establish minimum and maximum calorie levels, and were particularly supportive of the maximum calorie levels. These commenters included advocacy organizations, food banks, a health department, a professional association, and an industry association. Many stated that setting minimum and maximum calorie levels along with providing nutrient dense meals will help address food insecurity and obesity concerns.

A few commenters said many students are not active enough and recommended lower calorie limits. Others, however, indicated that the proposed maximum calorie limits for school lunch might not be adequate to meet the dietary needs of taller and active students. Several commenters asserted that the calorie levels must be adequate enough to support the dietary needs of children who may not have access to sufficient food outside of school. There is also a concern among commenters about the ability of schools to adhere to the minimum and maximum calorie limits in the absence of a nutritional analysis.

In order to control calorie intake, some commenters suggested that USDA establish limits on added sugars for products such as such ready-to-eat cereal, grain-based desserts, and dairy-based desserts to improve the diet of school children. A few commenters, including an advocacy organization, suggested adopting the World Health Organization's recommendation to limit added sugars to ''no more than 10 percent of a person's daily caloric intake.'' An advocacy organization and a professional association of health nutrition directors suggested adopting the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) breakfast standard, which sets the added sugars limit to no more than 6 grams of sugars per ounce of dry cereal.

USDA Response: This final rule is intended to respond to serious concerns about childhood obesity, and the importance for children to consume nutritious school meals within their calorie needs. Therefore, this rule implements the proposed minimum and maximum calorie levels for each grade group. In the NSLP, the calorie limits for each age/grade group take effect upon implementation of this final rule. In the SBP, however, calorie limits are not implemented until the SY 2013–2014 (the second year of implementation). This modification from the proposed rule is intended to give program operators additional time to implement the new meal requirements in the SBP.

USDA acknowledges the school meal programs provide a nutrition safety net for food-insecure children and agrees with commenters that meals must supply adequate calories for growth and development. IOM considered this aspect of the Child Nutrition Program missions when developing the minimum and maximum calorie levels for various age/grade groups in the NSLP and SBP. They also took into consideration other opportunities for food intake available to most children outside of school, and the role of community organizations and other groups in supporting the nutritional needs of low-income children.

Although some commenters suggested setting a limit on added sugars for products such as flavored milk, USDA, consistent with the Institute of Medicine recommendations, does not believe a standard is necessary and would unnecessarily restrict menu planning flexibility. The required maximum calorie levels are expected to drive menu planners to select nutrient dense foods and ingredients to prepare meals, and avoid products that are high in fats and added sugars. In addition, this final rule includes other provisions that limit the sources of discretionary calories.

We also wish to clarify that the calorie standards established for each age/grade group are to be met on average over the course of the week. On any given school day, the calorie level for the meal may fall outside of the minimum and maximum levels as long as the average number of calories for the week is within the required range. This provides some flexibility to menu planners, but careful procurement, planning and preparation are important to stay within the calorie ranges.

Accordingly, this final rule implements the proposed calorie requirements and codifies them under § 210.10(f) for the NSLP and under § 220.8(f) for the SBP. Calorie requirements applicable to the SBP in SY 2012–2013 are under § 220.23(b) and § 220.23(c).

Saturated Fat

Proposed Rule: Offer lunches and breakfasts that supply, on average over the school week, less than 10 percent of total calories from saturated fat.

Comments: Most commenters concerned about childhood obesity also expressed general support for limiting saturated fat in school meals at less than 10 percent of total calories. This is the same as the current saturated fat restriction and the 2010 Dietary Guidelines did not change this recommendation. A small number of commenters (a health care professional, a member of academia, and an advocacy organization) suggested a more restrictive standard, recommending that USDA require less than 7 percent of total calories from saturated fat. This limit is listed in the Dietary Guidelines Advisory Committee report but was not adopted as a recommendation in the 2010 Dietary Guidelines.

USDA Response: This final rule implements the proposed saturated fat standard, which is the same as the restriction currently in place in the NSLP and SBP. Schools must continue to limit saturated fat in the school meals to help reduce childhood obesity and children's risk of cardiovascular disease later in life. Many schools are still having difficulty meeting this requirement in the NSLP. Several major sources of saturated fat in the American diet are popular items in the lunch menu.

This final rule implements two new requirements set forth in the proposed rule and are anticipated to encourage

schools to reduce the saturated fat in meals: allowing only fat-free and low-fat milk, and establishing maximum calorie limits. USDA's technical assistance will continue to emphasize the need to purchase and prepare foods in ways that help reduce the saturated fat level in school meals (*e.g.,* procuring skinless chicken or using meat from which fat has been trimmed, and using vegetable oils that are rich in monounsaturated and polyunsaturated fatty acids such as canola and corn oils).

This rule does not require schools to meet a total fat standard under current regulations. The IOM report did not recommend that USDA require a total fat standard for school meals. The expectation is that the new meal requirements, including the dietary specifications for calories, saturated fat and *trans* fat, will enable schools to offer meals that are low in total fat.

Accordingly, this final rule implements the proposed saturated requirement and codifies it under § 210.10(f) for the NSLP and under § 220.8(f) for the SBP.

Sodium

Proposed Rule: Offer lunches and breakfasts that supply, on average over the school week, no more than the maximum sodium levels set for each age/grade group. Meet the intermediate sodium targets (two and four years post implementation of the rule), and the final sodium targets (ten years post implementation of the rule; changes represent a sodium reduction of approximately 25–50 percent in breakfasts and lunches). The proposed targets aimed to help reduce students' sodium intakes to less than the Tolerable Upper Intake Levels established in the Dietary Reference Intakes, which range from 1,900–2,300 milligrams per day for children ages 4–18.

Comments: Nutrition and health advocates, community-action groups, individuals, and some school districts expressed support for the proposed sodium restrictions and timeline. A medical association and an advocacy organization supported the proposed sodium restriction to help address the health risks associated with high sodium intake. A professional association recommended that USDA consider further reductions in sodium limits after progress has been assessed. An advocacy organization suggested that USDA base the proposed restrictions on the Dietary Guidelines recommendation of 1,500 mg of sodium per day for special population groups. The 2010 Dietary Guidelines recommend that persons who are 51 years and older, African American children and adults, and persons of any age that have hypertension, diabetes, or chronic kidney disease limit sodium intake to 1,500 mg per day (compared to the 2,300 mg per day recommended for the general population).

However, many commenters were concerned that schools will likely struggle to meet the proposed intermediate sodium limits and fail to achieve the final target within 10 years. Some commenters asserted that the final targets for each age/grade group are lower than the therapeutic levels set for certain high-risk populations and should be increased. A school advocacy organization and school districts argued that it would be difficult for schools to prepare palatable foods at the proposed final sodium targets and, therefore, students would be motivated to drop from the meal program and pack lunches that contain high levels of sodium.

Some commenters expressed concerns about the potential use of sodium substitutes in schools. Commenters also indicated that industry needs time for product development and testing, and schools need time for procurement changes, menu development, sampling, and to foster student acceptance. Two food manufacturers commented that pizza manufacturers would need to complete research in order to secure low sodium cheeses that adhere to the proposed final target and that children like. Some argued that many schools rely on canned and processed food items and have limited access to reduced-sodium products.

School food service staff, a food manufacturer, a nutrition professional and individual commenters suggested that USDA lengthen the time to reach the intermediate sodium targets, and eliminate or reevaluate the final target. Commenters also encouraged USDA to monitor the progress of sodium reductions toward targets before moving forward. Some offered various alternatives to the proposed sodium limits and timeline (*e.g.,* a food manufacturer suggested 33 percent reduction over ten years and a school food service staff member suggested 30 percent over ten years). Several commenters suggested a 10–20 percent reduction over ten years to allow schools to continue purchasing affordable processed foods while working on recipe modification, in order to reduce food costs and potential loss of student participation. Others recommended establishing daily limits for each school meal (*e.g.,* 1,000–1,200 mg/day for lunch and 1,000 mg/day for breakfast).

Some school districts and a child nutrition consultant stated that there is not enough scientific data linking sodium consumption with health issues in children, and did not agree with claims that children's early exposure to sodium leads them to develop a preference for salty foods. A child nutrition consultant, a school nutrition directors' association, a professional association, and a school district argued that further studies should be conducted so that the final target levels are science-based.

USDA Response: Reducing the sodium content of school meals is a key objective of this final rule reflecting the Dietary Guidelines recommendation for children and adults to limit sodium intake to lower the risk of chronic diseases. USDA has encouraged schools to reduce sodium since the implementation of the School Meals Initiative in 1995. According to the SNDA–III study, the average sodium content of school lunches (for all schools) remains high: More than 1400 mg. Therefore, this final rule requires schools to make a gradual reduction in the sodium content of the meals, as recommended by IOM and consistent with the requirements of the FY 2012 Agriculture Appropriations Act.

Schools will be required to meet the first intermediate sodium target for each age/grade group (target 1 in the chart) in the NSLP and SBP no later than July 1, 2014 (SY 2014–2015), two years post implementation of this final rule. To meet target 1, schools are expected to modify menus and recipes promptly to reduce the sodium content of school lunches by approximately 5–10 percent from their baseline.

Prior to the implementation of the second (target 2) and final sodium targets contained in this rule, USDA will evaluate relevant studies on sodium intake and human health, as required by Section 743 of the FY 2012 Agriculture Appropriations Act. The scheduled compliance date for target 2 is no later than July 1, 2017 (SY 2017–2018), five years post implementation of the final rule for both meal programs. In response to stakeholders' concerns, and the provisions of Section 743 of the FY 2012 Agriculture Appropriations Act, this final rule lengthens the time to reach the second intermediate targets from 4 to 5 years. This modification to the sodium proposal is intended to allow food manufacturers additional time to reformulate products and schools more time to build student acceptance of lower sodium meals. To meet target 2, schools have to reduce sodium in school lunches by approximately 15–30 percent from their baseline. We

anticipate schools will have to incorporate new low-sodium products and ingredients in meals offered in order to meet this target.

The scheduled compliance date for the final sodium targets is no later than July 1, 2022 (SY 2022–2023), ten years post implementation of the final rule. To meet the final sodium target, schools will have to reduce the sodium content of the meals by approximately 25–50 percent from the school baseline. This will require innovation on the part of product manufacturers in the form of new technology and/or food products. As required by Section 743 of the FY 2012 Agriculture Appropriations Act, USDA will certify that it has evaluated relevant data on sodium intake and human health prior to requiring compliance with the second and final sodium targets.

Meeting the final sodium targets will enable schools to offer meals that reflect the 2010 Dietary Guidelines' recommendation to limit sodium intake to less than 2,300 mg per day. Nearly all schools have to reduce the sodium content of school meals to meet final sodium targets, but the extent of the needed reduction varies by school/district as sodium limits for school meals do not currently exist. The following chart illustrates the sodium reduction in school meals:

Age/grade group	Baseline: Current average sodium levels as offered [1] (mg)	Sodium reduction: Timeline and amount			
		Target 1: meet by July 1, 2014 (SY 2014–2015) (mg)	Target 2: meet by July 1, 2017 (SY 2017–2018) (mg)	Final target: [2] Meet by July 1, 2022 (SY 2022–2023) (mg)	Percent change (current levels vs. final targets)
School Breakfast Program					
K–5	573 (elementary)	≤ 540 (28.4% of UL)	≤ 485 (25.5% of UL)	≤ 430 (22.6% of UL)	−25
6–8	629 (middle)	≤ 600 (27.3% of UL)	≤ 535 (24.3% of UL)	≤ 470 (21.4% of UL)	−25
9–12	686 (high)	≤ 640 (27.8% of UL)	≤ 570 (24.8% of UL)	≤ 500 (21.7% of UL)	−27
National School Lunch Program					
K–5	1,377 (elementary)	≤ 1,230 (64.8% of UL)	≤ 935 (49.2% of UL)	≤ 640 (33.7% of UL)	−54
6–8	1,520 (middle)	≤ 1,360 (61.8% of UL)	≤ 1,035 (47.0% of UL)	≤ 710 (32.3% of UL)	−53
9–12	1,588 (high)	≤ 1,420 (61.7% of UL)	≤ 1,080 (47.0% of UL)	≤ 740 (32.2% of UL)	−53

[1] Current Average Sodium Levels as Offered are from the School Nutrition and Dietary Assessment Study-III. Data were collected in the 2004–05 school year.

[2] The IOM final targets are based on the Tolerable Upper Intake Limits (ULs) for sodium, established in the Dietary Reference Intakes (DRI) (IOM, 2004). The sodium ULs for school-aged children are 2,300 mg (ages 14–18), 2,200 mg (ages 9–13), and 1,900 mg (ages 4–8). The final sodium targets represent the UL for each age/grade group multiplied by the percentage of nutrients supplied by each meal (approximately 21.5% for breakfast, 32% for lunch), as recommended by IOM. IOM's recommended final sodium targets for the K–5 age/grade group breakfasts and lunches are slightly higher than 21.5% and 32% 32%, respectively, of the UL because this proposed elementary school group spans part of two DRI age groups (ages 4–8 and 9–13 years).

USDA is committed to helping program operators reduce sodium in school menus. USDA's Team Nutrition and the National School Food Service Management Institute have developed guidance for reducing sodium. USDA also continues to make low-sodium USDA Foods available to schools. For example, USDA offers only reduced sodium canned beans and vegetables at no more than 140 mg per half-cup serving, including spaghetti sauce, salsa, and tomato paste. Canned whole kernel corn, whole tomatoes, and diced tomatoes are being offered with no added salt. Frozen vegetables, including green beans, carrots, corn, peas, and sweet potatoes are available with no added salt. USDA has also reduced the upper salt limit on mozzarella cheese (current range is 130–175 mg of sodium per 1 oz. serving) and chicken fajita strips (220 mg per 2 oz serving).

Accordingly, this final rule implements the proposed sodium limits, with modifications, and codifies them under § 210.10(f) for the NSLP and under § 220.8(f) for the SBP.

Tracking Calories, Saturated Fat, and Sodium

Proposed Rule: State agencies must monitor compliance with the dietary specifications (calories, saturated fat and sodium levels) by conducting a weighted nutrient analysis for the schools selected for administrative review every 3 years. The analysis must cover menu and production records for a 2-week period.

Comments: Commenters did not specifically address the proposal to combine the nutritional assessment of school meals with the administrative review for stronger program accountability. Overall, health and child nutrition advocates welcomed the new SA requirement to conduct administrative reviews every 3 years, which is codified through this final rule. They also agreed in general that reviewing menu and production records for a 2-week period and conducting a weighted nutrient analysis offer a more accurate assessment of school meals than current regulations.

However, State and local program operators expressed concern about the requirement to conduct administrative reviews every 3 years. Several commenters stated that SAs have limited time and resources to conduct more frequent administrative reviews and provide technical assistance to all SFAs. In addition, school districts, SAs, trade associations, advocacy organizations and others opposed removing responsibility to conduct a nutrient analysis from the SFAs, believing this change limit the SFAs' ability to assess their own efforts to reduce sodium and saturated fat, and comply with the calorie ranges. Other commenters also opposed the requirement for a weighted nutrient analysis because it would not identify issues in menu planning or reflect what students actually consume. Several commenters requested that a tool be developed for SAs to identify issues and help implement the new meal requirements for schools.

USDA Response: The HHFKA amended the NSLA to require improvements to school meals and more frequent monitoring of school meals to facilitate transition to the new meal requirements. This rule requires SAs to begin the 3-year Coordinated Review Effort (CRE) cycle on July 1, 2013 (SY 2013–2014) for the NSLP and SBP. To

help SAs meet this requirement, USDA will develop technical assistance tools to facilitate monitoring of school meals.

This rule requires SAs to conduct the nutrient analysis of school lunches and breakfasts as part of the administrative review, but does not limit SFA discretion to conduct a nutrient analysis of the school meals to determine if they are in line with the dietary specifications. We understand that many SFAs currently have the ability to conduct a nutrient analysis.

USDA is mindful of SA concerns about increased administrative burden. In response to concerns about the requirement to conduct a nutrient analysis of school meals using menus for a two-week period, this final rule reduces the time period to one-week, which is the current requirement. This modification to the proposed rule is expected to lessen the information collection burden on SAs without affecting their ability to assess the nutritional integrity of the meals offered and the general quality of the food service operation.

Accordingly, this final rule implements the proposed monitoring requirements, with modifications, and codifies them under § 210.18(c), § 210.18(g)(2), § 210.18(i)(3), § 210.18(m), and § 210.19(c) for the NSLP and under § 220.8(h), § 220.8(i), and § 220.8(j) for the SBP.

Tracking Trans Fat

Proposed Rule: Food products and ingredients used to prepare school lunches and breakfasts must contain zero grams of *trans* fat per serving (less than 0.5 grams per serving) according to the nutrition labeling or manufacturer's specifications.

Comments: Many commenters, including advocacy organizations, schools, health care professionals, community organizations and others expressed support for the proposal to restrict *trans* fat in school meals. Several of them asked that naturally-occurring *trans* fat be excluded from the *trans* fat limit. A few commenters suggested that the *trans* fat limit be greater than zero due to concerns over potential increased use of hydrogenated oils and saturated fats in school meals. No commenters opposed the proposal to restrict *trans* fat.

USDA Response: A number of studies suggest an association between *trans* fatty acid intake and increased risk of cardiovascular disease. The Dietary Guidelines recommend that all persons keep *trans* fatty acid consumption as low as possible by limiting foods that contain synthetic sources of *trans* fats, such as partially hydrogenated oils, and by limiting other solid fats. Therefore, to safeguard children's health, this final rule requires that food products and ingredients used to prepare school meals contain zero grams of added *trans* fat per serving (less than 0.5 grams per serving as defined by FDA) according to the nutrition labeling or manufacturer's specifications. This requirement takes effect in the NSLP on July 1, 2012 (SY 2012–2013). In the SBP, the requirement is effective on July 1 2013 (SY 2013–2014, the second year of implementation).

This requirement is intended to restrict synthetic *trans* fatty acids and does not apply to naturally occurring *trans* fats, which are present in meat and dairy products. Synthetic *trans* fatty acids are found in partially hydrogenated oils used in some margarines, snack foods, and prepared desserts. See USDA Foods guidance on *trans* fat at *http://www.fns.usda.gov/fdd/facts/nutrition/TransFatFactSheet.pdf.*

Accordingly, this final rule implements the proposed *trans* fat restriction and codifies it under § 210.10(g) § 210.10(h) and § 210.10(j), for the NSLP and under § 220.8(g), § 220.8(h), and § 220.8(j) for the SBP.

Standards for Meals Selected by the Student (Offer versus Serve (OVS)

Proposed Rule: Under OVS, students may not decline more than two food items at lunch and one food item at breakfast, and must select a fruit or a vegetable at each meal.

Comments: Many commenters expressed their views about this proposed requirement. Nutrition and health advocates, a professional association, a State department of health, some school districts and food service staff, and individuals expressed support for the proposed requirement to require a fruit or a vegetable as part of the reimbursable meal. They viewed this requirement as a means to encourage children to eat more fruits and vegetables. An advocacy group commented that requiring students to take a fruit or a vegetable should help increase actual fruit and vegetable consumption citing a pilot study in which more students consumed fruit when prompted to take a fruit item.

However, many commenters expressed concerns about potential food waste and overall costs associated with this proposed requirement. The commenters that opposed this proposal included a State department of education, school districts, school food service staff, school advocacy organizations, a teachers union, students, a child nutrition industry consultant, a food manufacturer, food service industry firms, nutrition professionals, and individuals. Generally, these commenters argued the proposed requirement that a reimbursable meal include a fruit or a vegetable would result in increased plate waste and increased cost by requiring students to choose a food they do not intend to eat. School food service staff also argued that indirect costs such as more frequent trash collection would increase if the students throw away more food. These commenters asserted that this proposed requirement would negate the purpose of OVS.

Commenters asked USDA to clarify the minimum amount of fruit or vegetable that a student must take for a reimbursable meal. Many commenters suggested that USDA allows students to select less than the full fruit or vegetable component under OVS. Suggestions included a minimum of ½ cup, ¼ cup, and ⅛ cup of fruit or vegetable for a reimbursable meal.

USDA Response: Increased vegetable and fruit intake is a key recommendation of the Dietary Guidelines. This recommendation applies to the NSLP and SBP because these programs are intended to nourish children but also help them develop healthy eating patterns. By requiring students to take a fruit or a vegetable, schools emphasize food choices that are high in nutrients and low in calories. Therefore, consistent with the Dietary Guidelines and the IOM recommendations, this final rule requires that the reimbursable lunch selected by the student includes a fruit or a vegetable beginning SY 2012–2013. In the SBP, this requirement is effective in SY 2014–2015 (the third year of implementation), when the fruit quantities for breakfast are required to increase.

However, in response to the commenters' concerns about potential food waste and cost increases, this final rule allows students to take ½ cup of a fruit or a vegetable as suggested by several commenters, rather than the full component, to have a reimbursable meal under OVS. For example, if a school is offering ½ cup of fruit pieces and ½ cup fruit juice to meet the 1 cup fruit component at lunch, the student must select at least one of those two items to have a reimbursable lunch under OVS.

This rule continues the current OVS practice under FBMP to allow students to decline up to two food components at lunch (preferred OVS option presented in the IOM report). Some commenters suggested that USDA implement the second OVS option identified in the IOM report to allow

students to decline more food components and, thus, have greater control of the amount of food on their plate. USDA is not adopting this suggestion. Although the second option would give school districts greater flexibility, it could negatively affect the nutritional integrity of the meal.

In the SBP, OVS applies to food items rather than food components because of the flexibility to substitute meats/meat alternates for grains (once the daily grain requirement is met). In SBP, schools must offer fruit, milk, and grains daily. On multiple days per week, schools will need to offer more than the minimum daily grains requirement of 1 oz. eq. per day to meet the weekly grain requirement. To accomplish this, schools will need to offer at least three or four food items on the breakfast menu. When a school offers four food items at breakfast, students may decline one food item. If only three food items are offered, students must take all the food items to preserve the nutritional integrity of the breakfast. More details about OVS will be provided in guidance.

Schools that offer salad bars must follow the OVS requirements. To ensure that students actually take the minimum required portion size from a salad bar, foods may be pre-portioned to allow staff to quickly identify if the student has a reimbursable meal under OVS. If not pre-portioning, then the cashier must be trained to judge accurately the quantities of self-serve items on student trays, to determine if the food item can count toward a reimbursable meal. For more information, see FNS memorandum SP 02–2010—Revised, dated January 21, 2011.

Accordingly, this final rule implements the proposed requirements, with modifications, and codifies them under § 210.10(e) for the NSLP and under § 220.8(e) for the SBP. The OVS requirements applicable to the SBP in SY 2012–2013 are under § 220.23(e)(2) and § 220.23(g)(4).

Monitoring Procedures

Proposed Rule:

- State agencies must review school lunches and breakfasts every three years during scheduled administrative reviews to monitor compliance with the meal requirements (meal patterns and dietary specifications for calories, saturated fat, sodium and *trans* fats).
- State agencies must conduct a weighted nutrient analysis for the schools selected for an administrative review to monitor compliance with the specifications for calories, saturated fat, and sodium. The analysis must cover menu and production records for a two-week meal period.
- State agencies must take immediate fiscal action if a required food component is not offered.
- For repeat violations of the vegetable subgroup and milk requirements, State agencies must take fiscal action if technical assistance and corrective action have not resolved these violations.
- For repeat violations of the food quantity and whole grain requirements, and the dietary specifications (calorie, sodium, saturated fat and *trans* fat), State agencies have discretion to take fiscal action if technical assistance and corrective action have not resolved these violations.

Comments: Various commenters, including a health care association, State department of education, trade association, nutrition professional, food service staff, and advocacy organizations supported the proposal to eliminate the School Meals Initiative (SMI) review and monitor the nutritional quality of school meals through the scheduled administrative review. Although a few commenters expressed concern with eliminating the SMI review, several commenters voiced support for a single monitoring system.

However, numerous commenters said that this proposal would not simplify monitoring because it increases the frequency of the review cycle and the meal review period, and requires SAs to conduct a nutrient analysis for the SFAs to determine compliance with the dietary specifications. Some commenters argued that SFAs would still have to conduct their own nutrient analysis to plan meals that meet the calorie, saturated fat, and sodium restrictions. They expressed concern that many food-based SFAs do not have the specialized tools to ensure compliance with the dietary specifications, and that SAs do not have enough time or resources to provide technical assistance to all SFAs.

Although some commenters supported establishing a 3-year review cycle, most commenters opposed increasing the frequency of the administrative reviews. Those in favor of the proposal (health and nutrition advocates and providers) stated that it would increase opportunities to provide technical assistance to the SFAs and result in improved meals. Those opposed included school districts, food service management companies, school food service staff, a school advocacy organization, State departments of education, and nutrition professionals. These commenters argued that retaining the 5-year review cycle would give SAs more time to provide training and technical assistance to the SFAs. They indicated that SAs would not have the staff to handle the increased workload of a 3-year review cycle and, therefore, the quality of the reviews could suffer.

Regarding the proposal to review menu and production records for a two-week meal period, most commenters expressed opposition. These commenters, including State and local operators, school food service staff, school advocacy organizations, professional associations, trade associations, and other groups argued that reviewing menus for one week is a reasonable amount of time to determine if an SFA is meeting the meal requirements. Some commenters estimated that the increased paperwork of a 3-year review cycle and a 2-week review of menus would triple the cost of completing the administrative review.

There was a mixed response to the proposal to include breakfast in the administrative reviews. Commenters that agreed school breakfasts should be included argued that these meals often contain less nutrient-dense foods than lunch. A similar number of commenters opposed the proposal because of cost concerns. The latter group stated that the reviews should only include lunch to offset the increased time and effort involved in conducting reviews every 3 years rather than every 5 years.

There were few and mixed opinions about the use of fiscal action. School food service staff argued that fiscal penalties are counterproductive and create an adversarial relationship between the SA and the SFA. They recommended that more emphasis be placed on providing technical assistance, not fiscal action. Other commenters favored increasing accountability to improve meal quality.

Commenters offered some suggestions regarding monitoring procedures, including that SAs monitoring report be made available on-line to the public. Another suggested that SAs target schools with prior non-compliance rather that assess a broad sample of schools.

USDA Response: Section 207 of the HHFKA amended the NSLA to require USDA to establish a unified monitoring system. Accordingly, this final rule eliminates the SMI review and strengthens the administrative review to assess compliance with the new meal requirements. As required by this rule, SAs must monitor compliance with the meal patterns and the dietary specifications (calories, saturated fat, sodium and *trans* fat) under the administrative review responsibilities established in 7 CFR 210.18. This

change is intended to focus more attention on the importance of providing lunches and breakfasts that reflect the science-based meal requirements, in accordance with § 9 of the NSLA and § 201 of the HHFKA.

In addition to observing the serving line and the meals counted at point of service during the administrative review, the SAs must conduct a nutrient analysis to ensure that the average levels of calories, saturated fat, and sodium in the meals offered over the school week are within the values specified in this final rule. However, in response to commenters' concerns, this final rule requires SAs to review menu and production records for one week only within the review period, instead of the two weeks stated in the proposed rule. This modification reduces the information collection burden for SAs. USDA is reviewing potential alternative approaches to nutrient analysis and will provide further guidance to SAs.

This final rule changes the administrative review cycle from 5 to 3 years in accordance with the NSLA, as amended by § 207 of the HHFKA. This change takes effect in SY 2013–2014, after the current 5-year review cycle ends. More frequent monitoring is intended to increase opportunities for the SAs to provide guidance and technical assistance to the SFAs during implementation of the new meal requirements. USDA is aware of program operators' concerns regarding increased monitoring and will provide technical assistance resources and guidance to SAs to facilitate transition to the 3-year review cycle.

This final rule also makes several improvements to the SBP to bring those meals closer to the recommendations of the Dietary Guidelines. Therefore, and in accordance with the NSLA as amended by the HHFKA, beginning SY 2013–2014, SAs must monitor breakfasts under the administrative review. However, because the new meal requirements (other than limiting types of milk) are being implemented gradually in the SBP, part of the compliance assessment must be based on prior nutrition standards (which are now in § 220.23) until new requirements in the SBP regulations at § 220.8 take effect. The requirement to conduct a nutrient analysis of breakfast menu records for one-week period begins July 1, 2013 (SY 2013–2014).

SAs must continue to use technical assistance and corrective action as the primary strategies to help schools comply with the meal requirements. However, this final rule gives SAs the ability to use fiscal action to enforce compliance with specific meal requirements. As currently done, SAs must apply immediate fiscal action if the meals offered are completely missing one of the required food components. SAs must also take fiscal action for repeated violations of the vegetable subgroup and milk type requirements when technical assistance efforts and required corrective action have not resolved these violations. However, SAs have discretion to take fiscal action for repeated violations of the food quantity and whole grain requirements, and for repeated violations of the dietary specifications (calories, saturated fat, sodium and *trans* fats).

A commenter suggested public disclosure of the administrative review findings. The NSLA, as amended by the HHFKA, requires schools to post review final findings and make findings available to the public. Also, the NSLA requires local education agencies to report on the school nutrition environment to USDA and to the public, including information on food safety inspections, local wellness policies, school meal program participation, and nutritional quality of program meals. These statutory requirements will be implemented through a separate rule.

Accordingly, this final rule implements the proposed monitoring requirements, with the modification discussed above, and codifies them under § 210.18(a), § 210.18(c), § 210.18(g) and § 210.18(m) for the NSLP and under § 220.8(h) and § 220.8(j) for the SBP.

Identification of Reimbursable Meal

Proposed Rule: Identify the foods that are part of the reimbursable meal(s) for the day at or near the beginning of the serving line(s).

Comments: Most of the commenters that addressed this proposal supported it because they believe it helps students avoid unintentional purchase of food items not included in the reimbursable meal. A few commenters opposed the proposed requirement and argued that it will overtly identify students that receive free and reduced price meals.

USDA Response: Beginning July 1, 2012 (SY 2012–2013), this final rule requires schools to identify the components of the reimbursable meal at or near the beginning of the serving line(s) as students and parents often are not aware of what is included in the school meal. Identifying the components of the reimbursable meal also reinforces nutrition education messages that emphasize selecting healthy choices for a balanced meal. Schools have discretion to determine the best way to present this information on the serving line. Implementing this requirement must not result in overt identification of any student participating in the NSLP or SBP through use of a separate serving line for the reimbursable meal or other segregation of certified students.

Accordingly, this final rule implements the proposed requirement and codifies it under § 210.10(a)(2) for the NSLP, and under § 220.8(h) and § 220.8(j) for the SBP.

Crediting

Proposed Rule:

- Disallow the crediting of any snack-type fruit or vegetable products (such as fruit strips and fruit drops), regardless of their nutrient content, toward the fruits component or the vegetables component.
- Require that all fruits and vegetables (and their concentrates, purees, and pastes) be credited based on volume as served with two exceptions: (1) Dried whole fruit and dried whole fruit pieces would be credited for twice the volume served; and (2) leafy salad greens would be credited for half the volume served.

Comments: Comments in favor of disallowing snack-type fruit or vegetable products exceeded the comments opposed. Those in favor stated that permitting such products sends the wrong nutrition message to children. Others said that children should be offered a variety of whole fruits and vegetables. However, some commenters opposed the requirement due to concerns over the cost of providing whole fruit. They suggested that USDA allow products made with 100 percent fruit.

Many commenters opposed the proposal that all fruits and vegetables (and their concentrates, purees, and pastes) be credited based on volume as served. These commenters included school districts, school advocacy organizations, trade associations, food manufacturers, a food service management company, a State department of education and others. They expressed concern over the potential cost increase due to product reformulation and reduced product acceptability. Many commenters recommended that USDA keep the current practice to credit tomato paste and puree based on their whole-food equivalency using the percent natural tomato soluble solids in paste and puree.

USDA Response: One of the goals of the School Meal Programs is to help children easily recognize the key food groups that contribute to a balanced meal, including fruits and vegetables.

Effective July 1, 2012 (SY 2012–2013), reimbursable meals must not include snack-type fruit products that have been previously credited by calculating the whole-fruit equivalency of the processed fruit in the product using the FDA's standards of identity for canned fruit nectars (21 CFR 146.113). FDA revoked the standard of identity for canned fruit nectars through a final rule published in the **Federal Register** (60 FR 56513) on November 9, 1995; therefore, there is no regulatory basis for allowing the crediting of these snack-type fruit products.

As a result of Section 743 of the FY 2012 Agriculture Appropriations Act, this final rule does not adopt the proposed crediting change for tomato paste and puree. USDA will credit tomato paste and puree as a calculated volume based on the whole food equivalency. Although this specific proposal was intended to promote consistency and improved nutrition by crediting all fruits and vegetables (and their concentrates, purees, and pastes) based on volume as served, this final rule must comply with the statutory provision.

Accordingly, this final rule disallows the crediting of any snack-type fruit or vegetable products, and continues the crediting of tomato paste and puree as a calculated volume under § 210.10(c)(2)(iii) of the regulatory text.

Fortification

Proposed Rule: Disallow the use of formulated grain-fruit products as defined in Appendix A to 7 CFR part 220.

Comments: Most commenters were in favor of removing formulated grain-fruit products from the School Meal Programs. They indicated that such products do not support the Dietary Guidelines' recommendation to consume fruits as a separate food group. However, some commenters opposed the removal of formulated grain-fruit products, and claimed that these products are cost-effective and convenient in new breakfast delivery systems such as Grab and Go and Breakfast in the Classroom.

USDA Response: This final rule disallows the use of formulated grain-fruit products to meet the grain and fruit components in the SBP beginning July 1, 2012 (SY 2012–2013). Formulated grain-fruit products, as defined in Appendix A to 7 CFR part 220, are (1) grain-type products that have grain as the primary ingredient, and (2) grain-fruit type products that have fruit as the primary ingredient. Both types of products must have at least 25 percent of their weight derived from grain. These products typically contain high levels of fortification, rather than naturally occurring nutrients, and are high in sugar and fat. Furthermore, they no longer meet a need in the school meal programs because schools can procure more nutrient-dense breakfast options with a similar shelf-life. This rule does not prohibit the use of fortified cereals or cereals with fruit (*e.g.,* ready-to-eat cereals) which may provide good sources of whole grains, fiber, and other important nutrients. In most instances, however, the use of highly-fortified food products is inconsistent with the Dietary Guidelines.

Accordingly, this final rule amends Appendix A to 7 CFR part 220 by removing Formulated Grain-Fruit Products in its entirety. It also makes a technical change to Appendix B to 7 CFR part 210 by removing the statement that affirms that Appendix B will be updated to exclude individual foods that have been determined to be exempted from the categories of Foods of Minimal Nutritional Value. Although USDA has published **Federal Register** Notices in the past to inform the public of exempted foods, Appendix B has not been amended subsequently to reflect these exemptions. A list of these exempted foods is maintained and available to all State agencies participating in the Programs. There have been no changes to the categories of exempted foods and USDA is maintaining the requirement to publish a **Federal Register** Notice and update the regulations to reflect any changes to the categories.

Accordingly, this final rule implements the proposed change by removing the Formulated Grain-Fruit Products from Appendix A to 7 CFR part 220.

III New Meal Patterns and Dietary Specifications

The following meal patterns must be implemented in SY 2012–2013 for the NSLP, and phased-in the SBP as specified in the footnotes and regulatory text.

Meal pattern	Breakfast meal pattern			Lunch meal pattern		
	Grades K–5 [a]	Grades 6–8 [a]	Grades 9–12 [a]	Grades K–5	Grades 6–8	Grades 9–12
	Amount of food [b] per week (minimum per day)					
Fruits (cups) [c d]	5 (1) [e]	5 (1) [e]	5 (1) [e]	2½ (½)	2½ (½)	5 (1)
Vegetables (cups) [c d]	0	0	0	3¾ (¾)	3¾ (¾)	5 (1)
Dark green [f]	0	0	0	½	½	½
Red/Orange [f]	0	0	0	¾	¾	1¼
Beans/Peas (Legumes) [f]	0	0	0	½	½	½
Starchy [f]	0	0	0	½	½	½
Other [f g]	0	0	0	½	½	¾
Additional Veg to Reach Total [h]	0	0	0	1	1	1½
Grains (oz eq) [i]	7–10 (1) [j]	8–10 (1) [j]	9–10 (1) [j]	8–9 (1)	8–10 (1)	10–12 (2)
Meats/Meat Alternates (oz eq)	0 [k]	0 [k]	0 [k]	8–10 (1)	9–10 (1)	10–12 (2)
Fluid milk (cups) [l]	5 (1)	5 (1)	5 (1)	5 (1)	5 (1)	5 (1)
Other Specifications: Daily Amount Based on the Average for a 5-Day Week						
Min-max calories (kcal) [m n o]	350–500	400–550	450–600	550–650	600–700	750–850
Saturated fat % of total calories) [n o]	< 10	< 10	< 10	< 10	< 10	< 10
Sodium (mg) [n p]	≤ 430	≤ 470	≤ 500	≤ 640	≤ 710	≤ 740
Trans fat [n o]	Nutrition label or manufacturer specifications must indicate zero grams of *trans* fat per serving.					

[a] In the SBP, the above age-grade groups are required beginning July 1, 2013 (SY 2013–14). In SY 2012–2013 only, schools may continue to use the meal pattern for grades K–12 (see § 220.23).

[b] Food items included in each food group and subgroup and amount equivalents. Minimum creditable serving is ⅛ cup.

[c] One quarter-cup of dried fruit counts as ½ cup of fruit; 1 cup of leafy greens counts as ½ cup of vegetables. No more than half of the fruit or vegetable offerings may be in the form of juice. All juice must be 100% full-strength.
[d] For breakfast, vegetables may be substituted for fruits, but the first two cups per week of any such substitution must be from the dark green, red/orange, beans and peas (legumes) or "Other vegetables" subgroups as defined in § 210.10(c)(2)(iii).
[e] The fruit quantity requirement for the SBP (5 cups/week and a minimum of 1 cup/day) is effective July 1, 2014 (SY 2014–2015).
[f] Larger amounts of these vegetables may be served.
[g] This category consists of "Other vegetables" as defined in § 210.10(c)(2)(iii)(E). For the purposes of the NSLP, "Other vegetables" requirement may be met with any additional amounts from the dark green, red/orange, and beans/peas (legumes) vegetable subgroups as defined in § 210.10(c)(2)(iii).
[h] Any vegetable subgroup may be offered to meet the total weekly vegetable requirement.
[i] At least half of the grains offered must be whole grain-rich in the NSLP beginning July 1, 2012 (SY 2012–2013), and in the SBP beginning July 1, 2013 (SY 2013–2014). All grains must be whole grain-rich in both the NSLP and the SBP beginning July 1, 2014 (SY 2014–15).
[j] In the SBP, the grain ranges must be offered beginning July 1, 2013 (SY 2013–2014).
[k] There is no separate meat/meat alternate component in the SBP. Beginning July 1, 2013 (SY 2013–2014), schools may substitute 1 oz. eq. of meat/meat alternate for 1 oz. eq. of grains after the minimum daily grains requirement is met.
[l] Fluid milk must be low-fat (1 percent milk fat or less, unflavored) or fat-free (unflavored or flavored).
[m] The average daily amount of calories for a 5-day school week must be within the range (at least the minimum and no more than the maximum values).
[n] Discretionary sources of calories (solid fats and added sugars) may be added to the meal pattern if within the specifications for calories, saturated fat, *trans* fat, and sodium. Foods of minimal nutritional value and fluid milk with fat content greater than 1 percent milk fat are not allowed.
[o] In the SBP, calories and *trans* fat specifications take effect beginning July 1, 2013 (SY 2013–2014).
[p] Final sodium specifications are to be reached by SY 2022–2023 or July 1, 2022. Intermediate sodium specifications are established for SY 2014–2015 and 2017–2018. See required intermediate specifications in § 210.10(f)(3) for lunches and § 220.8(f)(3) for breakfasts.

IV Implementation Timeline

The following chart provides a summary of the new requirements and the required implementation dates in the NSLP and SBP. Refer to the regulatory text for details.

New requirements	Implementation (school year) for NSLP (L) and SBP (B)						
	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2022/23
Fruits Component:							
• Offer fruit daily	L						
• Fruit quantity increase to 5 cups/week (minimum 1 cup/day).			B				
Vegetables Component:							
• Offer vegetables subgroups weekly	L						
Grains Component:							
• Half of grains must be whole grain-rich	L	B					
• All grains must be whole-grain rich			L, B				
• Offer weekly grains ranges	L	B					
Meats/Meat Alternates Component:							
• Offer weekly meats/meat alternates ranges (daily min.)	L						
Milk Component:							
• Offer only fat-free (unflavored or flavored) and low-fat (unflavored) milk.	L, B						
Dietary Specifications (to be met on average over a week):							
• Calorie ranges	L	B					
• Saturated fat limit (no change)	L, B						
• Sodium Targets [1]			L, B				L, B
○ Target 1.							
○ Target 2.							
○ Final target.							
• Zero grams of *trans* fat per portion	L	B					
Menu Planning:							
• A single FBMP approach	L	B					
Age-Grade Groups:							
• Establish age/grade groups: K–5, 6–8, and 9–12	L	B					
Offer vs. Serve:							
• Reimbursable meals must contain a fruit or vegetable (½ cup minimum).	L		B				
Monitoring:							
• 3-year adm. review cycle		L, B					
• Conduct weighted nutrient analysis on 1 week of menus	L	B					

[1] Target 2 and the final target will only be required after USDA evaluates relevant data on sodium intake and human health, as required by Section 743 of the FY 2012 Agriculture Appropriations Act.

Implementation Resources

With respect to resources for the changes, USDA estimates suggest that the common-sense revenue reforms for school food businesses included in the HHFKA will provide an additional $7.5 billion in non-Federal revenues over 5 years to the food service accounts of local school districts. This includes over $5.3 billion in additional revenue from a la carte foods, over $300 million in additional payments from paid lunches, and over $1.9 billion in additional revenue schools resulting from making school meals more competitive with a la carte foods.

Since the statute mandated that revenue streams from non-Program

foods relative to the costs of those foods, should be at least as high as the revenue stream for Program meals bears to costs beginning July 1, 2011, schools should receive over $1 billion in new revenues in School Year 2011–2012. That will help schools work toward implementing the new standards effective the following year, *i.e.,* July 1, 2012. In addition, USDA estimates that the interim rule ''National School Lunch Program: School Food Service Account Revenue Amendments Related to the Healthy, Hunger-Free Kids Act of 2010'' will increase participation in school meals programs by 800,000 children.

The six-cent performance-based reimbursement increase included in the HHFKA will provide additional revenue beyond this amount. The Congressional Budget Office estimated about $1.5 billion over the same period in performance-based funding.

USDA will work with the SAs to facilitate transition to the new meal requirements. USDA and the National Food Service Management Institute are developing technical assistance resources and training to help school foodservice staff improve menus, order appropriate foods to meet the new meal requirements, and control costs while maintaining quality. Resources and training materials being developed include identifying and purchasing whole grain-rich foods, lowering the sodium on menus, and meeting the new meal pattern requirements. Training will be available through a variety of methods including webinars and online learning modules.

We are updating the Child Nutrition Database and will reevaluate nutrient analysis software systems available from industry to assist SAs with monitoring calories, saturated fat, and sodium in the meals offered to students in grades K through 12 during the administrative review. The Child Nutrition Labeling Program is being updated to report whole grain-rich contributions to the grains component and to provide standardized claims for the vegetable subgroups consistent with the 2010 Dietary Guidelines.

In addition, the HHFKA provides USDA $50 million for each of the first two years of the new meal requirements for use in assisting SAs implement the new requirements. These funds, combined with increases in State Administrative Expense funding, should assist States and local operators in improving the quality of school meals provided to children.

V. Procedural Matters

Executive Order 12866 and Executive Order 13563

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated an ''economically significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). Pursuant to that review, it has been determined that this rule will have a significant impact on a substantial number of small entities.

The requirements established by this final rule will apply to school districts, which meet the definitions of ''small governmental jurisdiction'' and ''small entity'' in the Regulatory Flexibility Act. A Regulatory Flexibility Act analysis is included in the preamble.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, USDA generally must prepare a written statement, including a cost/benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local, or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires USDA to identify and consider a reasonable number of regulatory alternatives and adopt the most cost-effective or least burdensome alternative that achieves the objectives of the rule. The Regulatory Impact Analysis conducted by FNS in connection with this final rule includes a cost/benefit analysis and explains the options considered to implement the Dietary Guidelines in the school meal programs.

USDA sought the assistance of the Institute of Medicine of the National Academies to recommend changes to school meal standards in the least burdensome and costly manner consistent with the Dietary Guidelines. However, this final rule contains Federal mandates (under the regulatory provisions of Title II of the UMRA) that could result in costs to State, local, or tribal governments or to the private sector of $100 million or more in any one year. The HHFKA authorizes $50 million over two years to help State agencies implement the new meal pattern requirements. These funds, combined with increases in State Administrative Expense funding, should assist States and local operators in implementing the requirements established by this final rule. Local program operators need to optimize the use of USDA Foods and adopt other cost-savings strategies in various areas of the food service operation, including procurement, menu planning, and meal production to meet the rule requirements in a cost-effective manner.

Executive Order 12372

The NSLP is listed in the Catalog of Federal Domestic Assistance under No. 10.555 and the SBP is listed under No. 10.553. For the reasons set forth in the final rule in 7 CFR part 3015, Subpart V and related Notice published at 48 FR 29114, June 24, 1983, these Programs are included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Since the NSLP and SBP are State-administered, federally funded programs, FNS headquarters staff and regional offices have formal and informal discussions with State and local officials, including ITO representatives, on an ongoing basis regarding program requirements and operation. This structure allows FNS to receive regular input which contributes to the development of meaningful and feasible Program requirements.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132.

Prior Consultation With State Officials

FNS staff received informal input from various stakeholders while participating in various State, regional, national, and professional conferences. Various departments of education, boards of education, departments of health, and other state and local organizations provided input during the public comment period. The School Nutrition Association, School Food Industry Roundtable, National Alliance for Nutrition and Activity, Association of State and Territorial Public Health Nutrition Directors, and the Center for Science in the Public Interest shared their views about changes to the school meals. Numerous stakeholders also provided input at the public meetings held by the Institute of Medicine in connection with its school meals study.

Nature of Concerns and the Need to Issue This Rule

State Agencies and school food authorities want to provide the best possible school meals through the NSLP and SBP but are concerned about program costs, food waste, and increasing administrative burden. While FNS is aware of these concerns, section 9(a)(4) and section 9(f)(1) of the National School Lunch Act, 42 U.S.C. 1758(a)(4) and (f)(1), require that school meals reflect the most recent ''Dietary Guidelines for Americans'' and promote the intake of the food groups recommended by the Dietary Guidelines.

Extent To Which We Meet Those Concerns

Although there is general support for the meal requirements established by this final rule, State and local program operators, food industry, and others associated with the operation of the school meals programs expressed concern about the proposed increase in food quantities, limit on starchy vegetables, sodium reductions, and implementation timeline, as well as the estimated meal costs. USDA has taken into consideration these concerns, and the requirements of the FY 2012 Agriculture Appropriations Act, and has modified several of the key meal requirements to be responsive to the concerns of State and local program operators. This final rule makes significant improvements to the school meals, while modifying the following provisions to facilitate successful implementation of the final rule at the State and local levels:

- Reduce the proposed grains quantities at lunch to reduce food cost,
- Remove the proposed starchy vegetable restrictions at lunch and breakfast as required by the FY 2012 Agriculture Appropriations Act,
- Allow students to select ½ cup of a fruit or a vegetable to reduce food waste,
- Allow more time to comply with the second intermediate sodium targets,
- Remove the daily meat/meat alternate requirement at breakfast to reduce food cost,
- Provide additional time for implementation of the breakfast requirements, and
- Reduce the administrative burden by requiring State agencies to conduct a nutrient analysis of school meals using one week of menus, rather than two weeks as proposed.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, ''Civil Justice Reform.'' This final rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule would permit State or local agencies operating the National School Lunch and School Breakfast Programs to establish more rigorous nutrition requirements or additional requirements for school meals that are not inconsistent with the nutritional provisions of the rule. Such additional requirements would be permissible as part of an effort by a State or local agency to enhance the school meals and/or the school nutrition environment. To illustrate, State or local agencies would be permitted to establish more restrictive saturated fat and sodium limits. For these components, quantities are stated as maximums (*e.g.,* ≤) and could not be exceeded; however, lesser amounts than the maximum could be offered. Likewise, State or local agencies could accelerate implementation of the breakfast requirements in an effort to improve all school meals promptly. This rule is not intended to have a retroactive effect. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures under § 210.18(q) or § 235.11(f) must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with USDA Regulation 4300–4, ''Civil Rights Impact Analysis,'' to identify and address any major civil rights impacts the rule might have on program participants on the basis of age, race, color, national origin, sex or disability. After a careful review of the rule's intent and provisions, FNS has determined that this final rule is not expected to affect the participation of protected individuals in the NSLP and SBP. This final rule is intended to improve the nutritional quality of school meals and is not expected to limit program access or otherwise adversely impact the protected classes.

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

USDA is unaware of any current Tribal laws that could be in conflict with the requirements of this final rule. However, we have made special efforts to reach out to Tribal communities. We held five consultations (webinars and conference calls) with Indian Tribal Organizations in 2011 to discuss implementation of the Healthy, Hunger-Free Kids Act of 2010. These sessions provided the opportunity to address Tribal concerns related to school meals, clarify that traditional foods and local products can be incorporated into the school meals, and highlight the proposed changes to the meal pattern (increase in whole grains, fruits and vegetables) that are expected to support Tribal efforts to reduce diabetes in the community.

In addition, USDA will undertake, within 6 months after this final rule implementation, a series of Tribal consultation sessions to gain input by elected Tribal officials or their designees concerning the impact of this rule on Tribal governments, communities and individuals. These sessions will establish a baseline of consultation for future actions, should any be necessary, regarding this rule. Reports from these sessions for consultation will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA will respond in a timely and meaningful manner to all Tribal government requests for consultation concerning this final rule and will provide additional venues, such as webinars and teleconferences, to periodically host collaborative conversations with Tribal leaders and their representatives concerning ways to improve this rule in Indian country.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. chap. 35; see 5 CFR 1320) requires the Office of Management and Budget (OMB) approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. This rule contains information

collection requirements subject to approval by OMB under the Paperwork Reduction Act of 1995. FNS will merge these burden hours into National School Lunch Program, OMB # 0584–0006 which is currently under review. A 60-day notice was published in the **Federal Register** at 76 FR 2509 on January 13, 2011 which provided the public an opportunity to submit comments on the information collection burden resulting from this rule. This information collection burden has not yet been approved by OMB. FNS will publish a document in the **Federal Register** once these requirements have been approved. The current total estimated annual burden for OMB No. 0584–0006 is now 11,880,415 hours, rather than the 11,882,408 indicated in the proposed rule.

The average burden per response and the annual burden hours are explained below and summarized in the chart which follows:

Respondents for this rule: State Education Agencies (57) and School Food Authorities (6,983).

Estimated Number of Respondents for this rule: 7040.

Estimated Number of Responses per Respondent for this rule: 3.87217.

Estimated Total Annual Responses: 27,260.

Estimated Total Annual Burden on Respondents for this rule: 73,849 hours.

ESTIMATED ANNUAL BURDEN FOR 0584–NEW, NATIONAL SCHOOL LUNCH PROGRAM, 7 CFR 210

	Section	Estimated number of respondents	Frequency of response	Average annual responses	Average burden per response	Annual burden hours
Reporting:						
SA shall verify compliance with critical and general areas of review.	7 CFR 210.18(g) & 210.18(h).	57	1	57	33	1,881
SFA shall submit to SA documented corrective action, no later than 30 days from the deadline for completion, for violations of critical or general area identified on administrative follow-up review.	7 CFR 210.18(k)(2)	6,983	1	6,983	6	41,898
Total Reporting for DGA rule		7,040		7,040	6.2186	43,779
Total Existing Reporting Burden for Part 210						2,912,745
Total Reporting Burden for Part 210 with DGA rule.						2,956,524
Recordkeeping:						
SA establishes guidelines and approves School Food Authorities menu planning alternatives. (Burden removed by proposed rule).	7 CFR 210.10 (1)	0	0	0	0	*(57)
SA modifies menu planning alternatives or develops menu planning alternatives. (Burden removed by proposed rule).	7 CFR 210.10 (1)	0	0	0	0	*(100)
SA records document the details of all reviews and the degree of compliance with the critical and general areas of review. To include documented action on file for review by FNS.	7 CFR 210.18 (k), 210.18 (p), & 210.20 (b)(6).	57	93.23	5,314	2.0	10,628
SA documentation of fiscal action taken to disallow improper claims submitted by SFAs, as determined through claims processing, CRE reviews, and USDA audits. Contracts awarded by SFAs to FSMCs.	7 CFR 210.19 (c) & 210.18 (p).	57	139	7,923	0.50	3,962
SFAs adopt menu planning alternatives, modify menu planning alternatives or develop menu planning alternatives and submit them to the State agency for approval at SFA level. (Burden removed by proposed rule.).	7 CFR 210.10(1)	0	0	0	0	*(26,261)
SFA documentation of corrective action taken on program disclosed by review or audit.	7 CFR 210.18 (k)(2)	6,983	1	6,983	6	41,898
Total Recordkeeping for New burden		7,040		20,220	1.4871	30,070
Total Existing Recordkeeping Burden for 0584–0006, Part 210.						8,893,821
Total Recordkeeping Burden for 0584–0006, Part 210 with proposed rule.						8,923,891

*Indicates reduced burden hours due to changes in proposed DGA rule.

SUMMARY OF BURDEN (OMB #0584–NEW)

Total No. Respondents	7,040
Average No. Responses Per Respondent	3.87217
Total Annual Responses	27,260
Average Hours Per Response	2.70
Total Annual Burden Hours Requested	11,880,415
Current OMB Inventory	11,806,566
Difference	73,849

Reporting: Affected citation is 7 CFR 210.18(g) and 7 CFR 210.18(h)—Based on the comments received, this final rule changed the requirement to analyze two weeks' worth of menus to one week. Hence, average burden time per response is reduced from 40 hours to 33 hours for this citation.

Recordkeeping: 7 CFR 210.18 (k) and (p) and 210.20 (b)(6). As the record keeping time related to administrative review documents is reduced, average burden time per response is reduced from 2.3 hours to 2 hours. The current total estimated annual burden for OMB No. 0584–0006 is now 11,880,415 hours, rather than the 11,882,408 indicated in the proposed rule.

E-Government Act Compliance

The Food and Nutrition Service is committed to complying with the E-Government Act, 2002 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.

Regulatory Impact Analysis Summary

As required for all rules that have been designated significant by the Office of Management and Budget, a Regulatory Impact Analysis (RIA) was developed for this final rule. The following is a summary of the RIA. The complete RIA appears later in this document.

Need for Action

Under Section 9(a)(4) and Section 9(f)(1) of the NSLA, schools that participate in the NSLP or SBP must offer lunches and breakfasts that are consistent with the goals of the most recent Dietary Guidelines for Americans. School lunches must provide one-third of the Recommended Dietary Allowances (RDA) for protein, calcium, iron, and vitamins A and C, on average over the course of a week; school breakfasts must satisfy one-fourth of the RDAs for the same nutrients. Current nutrition requirements for school lunches and breakfasts are based on the 1995 Dietary Guidelines and the 1989 RDAs. School lunches and breakfasts were not updated when the 2000 Dietary Guidelines were issued because those recommendations did not require significant changes to the school meal patterns. The 2005 and 2010 Dietary Guidelines, provide more prescriptive and specific nutrition guidance than earlier releases, and require significant changes to school meal requirements.

Benefits

The United States Department of Agriculture's Food and Nutrition Service (FNS) contracted with the National Academies' Institute of Medicine (IOM) in 2008 to examine current NSLP and SBP nutrition requirements. IOM formed an expert committee tasked with comparing current school meal requirements to the 2005 Dietary Guidelines and to current Dietary Reference Intakes. The committee released its recommendations in late 2009 (IOM 2009).

In developing its recommendations, the IOM sought to address low intakes of fruits, vegetables, and whole grains among school-age children, and excessive intakes of sodium and discretionary calories from solid fats and added sugar. The final rule addresses these concerns by increasing the amount of fruit, the amount and the variety of vegetables, and the amount of whole grains offered each week to students who participate in the school meals programs. The rule also replaces higher fat fluid milk with low-fat and skim fluid milk in school meals. And it limits the levels of calories, sodium, and saturated fat in those meals.

A proposed rule, published by USDA in January 2011, made only small changes to the IOM recommendations. The final rule makes additional changes. These changes respond primarily to comments received from school and State officials, nutrition and child advocates, industry groups, parents of schoolchildren, and the general public. The most significant of these changes reduce the immediate and long-term costs of implementing the rule. Additional changes respond to recommendations contained in the 2010 Dietary Guidelines which were released after development of the proposed rule.

The linkage between poor diets and health problems such as childhood obesity are a matter of particular policy concern, given their significant social costs. One in every three children (31.7 percent) ages 2–19 is overweight or obese. Along with the effects on our children's health, childhood overweight and obesity imposes substantial economic costs, and the epidemic is associated with an estimated $3 billion in direct medical costs. Perhaps more significantly, obese children and adolescents are more likely to become obese as adults. In 2008, medical spending on adults that was attributed to obesity increased to an estimated $147 billion.

Because of the complexity of factors that contribute both to overall food consumption and to obesity, we are not able to define a level of disease or cost reduction that is attributable to the changes in meals expected to result from implementation of the rule. As the rule is projected to make substantial improvements in meals served to more than half of all school-aged children on an average school day, we judge that the likelihood is reasonable that the benefits of the rule exceed the costs, and that the final rule thus represents a cost-effective means of conforming NSLP and SBP regulations to the statutory requirements for school meals. Beyond these changes a number of qualitative benefits—including alignment between Federal program benefits and national nutrition policy, improved confidence of parents and families in the nutritional quality of school meals, and the contribution that improved school meals can make to the overall school nutrition environment, are expected from the rule.

Costs

This final rule will increase the amount of fruits, vegetables, and whole grains offered to participants in the NSLP and SBP. The final rule will also limit certain fats and reduce calories and sodium in school meals. Because some foods that meet these requirements are more expensive than foods served in the school meal programs today, the food cost component of preparing and serving school meals will increase.

The biggest contributors to this increase are the costs of serving more vegetables and more fruit, and replacing refined grains with whole grains. We estimate that food costs will increase by 2.5 cents per lunch served, as compared with prior requirements, on initial implementation of the final rule requirements. There is no immediate increase in breakfast food costs. Two years after implementation, when the fruit requirement is phased in for breakfast, and when all grains served at breakfast and lunch must be whole grain rich, we estimate that food costs will increase by 5 cents per lunch served and 14 cents per breakfast, as compared with prior requirements.

Compliance with this rule is also likely to increase labor costs. Serving

healthier school meals that are acceptable to students may require more on-site preparation, and less reliance on prepared foods. For purposes of this impact analysis, labor costs are assumed to grow so that they maintain a constant ratio with food costs, consistent with findings from a national study of school lunch and breakfast meal costs (USDA 2008). In practice, this suggests that food and labor costs may increase by nearly equal amounts relative to current costs.

The estimated overall costs of compliance are summarized below. Increased food and labor costs will be incurred by the local and State agencies that control school food service accounts. The rule will also increase the administrative costs incurred by the State agencies responsible for reviewing school district compliance with the new meal patterns. The analysis estimates that total costs may increase by $3.2 billion from fiscal year (FY) 2012 through fiscal year (FY) 2016, or roughly 8 percent when the rule's food group requirements are fully implemented in FY 2015. The estimated increases in food and labor costs are equivalent to about 10 cents for each reimbursable school lunch and about 27 cents for each reimbursable breakfast in FY 2015.

Estimated Cost of Final Rule (millions)

	Fiscal Year					
	2012	2013	2014	2015	2016	Total
Food Costs	$20.8	$135.4	$178.7	$612.8	$642.8	**$1,590.5**
Labor Costs	20.7	141.9	174.4	598.0	627.2	**1,562.3**
State Agency Administrative Costs	0.1	8.9	9.1	9.4	9.7	**37.1**
Total	**$41.6**	**$286.2**	**$362.1**	**$1,220.2**	**$1,279.7**	**$3,189.9**
Percent Change Over Baseline	**2.0%**	**2.0%**	**2.5%**	**8.0%**	**8.1%**	**5.2%**

Alternatives

One alternative to the final rule is to retain the proposed rule without change. The proposed rule closely followed IOM's recommendations. IOM developed its recommendations to encourage student consumption of foods recommended by the Dietary Guidelines in quantities designed to provide necessary nutrients without excess calories. The final rule still achieves that goal. Students will still be presented with choices from the food groups and vegetable subgroups recommended by the Dietary Guidelines. In that way, the final rule, like the proposed rule, will help children recognize and choose foods consistent with a healthy diet.

The most significant differences between the proposed and final rules are in the breakfast meal patterns, and those differences are largely a matter of timing. The final rule allows schools more time to phase-in key IOM recommendations on fruit and grains at breakfast. Once fully implemented, the most important difference between the final and proposed rule breakfast meal patterns is the elimination of a separate meat/meat alternate requirement. That change preserves current rules that allow the substitution of meat for grains at breakfast. It also responds to general public comments on cost, and on the need to preserve schools' flexibility to serve breakfast outside of a traditional cafeteria setting.

Even with these changes, and with the less significant changes to the proposed lunch standards, the final rule remains consistent with Dietary Guidelines recommendations. The added flexibility and reduced cost of the final rule relative to the proposed rule should increase schools' ability to comply with the new meal patterns. The final rule's less costly breakfast patterns will make it easier for schools to maintain or expand current breakfast programs, and may encourage other schools to adopt a breakfast program. These changes reduce the estimated 5-year cost of the final rule, relative to the proposed rule, by $2.9 billion.

A second alternative would implement the final rule's lunch meal pattern changes, but retain the proposed rule's breakfast meal pattern recommendations. Adopting all of the lunch provisions contained in the final rule, but retaining the proposed rule's breakfast provisions, would cost an estimated $5.9 billion over 5 years, or $2.7 billion more than the final rule. This alternative responds less effectively than the final rule to comments received by USDA from SFA and school administrators who expressed concerns about the cost of the proposed rule.

An alternative that implements the final rule's breakfast meal pattern changes, but retains the proposed rule's lunch meal pattern recommendations, would cost $3.4 billion over 5 years, about $180 million more than the final rule.

Regulatory Impact Analysis

Title: Nutrition Standards in the National School Lunch and School Breakfast Programs

Action

a. *Nature:* Final Rule.

b. *Need:* Section 103 of the Child Nutrition and WIC Reauthorization Act of 2004 inserted Section 9(a)(4) into the National School Lunch Act requiring the Secretary to promulgate rules revising nutrition requirements, based on the most recent Dietary Guidelines for Americans, that reflect specific recommendations, expressed in serving recommendations, for increased consumption of foods and food ingredients offered in school nutrition. This final rule amends Sections 210 and 220 of the regulations that govern the National School Lunch Program (NSLP) and the School Breakfast Program (SBP). The rule implements many of the recommendations of the National Academies' Institute of Medicine (IOM). Under contract to the United States Department of Agriculture (USDA), IOM proposed changes to NSLP and SBP meal pattern requirements consistent with the 2005 Dietary Guidelines and IOM's Dietary Reference Intakes. The final rule advances the mission of the Food and Nutrition Service (FNS) to provide children access to food, a healthful diet, and nutrition education in a manner that promotes American agriculture and inspires public confidence.

c. *Affected Parties:* The programs affected by this rule are the NSLP and the SBP. The parties affected by this regulation are USDA's Food and Nutrition Service, State education agencies, local school food authorities, schools, students, and the food

production, distribution and service industry.

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Abbreviations

The following abbreviations are used throughout this document:

CN Child Nutrition Programs
CPI Consumer Price Index
CRE Coordinated Review Effort
DRI Dietary Reference Intake
FNS Food and Nutrition Service
FY Fiscal Year
IOM Institute of Medicine
NSLA National School Lunch Act
NSLP National School Lunch Program
RDA Recommended Dietary Allowance
SA State Agency
SBP School Breakfast Program
SY School Year
SFA School Food Authority
SLBCS–II School Lunch and Breakfast Cost Study II
SMI USDA School Meals Initiative for Healthy Children
SNDA–III School Nutrition Dietary Assessment III
USDA United States Department of Agriculture

I. Background

The National School Lunch Program (NSLP) is available to over 50 million children each school day; an average of 31.7 million children per day ate a reimbursable lunch in fiscal year (FY) 2010. The School Breakfast Program (SBP) served an average of 11.7 million children daily. Schools that participate in the NSLP and SBP receive Federal reimbursement and USDA Foods (donated commodities) for lunches and breakfasts that meet program requirements. In exchange for this assistance schools serve meals at no cost or at reduced price to income-eligible children. Federal meal reimbursements and USDA Foods totaled $13.7 billion in FY 2010. FNS projections of the number of meals served and Federal program costs are summarized in Table 1.[1]

TABLE 1—PROJECTED NUMBER OF MEALS SERVED AND TOTAL FEDERAL PROGRAM COSTS

[In millions]

	Fiscal year					
	2011	2012	2013	2014	2015	2016
NSLP:						
—Lunches Served	5,386.7	5,465.3	5,530.9	5,586.2	5,630.9	5,675.9
—Program Cost	$11,822.8	$12,373.0	$12,499.8	$12,584.9	$12,679.3	$12,782.4
SBP:						
—Breakfasts Served	2,090.9	2,187.0	2,252.7	2,297.7	2,332.2	2,367.2
—Program Cost	$3,115.3	$3,337.7	$3,469.8	$3,556.7	$3,628.6	$3,721.0

In FY 2010, schools served 2.9 billion free NSLP lunches, 0.5 billion reduced price lunches, and 1.8 billion full price or ''paid'' lunches. Schools served 1.5 billion free breakfasts, 0.2 billion reduced price breakfasts, and 0.3 billion paid breakfasts. These figures do not include non-Federally reimbursable à la carte meals or other non-program foods.[2]

Reimbursement rates for meals served under the current meal patterns are established by law and are adjusted annually for inflation.[3] For school year (SY) 2011–2012, the Federal reimbursement for a free breakfast for schools in the contiguous United States and ''not in severe need'' is $1.51; the Federal reimbursement for a free lunch to schools in SFAs in the contiguous United States that served fewer than 60 percent free and reduced price lunches was $2.77. Schools that participate in the NSLP also receive USDA Foods for each free, reduced price, and paid lunch served, as provided by Section 6 of the Richard B. Russell National School Lunch Act (NSLA). Table 2 provides a breakdown of breakfast and lunch reimbursements in SY 2011–2012, including USDA Foods.

[1] The figures in Table 1 are USDA projections of the number of program meals served and the value of USDA reimbursements for those meals. These figures are baseline Federal government costs of the NSLP and the SBP estimated for the President's budget proposal for FY 2012. Elsewhere in this document, baseline costs refer to the cost to schools of serving meals that satisfy current program requirements.

[2] USDA program data.

[3] Reimbursement rates and annual inflation adjustments are set by statute, not regulation. The final rule does not alter current reimbursement rates. Reimbursement rates for school lunch under current nutrition standards are specified in Sections 4(b)(2) and 11(a)(2) of the NSLA (42 U.S.C. 1753(b)(2) and 42 U.S.C. 1759a(a)(2)). Breakfast reimbursement rates are specified in Section 4(b)(1)(B) of the Child Nutrition Act (42 U.S.C. 1773(b)(1)(B)). Both lunch and breakfast reimbursement rates are subject to the annual inflation adjustment prescribed by Section 11(a)(3) of the NSLA (42 U.S.C. 1759a(a)(3)).

TABLE 2—FEDERAL PER-MEAL REIMBURSEMENT AND MINIMUM VALUE OF USDA FOODS, SY 2011–2012 [4]

	Breakfast reimbursement		Lunch reimbursement		Minimum value of donated foods
	Schools in "severe need"	Schools not in "severe need"	SFAs that serve at least 60% of lunches free or at reduced price	SFAs that serve fewer than 60% of lunches free or at reduced price	Additional Federal assistance for each NSLP lunch served
Contiguous States:					
—Free	$1.80	$1.51	$2.79	$2.77	$0.2225
—Reduced Price	1.50	1.21	2.39	2.37	0.2225
—Paid	0.27	0.27	0.28	0.26	0.2225
Alaska:					
—Free	2.88	2.41	4.52	4.50	0.2225
—Reduced Price	2.58	2.11	4.12	4.10	0.2225
—Paid	0.40	0.40	0.45	0.43	0.2225
Hawaii:					
—Free	2.10	1.76	3.27	3.25	0.2225
—Reduced Price	1.80	1.46	2.87	2.85	0.2225
—Paid	0.30	0.30	0.33	0.31	0.2225

Under Section 9(a)(4) and Section 9(f)(1) of the NSLA, schools that participate in the NSLP or SBP must offer lunches and breakfasts that are consistent with the goals of the most recent Dietary Guidelines for Americans. School lunches must provide one-third of the Recommended Dietary Allowances (RDA) for protein, calcium, iron, and vitamins A and C, on average over the course of a week; school breakfasts must satisfy one-fourth of the RDAs for the same nutrients. Current nutrition requirements for school lunches and breakfasts are based on the 1995 Dietary Guidelines and the 1989 RDAs. (School lunches and breakfasts were not updated when the 2000 Dietary Guidelines were issued because those recommendations did not require significant changes to the school meal patterns.) The 2005 and 2010 Dietary Guidelines, provide more prescriptive and specific nutrition guidance than earlier releases, and require significant changes to school meal requirements.

The United States Department of Agriculture's Food and Nutrition Service (FNS) contracted with the National Academies' Institute of Medicine (IOM) in 2008 to examine current NSLP and SBP nutrition requirements. IOM formed an expert committee tasked with comparing current school meal requirements to the 2005 Dietary Guidelines and to current Dietary Reference Intakes. The committee released its recommendations in late 2009 (IOM 2009). For a summary discussion of the scientific standards that guided the committee, and the development of recommended targets for micro- and macronutrients, see the preamble to the proposed rule.[5]

II. Summary of Final Rule Meal Requirements

The proposed rule, published in January 2011, made only minor changes to the IOM recommendations. This final rule makes more significant changes. These changes respond primarily to comments received from school and State officials, nutrition and child advocates, industry groups, parents of schoolchildren, and the general public. Additional changes respond to recommendations contained in the 2010 Dietary Guidelines which were released after development of the proposed rule. As a group, these changes reduce program costs relative to the proposed rule. The final rule is effective at the start of SY 2012–2013.

The final rule, like the proposed rule, makes the following changes to current NSLP and SBP meal standards:

- Increases the amount and variety of fruits, vegetables, and whole grains;
- Sets minimum and maximum levels of calories; and
- Increases the focus on reducing the amounts of saturated fat and sodium provided in school meals.

Table 3 summarizes the breakfast and lunch meal standards with all provisions fully phased in. The following provisions are subject to a phased implementation; all other provisions are effective July 1, 2012:

- Minimum breakfast fruit requirement is effective July 1, 2014,
- Minimum breakfast grain requirement is effective July 1, 2013,
- Intermediate sodium targets take effect on July 1, 2014 and July 1, 2017; the final sodium target (in Table 3) takes effect on July 1, 2022. (See Table 3a.)

TABLE 3—SUMMARY OF FINAL RULE MEAL REQUIREMENTS [6]

Meal pattern	Breakfast meal pattern			Lunch meal pattern		
	Grades K–5 [a]	Grades 6–8 [a]	Grades 9–12 [a]	Grades K–5	Grades 6–8	Grades 9–12
	Amount of food [b] per week (minimum per day)					
Fruits (cups) [c d]	5 (1) [e]	5 (1) [e]	5 (1) [e]	2½ (½)	2½ (½)	5 (1)
Vegetables (cups) [c d]	0	0	0	3¾ (¾)	3¾ (¾)	5 (1)
Dark green [f]	0	0	0	½	½	½

[4] School year 2011–2012 NSLP and SBP reimbursement rates, and the minimum value of donated foods, can be found in the July 20, 2011 **Federal Register**, Vol. 76, No. 139, pp. 43256 and 43258.

[5] **Federal Register**, Vol. 76, No. 9, pp. 2494–2570.

[6] Table taken from preamble to the final rule.

TABLE 3—SUMMARY OF FINAL RULE MEAL REQUIREMENTS [6]—Continued

Meal pattern	Breakfast meal pattern			Lunch meal pattern		
	Grades K–5 [a]	Grades 6–8 [a]	Grades 9–12 [a]	Grades K–5	Grades 6–8	Grades 9–12
Red/Orange [f]	0	0	0	¾	¾	1¼
Beans/Peas (Legumes) [f]	0	0	0	½	½	½
Starchy [f]	0	0	0	½	½	½
Other [f g]	0	0	0	½	½	¾
Additional Veg to Reach Total [h]	0	0	0	1	1	1½
Grains (oz eq) [i]	7–10 (1) [j]	8–10 (1) [j]	9–10 (1) [j]	8–9 (1)	8–10 (1)	10–12 (2)
Means/Meat Alternates (oz eq)	0 [k]	0 [k]	0 [k]	8–10 (1)	9–10 (1)	10–12 (2)
Fluid milk (cups) [l]	5 (1)	5 (1)	5 (1)	5 (1)	5 (1)	5 (1)
Other Specifications: Daily Amount Based on the Average for a 5-Day Week						
Min-max calories (kcal) [m n o]	350–500	400–500	450–600	550–650	600–700	750–850
Saturated fat (% of total calories) [n o]	< 10	< 10	< 10	< 10	< 10	< 10
Sodium (mg) [n p]	≤ 430	≤ 470	≤ 500	≤ 640	≤ 710	≤ 740
Trans fat [o]	Nutrition label or manufacturer specifications must indicate zero grams of *trans* fat per serving.					

[a] In the SBP, the above age-grade groups are required beginning July 1, 2013 (SY 2013–14). In SY 2012–2013 only, schools may continue to use the meal pattern for grades K–12 (See § 220.23).
[b] Food items included in each food group and subgroup and amount equivalents. Minimum creditable serving is ⅛ cup.
[c] One quarter-cup of dried fruit counts as ½ cup of fruit; 1 cup of leafy greens counts as ½ cup of vegetables. No more than half of the fruit or vegetable offerings may be in the form of juice. All juice must be 100% full-strength.
[d] For breakfast, vegetables may be substituted for fruits, but the first two cups per week of any such substitution must be from the dark green, red/orange, beans and peas (legumes) or ''Other vegetables'' subgroups, as defined in 210.10(c)(2)(iii).
[e] The fruit quantity requirement for the SBP (5 cups/week or a minimum of 1 cup/day) is effective July 1, 2014 (SY 2014–2015).
[f] Larger amounts of these vegetables may be served.
[g] This category consists of ''Other vegetables'' as defined in Section 210.10(c)(2)(iii)(E). For the purposes of the NSLP, the ''Other vegetables'' requirement may be met with any additional this category also includes any additional amounts from the dark green, red/orange, and beans/peas (legumes) as defined in 210.10(c)(2)(iii) vegetable subgroups.
[h] Any vegetable subgroup may be offered to meet the total weekly vegetable requirement.
[i] At least half of the grains offered must be whole grain-rich in the NSLP beginning July 1, 2012 (SY 2012–2013), and in the SBP beginning July 1, 2013 (SY 2013–2014). All grains must be whole grain-rich in both the NSLP and the SBP beginning July 1, 2014 (SY 2014–15).
[j] In the SBP, the grain ranges must be offered beginning July 1, 2013 (SY 2013–2014).
[k] There is no separate meat/meat alternate component in the SBP. Beginning July 1, 2013 (SY 2013–2014), schools may substitute 1 oz. eq. of meat/meat alternate for 1 oz. eq. of grains after the minimum daily grains requirement is met.
[l] Fluid milk must be low-fat (1 percent milk fat or less, unflavored) or fat-free (unflavored or flavored).
[m] The average daily amount of calories for a 5-day school week must be within the range (at least the minimum and no more than the maximum values).
[n] Discretionary sources of calories (solid fats and added sugars) may be added to the meal pattern if within the specifications for calories, saturated fat, trans fat, and sodium. Foods of minimal nutritional value and fluid milk with fat content greater than 1 percent milk fat are not allowed.
[o] In the SBP, calories and trans fat specifications take effect beginning July 1, 2013 (SY 2013–2014).
[p] Final sodium specifications are to be reached by SY 2022–2023 or July 1, 2022. Intermediate sodium specifications are established for SY 2014–2015 and 2017–2018. See required intermediate specifications in § 210.10(f)(3) for lunches and § 220.8(f)(3) for breakfasts.

TABLE 3A—INTERMEDIATE AND FINAL SODIUM TARGETS

Age/grade group	Sodium reduction: timeline and amount		
	Target 1: July 1, 2014 (SY 2014–2015) (mg)	Target 2: July 1, 2017 (SY 2017–2018) (mg)	Final target: July 1, 2022 (SY 2022–2023) (mg)
K–5	≤ 1,230	≤ 935	≤ 640
6–8	≤ 1,360	≤ 1,035	≤ 710
9–12	≤ 1,420	≤ 1,080	≤ 740

Key differences between current meal pattern requirements and the final rule include:

• The number of fruit and vegetable servings offered to students over the course of a week would double at breakfast and would rise substantially at lunch.

• Schools would no longer be permitted to substitute between fruits and vegetables; each has its own requirement, ensuring that students are offered both fruits and vegetables every day.

• A minimum number of vegetable servings would be required from each of 5 vegetable subgroups. The proposed rule included tomatoes in the ''other'' vegetable category, consistent with the 2005 Dietary Guidelines. The 2010 Dietary Guidelines and this final rule create a new ''red/orange'' group that combines tomatoes with all of the vegetables in the previous ''orange'' category.

• Initially, half of grains offered to students would have to be whole grain rich. Two years after implementation, all grain products offered would have to be whole grain rich.

• Schools would be required to substitute low fat and fat free milk for higher fat content milk. This is a separate requirement of the Healthy Hunger-Free Kids Act of 2010 (HHFKA).

Section 202 of HHFKA requires schools to offer a variety of fluid milk consistent with the recommendations of the most recent Dietary Guidelines for Americans. The 2010 Dietary Guidelines recommends fat free or low fat milk (1 percent milkfat) for children ages 2 and older.

Table 4: School breakfast Program – Current Requirements Compared to Final Rule Requirements for a 5-Day School Week[a]

	Current Requirements	Final Rule		
Grade Levels	K-12	K-5	6-8	9-12
Fruit (cups)	2.5	5	5	5
Vegetable (cups)	0	0	0	0
Grain/Bread (oz eq)	0-10[b,c]	7-10	8-10	9-10
Meat/Meat Alternates (oz eq)	0-10[c]	0[d]	0[d]	0[d]
Milk (cups)	5	5	5	5

[a] Requirements and recommendations are for meals as offered for a 5-day school week. Requirements are minimum portion sizes based on the Traditional Food-Based Menu Planning approach.

[b] Must be enriched or whole grain.

[c] Requirements call for two grains, two meats, or one of each

[d] Schools retain ability to substitute meat for grains. See Table 3, footnote k for additional detail.

Table 5: National School Lunch Program: Current Requirements Compared to Final Rule Requirements for a 5-Day School Week[a]

	Current Requirements: Traditional Food-Based Approach			Current Requirements: Enhanced Food-Based Approach			Final rule[e]		
Grade Levels	K-3[b]	4-12[b]	7-12[c,d]	K-3[b,d]	4-12[b]	7-12	K-5	6-8	9-12
Fruit (cups)	2.5[f]	3.75[f]	3.75[f]	3.75[f]	4.25[h]	5[f]	2.5	2.5	5
Vegetable (cups)							3.75	3.75	5
Dark Green	NS	NS	NS	NS	NS	NS	0.5	0.5	0.5
Orange	NS	NS	NS	NS	NS	NS	0.75	0.75	1.25
Legumes	NS	NS	NS	NS	NS	NS	0.5	0.5	0.5
Starchy	NS	NS	NS	NS	NS	NS	0.5	0.5	0.5
Other	NS	NS	NS	NS	NS	NS	0.5	0.5	0.75
Additional Veg to Reach Total	NS	NS	NS	NS	NS	NS	1	1	1.5
Grain/Bread (oz eq)	8 (min 1/day)[g]	8 (min 1/day)[g]	8 (min 1/day)[g]	10 (min 1/day)[g]	12 (min 1/day)[g]	15 (min 1/day)[g]	8-9	8-10	10-12
Meat/Meat Alternates (oz eq)	7.5	10	15	7.5	10	10	8-10	9-10	10-12
Milk (cups)	5	5	5	5	5	5	5	5	5

[a] Requirements and recommendations are for meals as offered for a 5-day school week.

[b] Minimum portion sizes.

[c] Recommended potion sizes for the Traditional Food-Based Menu Planning approach.

[d] Optional grade configuration.

[e] See Table 3 and Table 3 footnotes for additional detail. Final rule standards shown in this table are after full phase-in (SY 2014-2015).

[f] Two or more servings of fruit, vegetables, or both a day.

[g] Must be enriched or whole grain.

[h] Two or more servings of fruit, vegetables, or both a day, plus an extra half-cup over the 5-day school week.

III. Cost/Benefit Assessment

A. Summary

1. Costs

The final rule will more closely align school meal pattern requirements with the science-based recommendations of the 2005 and 2010 Dietary Guidelines. These changes will increase the amount of fruits, vegetables, and whole grains offered to participants in the NSLP and SBP.[7] The final rule meal patterns will also limit certain fats and reduce calories and sodium in school meals. Because some foods that meet these requirements are more expensive than foods served in the school meal programs today, the food cost component of preparing and serving school meals will increase.

The biggest contributors to this increase are the costs of serving more vegetables and more fruit, and replacing refined grains with whole grains. We estimate that food costs will increase by 2.5 cents per lunch served, as compared with prior requirements, on initial implementation of the final rule requirements. There is no immediate increase in breakfast food costs. Two years after implementation, when the fruit requirement is phased in for breakfast, and when all grains served at breakfast and lunch must be whole grain rich, we estimate that food costs will increase by 5 cents per lunch served and 14 cents per breakfast, as compared with prior requirements.[8] In aggregate, we estimate that the rule may increase SFA food costs by $1.6 billion from FY 2012 through FY 2016. The annual increase in food costs relative to current standards is estimated to be about $0.6 billion by FY 2015.

The rule sets sodium targets that will not be fully implemented in the five year period covered by this analysis. The rule's initial sodium targets take effect in SY 2014–2015. Our cost estimate does not include an explicit adjustment to meet those targets. The rule's initial sodium targets impose relatively modest reductions from levels observed in SY 2004–2005.[9] Our estimate assumes that schools will meet the rule's initial targets as they reformulate recipes to meet the rule's food group requirements; that cost is contained in our estimate's food group and labor components.

Compliance with this rule is likely to increase labor costs. Serving healthier school meals that are acceptable to students may require more on-site preparation, and less reliance on prepared foods. IOM did not estimate the overall required increase in labor costs to implement its recommended changes in meal requirements, but noted an analysis of data from some Minnesota school districts that showed that ''healthier'' meals had higher labor costs—principally because of increased use of on-site preparation.[10].

For purposes of this impact analysis, labor costs are assumed to grow so that they maintain a constant ratio with food costs, consistent with findings from a national study of school lunch and breakfast meal costs (USDA 2008). In practice, this suggests that food and labor costs may increase by nearly equal amounts relative to current costs. Additional costs of compliance with the rule are discussed in subsections III C and III D of this analysis.[11]

The estimated overall costs of compliance are summarized in Table 6. For purposes of this analysis, the rule is assumed to take effect on July 1, 2012, the start of school year (SY) 2012–2013. The additional requirement to offer only whole grain rich grain products is assumed to begin in SY 2014–2015.

The analysis estimates that total costs may increase by $3.2 billion through fiscal year (FY) 2016, or roughly 8 percent when the rule's food group requirements are fully implemented in FY 2015. The estimated increases in food and labor costs are equivalent to about 10 cents for each reimbursable school lunch and about 27 cents for each reimbursable breakfast in FY 2015. These costs would be incurred by the local and State agencies that control school food service accounts.

TABLE 6—PROJECTED COST OF FINAL RULE

[Dollars in Millions]

	Fiscal year					
	2012	2013	2014	2015	2016	Total
Food Costs	$20.8	$135.4	$178.7	$612.8	$642.8	$1,590.5
Labor Costs	20.7	141.9	174.4	598.0	627.2	1,562.3
State Agency Administrative Costs.	0.1	8.9	9.1	9.4	9.7	37.1
Total	$41.6	$286.2	$362.1	$1,220.2	$1,279.7	$3,189.9
Percent Change Over Baseline	2.0%	2.0%	2.5%	8.0%	8.1%	5.2%

[7] Although a separate rulemaking will propose changes to the meal patterns for preschoolers, this rule makes one significant change for that age/grade group. Section 202 of the Healthy Hunger-Free Kids Act (Pub. L. 11–296) requires that schools offer a variety of milk, and that the milk offered comply with the recommendations of the most recent *Dietary Guidelines.* Consistent with that statutory requirement, this rule requires that schools serve only fat-free and low-fat milk in school lunches and breakfasts. That requirement applies to meals served by schools to children ages 3–4 as well as to older children in grades K–12. Because low-fat and fat-free milk tend to cost less than milk with higher fat content, that change will have a small negative effect on the cost of meals served to pre-K children. In addition to that change, the rule requires that schools serving meals to pre-K children adopt food-based menu planning (FBMP) for consistency with the rule's FBMP requirement for meals served to older children. Because the switch to FBMP, where necessary, makes no substantive change to the pre-K meal requirements, our analysis assumes that this provision of the rule has no impact on the cost of serving meals to these children. More than ⅔ of elementary schools used traditional or enhanced FBMP in SY 2004–2005 (USDA 2008, vol. 1, p. 36) and would need to make no changes at all to comply with the rule's pre-K menu planning requirement. For elementary schools that serve meals to pre-K children using a nutrient based menu planning system, the rule would require a change to FBMP. But that change is required for meals served to older children as well, and the administrative cost of that change is incorporated into the labor cost estimate of this analysis.

[8] The 2.5 cent per lunch figure is an estimate for the end of FY 2012 (the start of SY 2012–2013). The higher numbers are for FY 2015.

[9] USDA 2008, volume 1, pp. 162 and 196.

[10] IOM 2009, p. 148.

[11] The SLBCS–II found that costs other than food and labor accounted for 9.9 percent of reported SFA costs. These costs include ''supplies, contract services, capital expenditures, indirect charges by the school district, *etc.*'' (USDA 2008, pp. 3–5).

2. Benefits

The primary benefit of this rule is to align the regulations with the requirements placed on schools under NSLA to ensure that meals are consistent with the goals of the most recent Dietary Guidelines and the Dietary Reference Intakes. In increasing access to children for such meals it will address key inconsistencies between the diets of school children and Dietary Guidelines by (1) Increasing servings of fruits and vegetables, (2) replacing refined-grain foods with whole-grain rich foods, and (3) replacing higher-fat dairy products with low-fat varieties. It also results in a number of additional benefits, including alignment between Federal program benefits and national nutrition policy, improved confidence by parents and families in the nutritional quality of school meals, and the contribution that improved school meals can make to the overall school nutrition environment.

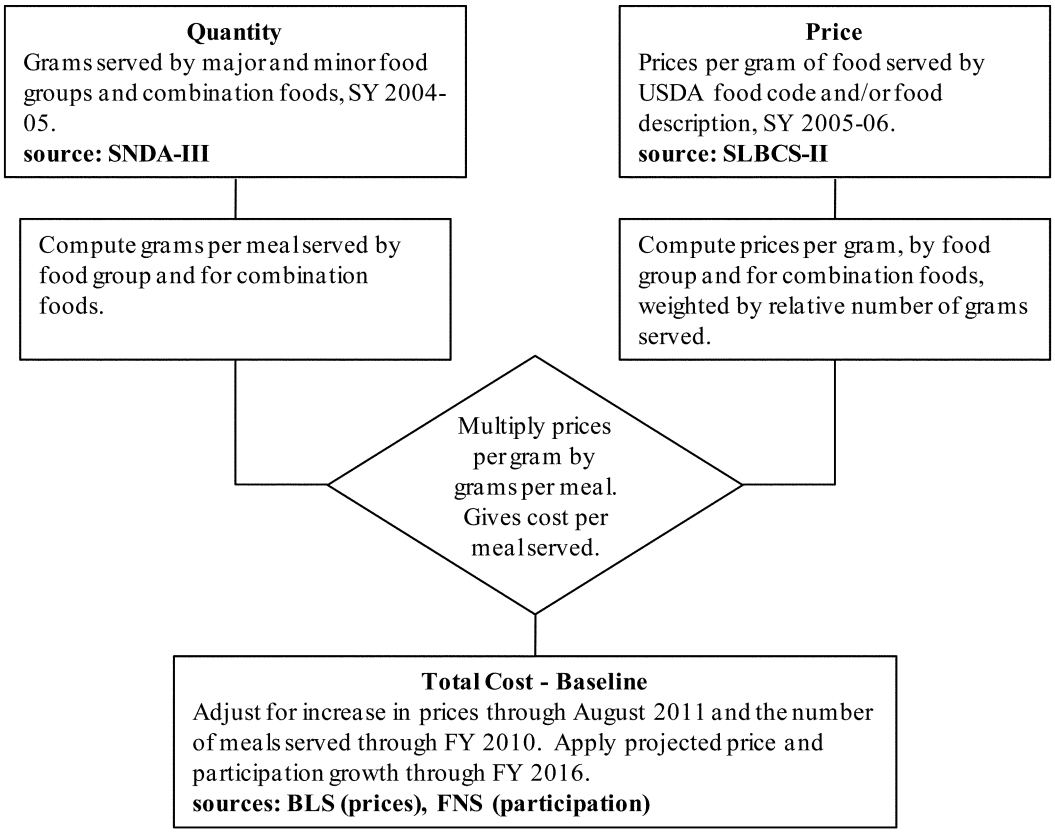
B. Food and Labor Costs

1. Baseline Cost Estimate

Food Costs: The analysis begins with an assessment of the cost of purchasing food to meet the rule's food-based meal requirements. The estimated increase in food cost is the difference between the cost of serving the quantities and types of foods used to meet current requirements and the cost of serving the quantities and types of foods outlined in the rule.

Figure 1: Baseline Food Cost Estimate Under Current Requirements and Practices

Objective: Use price and quantity data collected from schools to compute the total cost of NSLP and SBP meals served under current program rules.



The data sources that we use in this analysis, and their contribution to our food cost estimate, are summarized in Table 7.

TABLE 7—SUMMARY OF FOOD COST ESTIMATE DATA SOURCES

Data source	Contribution to food cost estimate
School Nutrition Dietary Assessment Study III (USDA 2007).	• Food codes and descriptions and food quantities served to students in SY 2004–05. Prices are applied to these food quantities to determine baseline food costs. • Meals served, quantities served, and quantities offered (''offer weights'') by food type, by school type (elementary, middle, and high). Used to determine students' inclinations to take an offered menu item (''take rates''). Take rates are applied to the types and quantities of food that must be offered to students under the rule to estimate quantities served.
School Lunch and Breakfast Cost Study II (USDA 2008).	• Food codes and descriptions, number of servings, average gram weight per serving, total grams served, cost per serving. These are used, along with other data sources, to estimate the cost per cup or ounce equivalent of each of the rule's required food types and combination entrées. • Also used to estimate the relative cost of food group subtypes: whole versus refined grain products, and the various vegetable varieties with separate serving requirements under the rule.

TABLE 7—SUMMARY OF FOOD COST ESTIMATE DATA SOURCES—Continued

Data source	Contribution to food cost estimate
USDA Child Nutrition Food Labels	• USDA food labels contain information on food group crediting for child nutrition program administrators. USDA maintains a collection of food labels for thousands of commercially-prepared entrees. Food group crediting information is used to determine the cup or ounce equivalents of meat, meat alternate, grain, vegetable, and fruit that may be credited by schools for a particular entrée. • Food group crediting is used to determine how much of the rule's food group requirements are satisfied by prepared foods offered by schools, and how much remains to be met with single food or non-entrée items.
USDA, National Food Service Management Institute, Recipe Database.	• The recipe database is used to supplement the information from USDA food labels. The recipe records, like the food labels, contain food group crediting information used to determine how much of the rule's food group requirements are satisfied by particular food items.
USDA Food Buying Guide	• The Food Buying Guide also contains information on food group crediting. The crediting information for various grain products is used in this estimate.
USDA, Agricultural Research Service, National Nutrient Database for Standard Reference, SR22.	• The SR22 is used to supplement the other food group crediting resources listed above. SR22 information was used to estimate food credits for food items without a CN food label, or a USDA recipe. SR22 provides protein and fiber content per given volume of a particular food. That information is used to estimate the food group credits for foods that are similar, but not identical, to foods with CN labels or USDA recipe records. • SR22 data is also used to compute the proper conversion factor from grams to cups for various school foods.
USDA, Agricultural Research Service, MyPyramid Equivalents Database for USDA Food Codes, Version 1.0.	• Used to determine the relative share of vegetables in combination foods and entrées by each of the varieties with separate serving requirements under the rule.
School Nutrition Dietary Assessment Study II (USDA 2001).	• Average food group crediting information for school salad bars is taken from SNDA–II.

We first totaled the value of food served by food group, as reported by schools in a national school nutrition assessment (SNDA–III), separately for lunch and breakfast. SNDA–III provides an estimate of the amount or quantity (in grams) of foods offered and served in the school lunch and breakfast programs for SY 2004–2005, based on a nationally representative sample of all participating public schools.[12] SNDA–III provides quantities of both minimally processed single foods (such as whole fruit, fruit juice, milk, and vegetables) and combination foods or entrees (such as beef stew, macaroni and cheese, and breakfast burritos). We summed the quantities of foods served to generate total gram weights for each single food and combination food category. We then divided these sums by SNDA–III's count of total meals served to generate average per-meal gram amounts for the same broad food categories.

We estimated the cost per gram within each food category using detailed price and quantity information collected as part of another nationally representative sample of public schools in SY 2005–2006 (SLBCS–II). SLBCS–II provides information on the number of servings, the average gram weight per serving, total grams served, and the cost per serving for a comprehensive list of single foods and combination entrees. The SLBCS–II dataset provides sufficient information to estimate weighted average prices for the same broad food categories identified in SNDA–III.

We computed preliminary per-meal baseline costs for breakfast and lunch as the product of the food quantities reported in SNDA–III and the unit prices computed from the SLBCS–II. Because the food prices available for this analysis are from SY 2005–2006, we inflated our estimates by the actual and projected increase in prices since that time. We computed a set of food group inflators weighted by SNDA–III's relative mix of foods served by schools in SY 2004–2005. We used the Consumer Price Index (CPI–U) for the specific food items in our weighted group averages. Because the mix of foods served in school breakfasts differs from the mix served at lunch (the grain group, for example, is weighted more heavily with bread at lunch, and more heavily with cereal at breakfast) we computed two sets of food group inflators. Through August 2011, these inflators are constructed with actual CPI values.[13] For years after 2011, the food group inflators rely on historic 7-year averages.

Our proposed rule analysis computed 5-year historic averages through FY 2009. Price inflation for most major food groups in the two years since FY 2009 was lower than inflation in the 5 years ending in September 2009. For our final rule cost analysis we use a 7-year average to project future prices. This 7-year average adds the most recent 2 years of price data to the 5 years used in the proposed rule methodology. We use a 7-year average, retaining all of the 5 years used in the proposed rule methodology, to avoid giving too much weight to the reduction in price inflation observed during the most recent two years, a period of weak economic growth and consumer demand. Use of a 5-year average ending in FY 2011 would produce a lower cost estimate than the one presented here.[14]

Food group inflation factors are summarized in Table 8.

[12] If patterns of student selection of foods are different in private schools than they are in public schools, then the reliance on public school data alone may bias our results. However, enrollment in public schools accounts for 97 percent of total enrollment in NSLP participating schools. Public schools account for more than 98 percent of total enrollment in SBP participating schools (USDA program data). Because public schools account for such a large share of total enrollment by participating schools, we expect that any differences in selection patterns between public and private schools would have little impact on our analysis.

[13] We used index values for the 11 months ending in August 2011 to estimate average index values for all of FY 2011.

[14] If, instead, we entirely discount the most recent two years of inflation, and instead used a 5-year average ending in FY 2009 to project future food prices, then our cost estimate would be higher. That scenario is discussed in Section F.

TABLE 8—FOOD GROUP PRICE INFLATORS [15]

	Cumulative increase 2006 to 2011 (percent)	*7-year Historic average (for years after 2011)* (percent)
Lunch inflators:		
—Milk	12.33	2.03
—Meat or Meat Alternate	17.54	2.75
—Fruit Juice	19.18	2.82
—Fruit (non-juice)	12.39	2.82
—Vegetables	18.52	3.97
—Refined and Whole Grains	25.16	3.85
—Combination Foods/Entrees	15.62	2.67
Breakfast inflators:		
—Milk	12.33	2.03
—Meat or Meat Alternate	16.52	2.63
—Fruit Juice	19.18	2.82
—Fruit (non-juice)	10.38	2.66
—Vegetables	19.81	4.83
—Refined and Whole Grains	17.39	2.50
—Combination Foods/Entrees	15.62	2.67

The value of USDA Foods and the value of cash in lieu of such food donations enters into both our baseline and final rule cost estimates; we treat them as food ''costs'' in both estimates. This is the same approach used in the SLBCS–II to estimate the cost of preparing and serving school meals.

We assume in the analysis that the types of commodities offered to schools in future years may satisfy the food group requirements of the final rule as effectively as they do now. USDA's annual commodity purchase plan, developed by FNS in consultation with the Agricultural Marketing Service and the Farm Service Agency, is driven by school demand for particular products as well as by current prices, available funds, and the variable nature of agricultural surpluses.[16]

In large measure, USDA Foods offered to schools are already well positioned to support the final rule's requirements. In recent years USDA has purchased relatively more canned foods and meats with reduced levels of fat, sodium, and sugar for school distribution. As products such as butter and shortening have been removed from the USDA Foods available to schools, new products such as whole grain pasta have been added. The rule is likely to move school demand towards a greater emphasis on these new offerings as schools introduce new menus. We assume that the contribution of USDA Foods to the cost of preparing school meals will not change after implementation of the rule.

The final step in constructing the baseline cost estimate was to multiply the per-meal cost estimates by the projected number of breakfasts and lunches served through our 5-year forecast period. Projected growth in the number of NSLP and SBP meals served in the absence of the rule is shown in Table 9.

TABLE 9—PROJECTED BASELINE GROWTH IN REIMBURSABLE MEALS SERVED [17]

	Fiscal year					
	2011	2012	2013	2014	2015	2016
Lunches:						
Meals (billions)	5.4	5.5	5.5	5.6	5.6	5.7
Percent change	2.4%	1.5%	1.2%	1.0%	0.8%	0.8%
Breakfasts:						
Meals (billions)	2.1	2.2	2.3	2.3	2.3	2.4
Percent change	6.8%	4.6%	3.0%	2.0%	1.5%	1.5%

Appendix A contains a set of tables that detail the calculations described above. The appendix tables present baseline and final rule food prices, food quantities, and meals served for each year from FY 2012 through FY 2016.

Note that our baseline per-meal cost estimates are averages. They reflect the variety of meals served across all NSLP and SBP participating schools. Some schools may be much closer than others to serving meals that meet the requirements of the rule, and the costs of compliance with the rule may therefore vary at the school level. The use of an average baseline cost estimate is appropriate, however, for estimating the aggregate cost of compliance across all schools.

[15] Computed by USDA from CPI figures from the Bureau of Labor Statistics. The figures for combination foods are based on the CPI values for the Food at Home series.

[16] For more information see *http://www.commodityfoods.usda.gov/fd_purchasing.htm.*

[17] The projected growth above in meals served through FY 2011 reflects the difference between FNS estimates for FY 2011 prepared for the 2012 President's Budget and actual meals served in FY 2010. The remaining percentages are FNS projections prepared for the FY 2012 President's Budget.

2. Final Rule Cost Estimate

Food Costs: Both our baseline and final rule food cost estimates rely on quantity and price information reported by schools in SNDA–III and SLBCS–II. These datasets contain detailed information on the quantity, variety, and unit prices of foods offered and served to students. Many of the records on these datasets describe single item foods that are served alone or are used in school recipes. But other records describe prepared or heat-and-serve entrees and other ''combination foods.'' As described above, we developed our baseline cost estimate by multiplying the gram weight of food items served by their cost per gram. For both single item foods and combination foods, prices and quantities are given in SLBCS–II and SNDA–III; our baseline cost estimate required limited processing of these datasets.

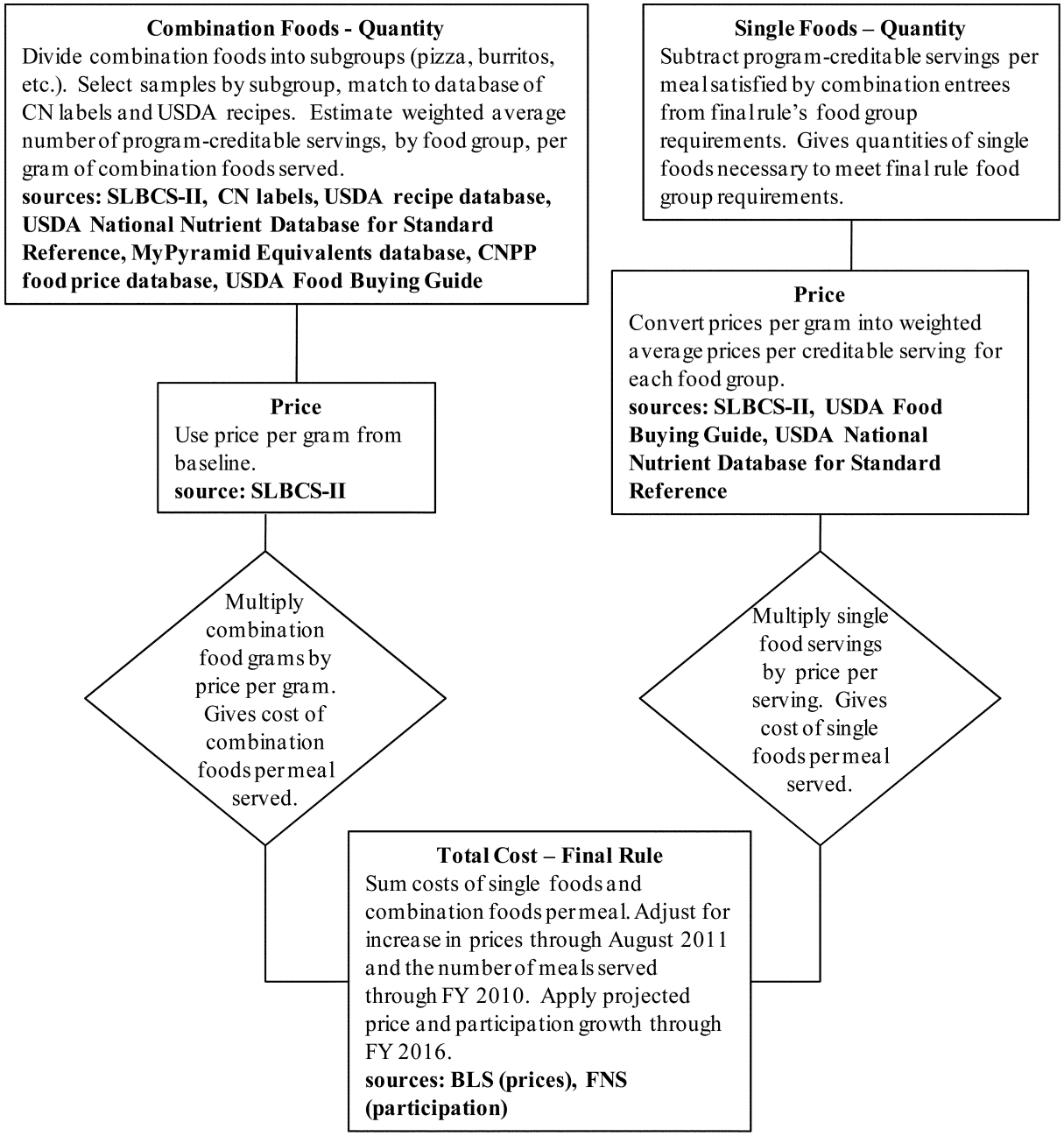
For the final rule cost estimate we continue to rely on prices per gram from SLBCS–II. But for quantities served we need to look to the requirements of the rule rather than to SNDA–III. We use the midpoints of the rule's food group requirements, expressed in servings rather than grams, to estimate the quantities of food that schools must purchase.[18] For single foods, the number of program-creditable food group servings per gram is a function of the foods themselves (density and fat content, for example) and whether the foods (primarily vegetables) are served raw or cooked. We relied on several sources for this information, including the *USDA Food Buying Guide* and the *National Nutrient Database for Standard Reference.* For combination foods we relied on the USDA's child nutrition food labels and the USDA's recipe database; these sources contain the result of analyses performed by food manufacturers and USDA. Because the sources for program-creditable servings per gram are different for single foods and combination foods, we need to separate single foods from combination foods and estimate their costs separately.

A basic assumption underlying the estimated cost of reimbursable meals under the final rule is that schools will continue to serve entrees that have proven popular with students on current school menus. Some of these entrees may be modified to replace a portion of their refined grains with whole grains, or starchy vegetables with other vegetable varieties. But, because pizza, burritos, and salad bars are successful items today, this impact analysis assumes that they will remain on school menus after implementation of the rule.

Figure 2: Food Costs Under Final Rule

Objective: Use price data collected from schools and new meal pattern requirements to estimate the cost of serving meals under the final rule.

[18] The rule's food group requirements are expressed in servings per week. Because we are developing an average cost per meal we divide these weekly figures by 5. Some of the rule's requirements are given in ranges of servings, such as 10–12 meat or meat alternate servings (for lunches) per high school child per week (see Table 3). FNS's primary cost estimate targets the midpoints of the rule's food group requirements where requirements are expressed as ranges.



We separated combination foods from single food items in the SNDA–III and SLBCS–II datasets.[19] Using USDA food codes and the descriptive food labels found on the records of both datasets, we divided the combination foods into sub-categories such as chili, beef dishes, lasagna, chicken sandwiches, macaroni and cheese, and peanut butter and jelly. Recognizing that there is variation within these groups, we selected a sample of the most commonly served varieties, and retrieved paper food labels with matching USDA food codes from USDA's Child Nutrition food label collection (CN labels).

CN labels are affixed to many of the commercially prepared and processed foods purchased by school food authorities. The labels provide information on serving size and the number of cup and ounce equivalents of meat, meat alternate (such as cheese, eggs, legumes, or soy protein), grains, or vegetables that schools may credit toward current reimbursable meal pattern requirements.[20] We averaged the crediting information for several varieties within each combination food category to generate representative food credits for the category.

CN labels are not available for some combination foods. However, foods with similar descriptions are often found in USDA's recipe database. The USDA recipe database provides the same type of food crediting information found on CN labels. We used the crediting information from the recipe database when CN labels were unavailable for sampled combination foods. FNS averaged the crediting information from labels and recipes when both sources returned data for particular combination foods.

[19] As with the baseline estimate, we prepared separate estimates of meals served under the final rule for breakfast and lunch.

[20] Many large commercial food vendors prepare their own CN labels to help market their foods to SFAs. Other labels are developed by USDA.

CN labels and USDA recipes do not indicate whether creditable grain servings are refined or whole grains, nor do they specify what fraction of creditable vegetable servings are satisfied by dark green, deep yellow, starchy, or other varieties. But, USDA's *MyPyramid* database breaks down total grain and vegetable content for given foods into those subcategories or varieties. We matched USDA food codes for the sample of combination foods against the *MyPyramid* database in order to estimate relative shares of whole and refined grains, and vegetable varieties for the combination foods served.[21]

With these average food credits, and with unit prices from the SLBCS–II, we estimated a price per creditable ounce or cup equivalent of meat, grain, vegetable, and fruit for each combination food served. We then computed a weighted average price per food credit for combination foods as a whole, using the SLBCS–II's relative gram weight of each item. Finally, we multiplied the average price and food credit per gram by SNDA–III's total gram weight of combination foods served per reimbursable meal at the elementary, middle, and high school levels.

These steps generate a price, and a set of food group credits, contributed by combination foods to the average elementary, middle, and high school lunch and breakfast.

We subtracted the food credits accrued by combination foods from a set of school-level food group targets that represent the requirements of the rule after adjustment for student selection. Under the final rule, as under current program rules, students need not take all of the food items offered to them in order for their lunch or breakfast to qualify for Federal reimbursement. The difference between what is offered to students and what they select is the ''take rate.'' We computed average take rates by school level for milk, meat/meat alternate, fruit, vegetables, and grains from SNDA–III and applied those rates, unchanged, to the final rule's food group requirements from Tables 4 and 5.[22]

These adjusted requirements are estimates of what elementary, middle, and high schools are likely to serve to students after implementation of the rule. The unadjusted requirements are what schools must offer to their students to be in compliance.

The take-rate adjusted requirements not satisfied by combination foods must be met with single offerings of meat or meat alternates, grains, fruit, vegetables, and milk. We computed weighted average prices for these broad food groups, and for dark green, deep yellow and other vegetable varieties, from the SLBCS–II dataset. We estimated the cost of whole grains relative to all grain and bread products with information contained in a food price database developed by USDA's Center for Nutrition Policy and Promotion. The prices per unit of these foods, multiplied by the balance of the rule's requirements that are not met by combination foods, give a total cost per meal for single item foods.

Note that this analytic framework uses an identical set of combination foods in the baseline and final rule cost estimates; we do not attempt to construct a reformulated set of combination foods to satisfy the rule's requirements for whole grains or dark green, yellow, and other vegetable varieties. The deficits in whole grains and in dark green and other vegetable varieties are satisfied entirely through increased offerings of single foods.[23] As a result, the cost per unit of combination foods served is unchanged in the baseline and under the final rule, and the entire cost of meeting the new rule's requirements is reflected in the cost of single foods.

In practice, we expect manufacturers will offer reformulated versions of popular combination foods, and that schools will incorporate more whole grains and vegetable varieties in their entree recipes, so that students will not be expected to consume all of their whole grains and healthier vegetables as single foods. Implicit in this modeling approach is the assumption that the cost of serving more whole grains and vegetable varieties is similar, whether those foods are part of combination recipes or single items. The reasoning behind this assumption is that the likely effect of these reformulations on the cost of combination foods is uncertain. While some varieties of combination foods may help schools meet the new requirements at lower cost than single foods, others may be developed to provide greater student acceptance or ease of preparation than single items. These products could command higher prices. We thus assume that, on average, these two propensities combine to result in no net difference in the cost of whole grains and vegetable varieties as combination foods or as single items.[24]

The final rule requires that no more than half of the fruit requirement be met with fruit juice because juice lacks fiber and may contribute to excessive calorie consumption. Schools may therefore find it necessary to offer more whole or cut-up fruit relative to fruit juice than they offer today. For this reason, this cost estimate assumes that the rule's entire increase in the fruit group requirement will be satisfied with additional servings of whole or cut-up fruit; the estimate assumes that schools will serve no more fruit juice to students under the final rule than they serve today. As a result, there is no added cost for fruit juice in Table 11.

The methodology outlined above generates a set of per-meal cost estimates for breakfast and lunch under the requirements of the final rule. Like our baseline estimates, these are multiplied by weighted food group inflation factors, then multiplied by the projected number of meals served to generate projected aggregate costs through FY 2016.

Labor costs: Compliance with this rule is also likely to increase labor costs because of the need for more on-site preparation, and less reliance on prepared foods, than current requirements. The challenge faced by schools in reducing the sodium content of school meals, one element of both the IOM recommendations and this rule, illustrates the need for additional labor hours by school kitchen staff.

More local food preparation and the use of a greater proportion of fresh foods and frozen vegetables could result in acceptable school meals with a lower sodium content. However, many food production kitchens are designed to heat and hold food items rather than to prepare them.[25]

In addition to the implied need for new kitchen equipment, IOM notes that

[21] Because CN crediting values and *MyPyramid* equivalents are not the same, information from the *MyPyramid* database was used only to determine *relative* shares of vegetable or grain subtypes. FNS also used the *MyPyramid* database to determine if particular combination foods contained *any* dark green vegetables, orange vegetables, *etc.*

[22] Our take rates are weighted averages computed from all school level records on SNDA–III. SNDA data allows the computation of take rates for single food items and combination entrees. We use estimates of the component foods contained in combination entrees to estimate overall take rates for each of the final rule's food groups, whether those foods are served separately or as part of a combination entrée. We cap individual school take rates for any food group at 100%. We assume that these take rates remain unchanged after implementation of the rule for two primary reasons: lack of an evidence-based alternative, and to avoid understating the costs of the rule.

[23] The amount of refined grains in combination foods in excess of final rule requirements are offset by subtracting the value of an equivalent amount of single food refined grain products from the rule's per-meal cost.

[24] Note that we are only referring to the incremental cost of foods above the quantities already purchased by schools (singly or in combination items), not the overall cost of all foods in the final rule's meal patterns.

[25] IOM 2009, p. 110.

''switching from heat and hold to food production requires the addition of staff. Those districts that estimate meals per labor hour (MPLH) to monitor productivity may see an unfavorable decrease in their numbers.'' [26]

If schools choose to prepare more meals on-site to meet new requirements, IOM sees the need for ''greater managerial skill,'' and ''more skilled labor and/or training.'' [27] At the same time, lesser reliance on prepared foods offers some opportunity for offsetting savings.

An empirical analysis of data from 330 Minnesota school districts found that ''healthier'' meals had higher labor costs (for on-site preparation) but lower costs for processed foods (Wagner, *et al.,* 2007). The authors call for funds to be made available for labor training and kitchen upgrades. They suggest that higher federal meal reimbursement rates may be unnecessary (under the assumption that the meals do not cost more to produce because lower food costs offset higher labor costs).[28]

The effect of the final rule's meal requirements on the mix of food and labor costs is unclear. The rule requires schools to offer relatively more foods with higher unit costs than schools now offer to their students. The rule requires, for example, that schools replace many of their refined grain foods with whole grain substitutes. Because prices for whole grain products tend to exceed the prices of similar products made with refined grains, savings from eliminating a particular refined grain product is more than offset by the cost of its whole grain counterpart. Where pre-baked whole grain foods are simply substituted for pre-baked refined grain products, or whole grain flour is substituted for refined flour in existing recipes, the added cost of serving these new foods is strictly a food cost; labor costs may not increase at all.

But the rule includes other provisions that are likely to increase both food and labor costs. One is the requirement that schools offer more vegetables, from a variety of vegetable subgroups, than schools tend to offer today. Some schools may choose to meet those targets by offering vegetables in school salad bars. It is possible that the cost of installing and maintaining a salad bar could increase the overall cost of school meal production. Similarly, to meet the rule's calorie and fat requirements, schools may find it necessary to rely less on pre-purchased entrees, and hire more central kitchen or cafeteria workers to prepare healthier meals from scratch.

SLBCS–II data show that the cost of purchasing food accounted for 45.6 percent of SFA reported costs, on average. Labor accounted for an additional 44.5 percent of reported SFA costs. The remaining 9.9 percent of reported costs are attributable to ''supplies, contract services, capital expenditures, indirect charges by the school district, etc.'' [29] Labor costs are broadly defined in the SLBCS–II to include the costs of foodservice administrative tasks such as planning, budgeting, and management, and foodservice equipment maintenance.[30] Some of these tasks are detailed in section III.C.1. These tasks include training food preparation staff, servers, and cashiers. They also include the work of individuals who plan menus and prepare recipes.

For purposes of this analysis, we assume that the relative contributions of food and labor to the total cost of preparing reimbursable school meals will remain fixed at the levels observed in the SLBCS–II. As a result, we estimate that labor costs increase on a nearly dollar for dollar basis with estimated food costs.[31] We estimate that the rule may increase schools' food costs by about 8 percent by FY 2015. Although labor costs relative to food costs have held steady over many years,[32] this approach may overstate labor costs. We explore the potential effect of labor costs growing at a somewhat lower rate in section F.

Food and Labor Cost Summary: Table 10 summarizes the estimated increase in food and labor costs associated with the final rule through FY 2016.[33] (The final two rows of Table 10 also include the estimated administrative costs to State agencies.) Overall, we estimate that the rule may increase the total cost of reimbursable school meals by $3.2 billion over five years; the cost of food would increase by $1.6 billion, and the cost of labor would increase by $1.6 billion. In the first year of full implementation (FY 2015),[34] the combined cost of food and labor is expected to be about 8 percent higher under the final rule than under existing requirements. The estimated additional cost of food for a reimbursable lunch increases from about 2.5 cents in FY 2012 to 5.4 cents in FY 2016; food costs for a reimbursable breakfast grow to 14.1 cents in FY 2016. These per meal increases roughly double—to 11 cents and 28 cents by FY 2016—when the estimated cost of labor is included.

[26] Ibid.

[27] IOM 2009, p. 148.

[28] Ibid.

[29] USDA 2008, p. 3–5

[30] USDA 2008, p. 3–9

[31] The estimates contained in this analysis assume labor costs equal to food costs multiplied by (44.5/45.6), the ratio of reported labor to food costs in the SLBCS–II.

[32] Labor costs as a share of the total costs of preparing school meals were found to be 43.8 percent in FNS's SY 1992–1993 School Lunch and Breakfast Cost Study I, and 44.5 percent in the SY 2005–2006 School Lunch and Breakfast Cost Study II (a statistically insignificant difference). Food costs as a percent of total costs grew slightly from 45.6 percent in SY 1992–1993 to 48.3 percent in SY 2005–2006. But this change, too, is statistically insignificant. USDA 2008, p. 9–2.

[33] The new standards will take effect at the start of SY 2012–2013. Because the 2012–2013 school year begins in July 2012, there is just a small cost in Federal FY 2012. Note that these figures assume no effect on student participation. We discuss the possible effects of the rule on student participation in section III.F. We examine the effect of alternate participation assumptions in section F.

[34] Two years after implementation of the rule, in SY 2014–2015, all grains servings offered to meet meal pattern requirements must be whole grain rich. The new minimum fruit requirement at breakfast also takes effect in SY 2014–2015; this is the last of the rule's major changes to the breakfast meal patterns.

Table 10: Food and Labor Cost Summary

	Fiscal Year					
	2012	2013	2014	2015	2016	Total
Food Costs						
Lunch						
Total Cost (millions)	$21.2	$145.4	$174.2	$291.4	$308.2	**$940.4**
Per Meal	0.025	0.026	0.031	0.052	0.054	
Breakfast						
Total Cost (millions)	-$0.4	-$10.0	$4.5	$321.4	$334.6	**$650.1**
Per Meal	-0.001	-0.004	0.002	0.138	0.141	
Lunch + Breakfast						
Total Cost (millions)	$20.8	$135.4	$178.7	$612.8	$642.8	**$1,590.5**
Per Meal	0.017	0.017	0.023	0.077	0.080	
Food + Labor Costs						
Lunch						
Total Cost (millions)	$41.9	$287.3	$344.2	$575.7	$609.0	**$1,858.1**
Per Meal	0.049	0.052	0.062	0.102	0.107	
Breakfast						
Total Cost (millions)	-$0.4	-$10.0	$8.8	$635.1	$661.0	**$1,294.7**
Per Meal	-0.001	-0.004	0.004	0.272	0.279	
Lunch + Breakfast						
Total Cost (millions)	$41.5	$277.3	$353.1	$1,210.9	$1,270.0	**$3,152.8**
Per Meal	0.035	0.036	0.045	0.152	0.158	
Food + Labor + State Administrative Costs						
Lunch + Breakfast						
Total Cost (millions)	$41.6	$286.2	$362.1	$1,220.2	$1,279.7	**$3,189.9**
Per Meal	0.035	0.037	0.046	0.153	0.159	

3. Food Cost Drivers

Table 11 provides a breakdown in the estimated food costs of the final rule by seven broad food categories. Consistent with the Dietary Guidelines, the rule will require schools to offer more fruits, vegetables, and whole grains than they currently offer today.

Changes in school demand also impact food producers. The figures in Table 11 indicate that the economic costs and benefits of the rule may not be shared equally by producer groups.

Table 11: Estimated Food Costs by Food Category (dollars in millions)

Food group	Fiscal Year					
	2012	2013	2014	2015	2016	Total
Milk	-$4.5	-$30.0	-$30.9	-$31.8	-$32.7	**-$130.0**
Meat or Meat Alternate	-25.4	-169.0	-175.3	-181.6	-188.1	**-739.4**
Fruit Juice	0.0	0.0	0.0	0.0	0.0	**0.0**
Fruit (non-juice)	0.5	3.1	46.9	294.9	307.2	**652.6**
Vegetables	75.8	510.5	533.9	547.0	573.0	**2,240.2**
Refined Grains	-80.0	-569.6	-888.9	-1,569.2	-1,639.5	**-4,747.1**
Whole Grains	54.5	390.4	693.0	1,553.5	1,622.8	**4,314.3**
Total Cost of Rule	**$20.8**	**$135.4**	**$178.7**	**$612.8**	**$642.8**	**$1,590.5**

Milk: This impact analysis estimates that the amount of milk served to students will not change after implementation of the rule.[35] However, the rule does require schools to serve only low-fat or fat-free milk in the school meals programs.[36] Because the per-unit cost of low-fat and fat-free milk is less than the average per-unit cost of the mix of milk products now served in schools, the estimated cost of serving milk under the rule is reduced. Some comments on the proposed rule noted that schools had already made the transition to fat-free and low-fat milk, and that there would be no savings as a result of this provision. We discuss this and other comments in Section E.

Fruit Juice: The estimate assumes that schools will satisfy the rule's increased fruit requirement entirely through additional servings of whole or cut-up fruit, not fruit juice. We expect that schools will have to encourage consumption of additional whole or cut-up fruit in order to satisfy this requirement. The cost estimate assumes that the amount of fruit juice served to students will not increase above the levels assumed in the baseline estimate. As a result, the relative share of whole or cut-up fruit to fruit juice servings offered to (and taken by) students will increase after implementation of the rule.

Grains: The rule initially requires that half of grains offered to students be whole grain rich. Beginning in SY 2014–2015, the rule requires that all grains served be whole grain rich. This transition is reflected in the large changes in both the whole grain and refined grain figures between FY 2014 and FY 2016.

This analysis estimates that the total amount of grain products served will be less after implementation of the final rule than the amount served in our baseline (the per-meal amount taken by students according to SNDA–III). The effect of this net reduction in total grains served is reflected in figures for fiscal years 2012 to 2014, where the cost decrease for refined grains is substantially greater than the cost increase for whole grains. Throughout the estimation period, we assume that the unit cost of whole grains exceeds the unit cost of comparable refined grain products. Despite this, the net reduction in total grain products served through FY 2014 more than offsets the increased unit cost of whole grains. After FY 2014, when the rule's 100 percent whole grain rich requirement takes effect, the added cost of serving higher priced whole grain products about equals the savings from a reduction in grains products served.

4. Comparison of FNS and IOM Cost Estimates

IOM prepared its own food cost estimate for its recommended meal pattern changes. The methodology behind that estimate is discussed in *School Meals: Building Blocks for Healthy Children* (IOM 2009). While IOM relies on SLBCS–II and SNDA–III, the same primary sources used by FNS, to estimate unit costs and baseline quantities served, its methodology differs from ours in several ways.

Perhaps the most significant difference is in the establishment of baselines. We used all records on the SNDA–III dataset to estimate baseline quantities of food served and student take rates. IOM limited its analysis to a set of six representative baseline menus selected from the SNDA–III dataset. IOM selected one 5-day lunch menu and one 5-day breakfast menu for each of three age-grade groups (elementary, middle, and high school) at random from a subset that excluded practices identified as uncommon.[37] The goal of both methodologies is to estimate a baseline food cost representative of all schools that participate in the Federal school meals programs. We have not attempted to isolate and quantify the effect of this methodological difference on our cost estimates. Another important difference between the IOM and FNS estimates is our use of different student take rates in preparing food cost estimates for the recommended meal patterns. We computed take rates from SNDA–III and applied them, largely unchanged, to the food group serving requirements of the final rule.[38] We do not increase take rates in anticipation of greater demand for better meals, nor reduce take rates in anticipation of a decline in student acceptance of new vegetable varieties, whole grains, or low fat milk relative to the starchy

[35] See section F. for an examination of the cost implications of altering this assumption.

[36] This provision is required by Section 202 of the HHFKA and has already taken effect. Through implementation memo SP–29—2011, dated April 14, 2011, schools were required to offer a variety of milk that meets *Dietary Guidelines* recommendations. The USDA implementation memo clarifies that schools must offer at least two fat-free or low-fat (1 percent milkfat) varieties effective with the start of SY 2011–2012. This final rule includes the additional requirement that flavored milk be offered in fat-free form only.

[37] IOM excluded menus that did not offer a reduced fat or fat free unflavored milk, offered only one entree, offered 15 or more entree options, offered juice drinks rather than 100% fruit juice, or offered dessert every day. IOM 2009, p. 307

[38] FNS caps individual school take rates at the food group category to 100 percent. We also attempt to include the contribution of component foods in combination entrees in our estimates of take rates for the major food groups (fruit, milk, vegetables, grains, and meat/meat alternates).

vegetables, refined grains, and higher fat milk on current school menus.[39] IOM modified observed take rates from SNDA–III where the expert judgment of committee members and school meal practitioners deemed it appropriate.[40] Additional differences in FNS and IOM take rates can be attributed to IOM's use of six representative school menus in its analysis; IOM computed its take rates from those schools alone. FNS take rates are computed from all schools on the SNDA–III dataset.

C. Administrative Impact

1. School Food Authorities (SFA)

An initial increase in administrative staff time for training and implementation is anticipated at the SFA level. Most of these impacts will be limited to the transition to the rule's new requirements as a result of:

- Training staff on the required components of reimbursable lunches and breakfasts;
- Changes to menus and portion size may necessitate revisions to menus and recipes currently used by SFAs;
- Changes to food purchasing and commodity food use (for example, increasing purchases for fresh fruit and vegetables, whole grain products, and lower sodium products), as well as changes in the methods of preparation of food, may be necessary for many schools;
- Changes in SFA financial structure, as SFAs may need to review finances in order to determine how to deal with any cost changes associated with the rule's requirements;
- Forging new relationships with local farmers to supply fresh produce appealing to the tastes of school children; and
- Modifying a la carte foods and other foods at school to maintain NSLP and SBP participation rates.

The rule also increases the scope of State Agency administrative reviews of SFAs by combining the current Coordinated Review Effort (CRE) with the requirements of School Meals Initiative (SMI) reviews, and increases their frequency to once every three years. SFAs that previously held separate CREs and SMIs may experience a decrease in burden, because they will undergo just one State Agency administrative review every three years, rather than two reviews (one CRE and one SMI) every five years.

FNS expects these additional burdens on SFA staff time and budgets may be offset by other benefits. For instance, new age/grade groupings would require school districts to offer different portion sizes instead of the same portions to all ages/grades. While this could be an additional burden to some SFAs, it could also reduce plate waste with use of more appropriate age/grade groupings. Moreover, it is expected that, as food service workers gain experience and become comfortable with the new requirements, administrative efforts associated with implementation may decline. Therefore, although an initial administrative impact is anticipated, FNS does not expect any significant long-term increase in administrative burden.

2. State Agencies

State Child Nutrition Agencies (SAs) play a key role in the implementation of school meal programs through their agreements and partnership with local SFAs. FNS anticipates that SAs that administer the school meals programs will work closely with SFAs to meet the requirements of the rule, and to remove barriers that may hinder compliance.

Many changes associated with implementation of the rule may result in an increased burden and additional required level of effort from States, such as:

- *Training and technical assistance:* SAs will provide training and technical assistance to SFAs on new calorie and meal pattern requirements, age/grade groupings, and revised nutrient requirements. Moving to a single, food-based menu planning system may simplify the meal service for some schools and will likely streamline the meal planning process, but may require initial training to accomplish.

Although SAs may meet most of this demand by modifying current training and technical assistance efforts, we recognize that SAs may incur additional costs assisting SFAs with the transition to the final rule requirements. Our cost estimate provides for an additional 80 hours per SA in each of fiscal years 2012 and 2013, for a total of $0.2 million.

- *Systems assistance:* SAs may assist SFAs with any changes in the meal planning process occurring as a result of this rule. This is included in our $0.2 million estimate for training and technical assistance.
- *Food procurement and preparation:* More fruits, vegetables, whole grains, and foods that are lower in sodium may be necessary to align meals with the new meal patterns. SAs may also review SFA contracts with food service management companies (FSMCs). We have not estimated this cost, but expect that it will be small.
- *Monitoring and compliance:* SAs will be required to conduct administrative reviews (formerly CREs and SMIs) more frequently, once every 3 years for each SFA beginning in SY 2013–2014. Nutrient analysis will be required for all SFAs and will become an additional component of each review (separate SMIs will be eliminated). Nutrient-based menus will be eliminated and only food-based menu planning will be permitted. The final rule drops the proposed rule requirement to require administrative reviews to cover two weeks of menus and production records; instead, the final rule keeps the current one week review requirement. The final rule, like the proposed rule, would include breakfast in SA administrative reviews.[41]

SAs are currently required to conduct a CRE for each SFA once every 5 years; to conduct a nutrient analysis via SMI review for only those SFAs with food-based menu planning systems (although approximately 30 percent of these SFAs elect to conduct the nutrient analysis themselves); to review menus from a one-week period preceding the review date; and to review a breakfast meal only in the case of a follow-up CRE (which is only conducted in those cases in which problems are noted in the initial CRE). Total costs for each SA to complete a CRE include costs for staff labor, travel (including transportation, accommodations, and meals/incidental expenses), and possible printing costs for those SAs that provide CRE results to SFAs and FNS in hard copy rather than electronically.

Limited discussion with a small number of SA and FNS Regional Office officials suggest that a typical CRE or SMI review costs about $2,000 in 2010, with about half of that cost used for staff travel. Because travel is a largely fixed cost, SAs that previously conducted separate CRE and SMI reviews should realize some savings once SMIs are ended and the nutrient analysis is made part of the consolidated administrative review. That may help offset some of the cost of increased review frequency. A mid-sized State that now conducts 100 CRE reviews might incur annual

[39] As discussed elsewhere in this impact analysis, our take rate assumptions are intended to avoid understating the cost of the rule given the uncertain response of both students and school foodservice workers to the new meal pattern requirements. We test the cost implications of adopting different take rates in section F.

[40] IOM 2009, p. 136.

[41] FNS estimated in 1994 that extending the SFA review cycle from four to five years would decrease costs associated with this effort by 20 percent. (June 10, 1994, **Federal Register** Vol. 59, No. 111, p. 30234) A similar, but opposite, effect might be expected from shortening the cycle from five to three years.

expenses of $200,000. Under the final rule, that SA could expect to conduct ⅔ more administrative reviews, or roughly 167 per year. If we assume conservatively that the SA realizes no savings from elimination of SMI reviews, its review costs would increase by $134,000 per year—an upper-bound estimate. If all SAs incurred this same expense, the total cost would be roughly $8 million per year by FY 2013.

3. USDA/FNS

FNS will assist State Agencies by providing nutrition education, training, guidance, and technical assistance to facilitate their work with local school food professionals. This may include developing training standards, materials, updated measures for nutrition analysis, and revisions to the food buying guide.

While we expect a small increase in administrative burden for FNS under the rule because of the need to provide additional training and technical assistance to SAs, and to support their role in the administrative review process, this may largely be met by adapting existing efforts to the new requirements.

D. Food Service Equipment

Changes in meal pattern requirements may require some SFAs to replace or purchase additional foodservice equipment. For example, some SFAs may need to replace fryers with ovens or steamers. In FY 2009, FNS solicited requests from SFAs for food service equipment grants. In response to its solicitation, FNS received a total of approximately $600 million in grant requests from SFAs. FNS awarded grants for such purposes totaling $125 million, using $100 million from funds provided by the 2009 American Recovery and Reinvestment Act (ARRA) and $25 million provided by the FY 2010 Agriculture Appropriations Act. The strong response to these grant programs indicates that schools could make productive use of an even greater investment in kitchen equipment. FNS awarded grants for such purposes totaling $125 million, using $100 million from funds provided by the 2009 American Recovery and Reinvestment Act (ARRA) and $25 million provided by the FY 2010 Agriculture Appropriations Act. However, much of that demand is associated with the routine need to replace equipment that is nearing the end of its useful life—a cost that is appropriately covered by USDA meal reimbursements and other sources of food service revenue. Although some schools may need additional upgrades to prepare meals that meet the new standards, we do not have the data necessary to assess that need or to estimate the associated cost. The $125 million in kitchen equipment grants distributed to schools through ARRA funds and the FY 2010 appropriation should have addressed much of the most pressing need. For these reasons, we do not include additional incremental equipment costs in our final rule estimate.

Our decision not to include an additional equipment cost in our proposed rule estimate generated comments from school officials and foodservice industry representatives. Those comments do not provide enough information on which to base a reliable estimate of the need for additional kitchen equipment as a result of the rule. The comments confirm that the need, where it exists, will vary significantly. Although we cannot reliably estimate the aggregate cost of meeting the need for additional equipment, we provide one estimate in the Section F below. Additional detail on the comments received from schools and the foodservice industry on this point is discussed in Section E.

E. Comments on Proposed Rule

As noted in the preamble to the final rule, USDA received more than 130,000 comments on the proposed rule. Comments on the content of the rule itself are discussed in the preamble. Other comments, addressed specifically to the proposed rule's impact analysis, are discussed here.

a. Proposed Rule is Too Costly

Many commenters expressed concern that the proposed rule was too costly. Schools and school districts would not be able to meet the proposed rule's meal standards without additional resources from Federal, State, or local governments. Some of these commenters noted that the cost of the proposed rule exceeded the 6 cents per lunch that would follow adoption of the new meal requirements. Many also noted that State and local governments were not in a position to provide school districts with additional funding. The result, some commenters warned, was that schools might stop serving reimbursable breakfasts under the SBP. Other commenters suggested that schools might even stop serving reimbursable NSLP lunches.

In response to these comments, the final rule modifies the proposed rule's meal pattern requirements. The effect of those modifications is to reduce the cost to schools and SFAs of implementing the rule. The modifications are discussed in detail in the rule, and summarized in Section II of this impact analysis. The modifications offer schools short term savings, relative to the proposed rule, by phasing in the rule's breakfast fruit and grain requirements. As a result of elimination of the proposed rule's breakfast meat requirement, the ongoing cost of the final rule after full implementation is also reduced.

Eliminating the proposed limit on the amount of starchy vegetables that schools may offer at lunch has little effect on the cost of the final rule relative to the proposed rule. Significant savings are realized through a reduction in the lunch pattern's grain requirement.

Part of the difference in the estimated 5-year costs of the proposed and final rules is due to lower projected food cost inflation and increased student participation since preparation of the proposed rule estimate. To facilitate comparison of the estimated costs of the proposed and final rules, we prepared two estimates of the final rule's provisions. The first uses the most current food inflation and student participation figures; this is our primary estimate summarized in Table 6. The second applies the same food inflation and student participation estimates that we used in our proposed rule cost estimate. That is, we use the projections of food inflation for years after FY 2009 that we developed for the proposed rule. (Our primary estimate for the final rule uses actual inflation through August 2011, and an updated projection for years after FY 2011.) The difference between this second estimate and the estimated cost of the proposed rule provides a more direct measure of the reduction in cost due to changes in the content of the proposed and final rules. Using that difference as our basis of comparison, the final rule reduces costs over the first 5 years by almost $3 billion, or 44 percent, as compared to the proposed rule.

TABLE 12—REDUCTION IN ESTIMATED COST OF FINAL RULE RELATIVE TO PROPOSED RULE

	Fiscal year					
	2012	2013	2014	2015	2016	Total
Proposed rule	$181.5	$1,246.8	$1,401.9	$1,923.8	$2,041.3	$6,795.2
Final rule—primary estimate	41.6	286.2	362.1	1,220.2	1,279.7	3,189.9
Difference	−139.8	−960.6	−1,039.7	−703.6	−761.6	−3,605.3
Proposed rule	$181.5	$1,246.8	$1,401.9	$1,923.8	$2,041.3	$6,795.2
Final rule—with proposed rule inflation and participation estimates	53.5	376.0	474.8	1,419.0	1,511.1	3,834.5
Difference	−127.9	−870.6	− 927.0	−504.8	−530.2	−2,960.7

In response to comments that an additional 6 cents per reimbursable lunch [42] falls short of our estimated per meal cost of the proposed rule, we point out that the HHFKA contains a comprehensive package of school lunch and breakfast reforms. These reforms are intended to both increase the quality of school meals and competitive school foods offered to students, and to address financial and funding issues. These latter provisions are expected to increase the amount of revenue generated by SFAs while eliminating the subsidization of paid lunches and non-program foods with Federal funds meant to support reimbursable meals generally, and meals served to free and reduced-price eligible children in particular. The impact analysis contained in the interim final rule prepared for Sections 205 and 206 of HHFKA estimates that those provisions will increase SFA revenues by $7.5 billion through FY 2015.[43] HHFKA section 205 is designed to gradually reduce the disparity in per-meal school revenue from reimbursable paid lunches relative to the per-meal Federal reimbursement for free lunches. Section 206 requires schools to increase the share of SFA revenue generated by nonprogram foods to a level at least as great as nonprogram food's contribution to total SFA food costs.

b. Costs Are Understated

Some commenters felt that the cost estimate presented in the proposed rule is understated. As we describe in Section III.B.2., our methodology relies primarily on data collected by USDA in SNDA–III to estimate the types and quantities of food offered by schools to program participants. SNDA–III collected information from schools in SY 2004–2005. We believe that our use of the data from that study, which is several years old, presents a greater risk of overstatement than understatement of the cost of the rule, holding other factors constant. The Dietary Guidelines Advisory Committee completed its 2005 report in August 2004, just as SY 2004–2005 began. The 2005 Dietary Guidelines policy document was released by the U.S. Department of Health and Human Services and USDA in January 2005. These documents were released as SNDA–III data was being collected—too soon for substantial changes prompted by the Dietary Guidelines to be reflected in meals offered to students.

In the years since data was collected for SNDA–III, schools and USDA have taken steps to bring school meals into closer compliance with the 2005 Dietary Guidelines. One example, cited by IOM, is the recent improvement in USDA Foods offered to schools through the USDA's commodity programs.[44] These changes provide schools with an increased variety of whole grain, low fat, and low sodium products for use in healthier school meals. Other changes have been initiated by schools. The School Nutrition Association's 2010 ''Back to School Trends Report'' highlights some of the most recent changes that schools are making in anticipation of new Federal standards: [45]

95% of schools districts are increasing offerings of whole grain products.

90.5% are increasing availability of fresh fruits/vegetables.

69% of districts are reducing or eliminating sodium in foods.

66% of districts are reducing or limiting added sugar.

51% of districts are increasing vegetarian options.[46]

Our use of SNDA–III data means that our cost estimate does not reflect the most recent progress that schools have made toward adoption of Dietary Guidelines recommendations. At least one non-profit organization offered a comment on the proposed rule that concurs with that assessment. The commenter's primary point was that we overstate the savings from replacing more expensive high fat milk with less expensive low fat and fat free varieties; the commenter notes that many schools have already made that transition. We acknowledge that the potential savings of the final rule's milk provision may be overstated in our cost estimate. But that savings is potentially overstated for the same reason that the costs of meeting the rule's other food group requirements may be overstated. Schools have taken recent steps to adopt Dietary Guidelines recommendations on vegetables, fruit, whole grains, and sodium; schools' gradual adoption of Dietary Guidelines recommendations has not been limited to milk. Because our projected savings from the rule's milk provision is much lower than our projected cost of the rule's vegetable, fruit, and whole grains provisions, we believe that the risk that we overstate the cost of the rule exceeds the risk that we understate its cost.

c. Analysis Does Not Capture Full Effect of Recent Food Inflation

Some commenters argued that we understated or did not adequately account for food inflation in our proposed rule cost estimate. Both our proposed and final rule cost estimates use food group specific inflation figures from the BLS to estimate current year prices (FY 2011 prices for the final rule analysis) from a set of baseline prices paid by schools in SY 2005–2006 (taken from the SLBCS–II). Both analyses use

[42] Section 201 of HHFKA provides an additional 6 cents to schools for each NSLP lunch that meets this rule's meal pattern requirements.

[43] **Federal Register,** Vol. 76, No. 117, pp. 35301–35318.

[44] ''The [USDA] Commodity Program has made substantial improvements in its offerings in recent years to become better aligned with *Dietary Guidelines for Americans* and to be more responsive to its 'customers.' '' (IOM 2009, p. 188)

[45] This is just a summary of recent changes adopted by schools. Schools have been moving toward 2005 *Dietary Guidelines* standards over several years.

[46] Figures taken from the SNA's Web site (*http://www.schoolnutrition.org/Content.aspx?id=6926,* accessed 10/10/11).

those current year estimates to project prices through FY 2016.

In our final rule estimate we use a 7-year historic average of food inflation, by food group, to project prices. Our proposed rule estimate used a 5-year historic average to inflate food costs. In developing our final rule estimate we recognized that actual food price inflation since we prepared our proposed rule estimate was substantially lower than inflation over the previous 5 years. We adopted a 7-year historic average in our final rule cost projections in order to temper the effects of relatively low recent food price inflation. This yields a slightly higher estimate for our final rule than we would have gotten had we used an updated 5-year average projection factor. We do this to avoid the risk of understating the cost of the final rule.

d. Analysis Does Not Account for Higher Costs of Healthier Foods

Some commenters referred specifically to the higher costs of whole grains and vegetables emphasized by the rule. Others referred to the additional costs necessary to produce low-sodium school meals. We address these separately.

Higher Prices for Food Groups Emphasized by the Rule

Our proposed rule and final rule cost estimates develop separate prices for each of the food subgroups with specific standards in the rule. For example, we estimate separate prices for whole grains and refined grains, for whole fruit and fruit juice, and for the dark green, red-orange, starchy, and ''other'' vegetable subgroups. In each of these cases, we estimate higher unit prices for the food subgroups emphasized by the rule. In some cases the price premium for these food subgroups may reflect lower supply in the school food marketplace. As industry increases the supply of these products in response to higher school demand, economies of scale may reduce their cost. Our cost estimates for both the proposed and final rules discount the possibility that prices for these foods may moderate over time. Again, we do this to avoid understating the cost of the rule.

Added Cost of Producing Meals With Less Sodium

The proposed rule's first intermediate sodium targets were designed to be met by schools through menu and recipe changes using currently available foods. The proposed rule's second intermediate target was designed to be met with the help of the food industry through changes that can be met with current food processing technology. The proposed rule analysis stated that ''a reduction in sodium can be achieved at minimal cost, at least over the short term, when sodium requirements are only partially phased-in.'' But the analysis also noted that meeting the rule's sodium targets would likely require replacing some packaged foods with foods prepared from scratch. To clarify, we recognize that meeting even the first sodium target has some cost; however, we do not estimate that as a separate component cost in either the proposed or final rule analyses. Much of the cost of meeting the proposed and final rules' short term sodium targets is contained in the cost of substituting prepared foods for foods cooked from scratch in schools or central kitchens. We account for this in our labor cost estimate. Our proposed and final rule analyses estimate that labor costs will rise nearly dollar for dollar with food costs. Over 5 years, the final rule estimates that labor costs will increase by $1.6 billion.

Our cost estimate extends only through FY 2016, two years before the final rule's second sodium target takes effect. As a result, we do not estimate the cost of meeting that target in SY 2017–2018, or the rule's final sodium target in SY 2022–2023. However, two provisions in the final rule respond to the challenge of meeting those targets. The first is a delay in the second intermediate target from 4 years post-implementation in the proposed rule to 5 years in the final rule. Lengthening the transition to lower sodium foods is intended, in part, to facilitate student acceptance. But it also gives industry more time to develop products that meet the rule's standards. To the extent that limited supply is a school cost issue, delaying the second intermediate target to 5 years should help reduce costs. The final rule also promises USDA review of schools' progress toward the rule's final sodium target, and allows for modifications to the sodium targets if necessary.

e. Analysis Understates Need for Additional Equipment and Infrastructure

School officials and others commented that our proposed rule analysis understated the need for additional investment in food preparation and storage equipment as schools move away from a ''heat and hold'' foodservice model, to a model that relies more on on-site preparation. Our proposed rule analysis discussed the $125 million for school foodservice equipment provided to schools through the 2009 American Recovery and Reinvestment Act (ARRA) and the FY 2010 Agriculture Appropriations Act. Although the proposed rule analysis recognized that the demand for ARRA grants greatly exceeded the amount available, the analysis noted that much of that demand was driven by the routine need to replace aging equipment, costs that are appropriately covered by USDA meal reimbursements and other sources of food service revenue. The proposed rule analysis did not include an additional cost tied specifically to meeting the proposed rule meal patterns.

Some commenters offered estimates of the cost required to equip schools to produce more foods on site. These costs ranged from $4,000 per school for new equipment, to $500,000 or more for a full kitchen and serving site renovation (an estimate given by a foodservice industry representative). Commenters indicated that preparing more meals on-site would require investment in additional refrigeration equipment, microwaves and combination ovens, storage space, sinks, cutting boards and knives. What these comments cannot tell us is the percent of schools in need of new equipment, or the average per-school cost to meet that need. If fully half of all schools require investments averaging $5,000, then the total cost of new equipment necessary to prepare meals that meet the final rule standards would be $250 million. In the end, we do not have the data necessary to develop a reliable estimate of need in excess of the routine costs of replacing outdated equipment. In Section F we present an alternate cost estimate of the final rule under a different assumption about the need for additional investment in school kitchen equipment.

F. Uncertainties

We made several simplifying assumptions in developing this cost estimate, reflecting gaps in available data and evidence. The most significant simplifications are discussed in Table 13. In most cases, our primary estimate reflects conservative assumptions, to avoid understating the costs of the rule. In this section, we describe the impact of several alternative assumptions on the estimate. The cost impacts of these alternatives are presented in Table 14.

TABLE 13—SIMPLIFYING ASSUMPTIONS

Item	Explanation and Implications of Simplifying Assumptions
Take Rates	For each of several food groups, we used SNDA–III data to compute average ''take rates'' equal to the percentage of food servings taken by students for each serving offered to them. Take rates under current program rules vary by school, grade level, and menu planning system. They are, at best, a rough predictor of student behavior under the new rule, which imposes a single food-based meal planning system across all schools, and requires schools to offer a mix of foods somewhat different than many students are accustomed to. We apply these take rates to generate our final rule cost estimate. Different take rate assumptions could produce higher or lower cost estimates. Take rates higher than the ones used in our estimate imply that students will select more foods from menus that meet final rule standards than they now select from more familiar current school menus; we believe that risk is reasonably low, at least in the short term. It may be more likely that actual take rates will fall below our estimates. However, the possibility of lower take rates is constrained by the requirement that students select enough components to constitute a reimbursable meal.
Student Participation	The cost estimate assumes no change in student participation following introduction of the rule's new meal pattern requirements. However, we recognize that participation may increase due to better meals or decrease when favorite school foods are replaced with unfamiliar or less appealing options. We chose not to estimate a participation effect given the uncertainty about how schools will incorporate new foods into their menus, and what changes schools will make to a la carte and other non-NSLP/SBP ''competitive'' foods, factors known to affect NSLP/SBP participation. Schools have a financial interest in preserving the revenue stream that comes with serving Federally-reimbursable school meals. It is also unclear whether participation effects, if any, may prove temporary or permanent. We estimate the cost of the rule under an assumption of increased and reduced student participation in the uncertainties section.
USDA Foods	We include USDA Foods (formerly USDA commodities) in both the quantity and value of food served in its baseline and final rule cost estimates. This treatment of USDA Foods is consistent with the SLBCS–II which includes the value of USDA Foods in its computation of the cost of producing a school meal. We assume that USDA Foods will contribute comparably to the overall cost of preparing school meals under current rules and under the new rule. We believe it is reasonable to ignore the value of USDA Foods in computing the estimated cost increase of the rule.
Whole Grains	We apply a single take rate to both whole grain rich and refined grain products. A less conservative approach would have applied a lower take rate to whole grain foods, at least when offered singly, rather than as part of a combination entree. Further, this take rate is the same take rate observed in SNDA–III where the relative share of whole grain rich products is lower than the 50 percent share that schools must offer in the first two years of implementation, and much lower than the 100 percent share that must be offered thereafter. Testimony before the IOM expert committee by University of Minnesota Professor Leonard Marquart documented steps SFAs can take to phase in whole grains in a manner that promotes high take rates.
Labor Rates	We assume that the relative contributions of food and labor to the total cost of preparing reimbursable school meals will remain fixed at the levels observed in the SLBCS–II study. The study found that the cost of purchasing food accounted for 45.6 percent of SFA reported costs on average, while labor accounted for 44.5 percent of reported costs. We therefore estimate that labor costs will increase on a nearly dollar for dollar basis with estimated food costs. Our assumption leads to a substantial increase in estimated labor costs, one that assumes schools may rely less on prepared foods and more on on-site preparation. Nevertheless, USDA received comments from some individuals and organizations indicating that our proposed rule understates the likely increase in labor costs. To respond to these comments, we re-estimate the cost of the proposed rule assuming a bigger increase in labor costs in Section F. The cost estimate developed in this impact analysis is based entirely on the cost of adding or deleting foods from particular food groups.
	The cost estimate accounts for current price differences in whole grains compared to refined grain products, fat free and low fat milk compared to 2 percent or whole milk, whole fruit compared to fruit juice, and vegetables by subgroup. But it does not account directly for differences in the costs of comparable combination entrees with different levels of sodium, fat, or calories. SNDA–III found that school lunches offered to students in SY 2004–2005 provided, on average, about 11 percent of calories from saturated fat. The final rule would limit this to 10 percent—a relatively modest reduction.
Macronutrient Requirements and Calories.	Our cost estimate does take into account the added cost of more fruits and vegetables. It also takes into account the cost of shifting to a wider variety of vegetables.
	Finally, the estimate accounts for the replacement of higher fat content milk with low fat and skim milk. All of these steps implicitly incorporate the cost of offering lower calorie and lower fat content meals into our estimate. We mention above that that the first intermediate sodium target can be achieved with changes to school menus and preparation methods using foods already available in the marketplace. To the extent that the rule's first sodium target *requires more on-site preparation of meals, we account for that in our labor cost estimate. We estimate that the additional cost of acquiring lower sodium versions of processed foods to meet the rule's initial sodium target will be minimal. This is one of the very few assumptions that, if wrong, tends to understate the cost of the rule. But, given the decision to err on the side of overstating costs when making most other assumptions, we believe that the upside risk to an error on this assumption is small.*

a. Change in Participation—2 Percent Increase

As discussed in Table 13 above, we assumed that student participation would not change following the introduction of new meal requirements. Table 14 Sections A and B model the effects of altering that assumption.

Section A estimates the effect of a two percent increase in student participation on the cost of the rule relative to our primary cost estimate in Table 6. The dollar figures in Section A are the estimated cost to schools of preparing all meals served under our baseline assumption plus an additional 2 percent; the costs are not just limited to the incremental per-meal costs of the final rule. The additional meals are eligible for USDA reimbursement at the appropriate free, reduced price, or paid rates. However, the figures shown in

Section A are not offset by these increased Federal reimbursements. The net cost to schools, after accounting for Federal reimbursements, would be lower. Because these costs reflect the provision of improved meals to additional children, we would expect a commensurate increase in the benefits resulting from addition of more fruits, vegetables, and whole grains to the diets of participating children. This participation assumption would result in a $1.3 billion increase over the cost of our primary estimate.

b. Change in Participation—2 Percent Decrease

Table 14, Section B models the effect of a two percent decrease in participation upon implementation of the new rule. A reduction in participation reduces the cost of compliance with the rule, relative to the primary cost estimate in Table 6.[47] Again, because the cost reduction reflects the provision of improved meals to fewer children, we would expect a proportionate decrease in the rule's benefits for participating children. This reduction in cost is a reduction in the entire cost of serving 2 percent fewer meals, not just the incremental per-meal cost of complying with the final rule. Schools would realize a partially offsetting decrease in Federal meal reimbursements; that offset is not shown in Table 14. The effect of a 2 percent decrease in student participation would be to decrease the cost of implementing the final rule by $1.3 billion.

c. Higher Rate of Increase in Labor Costs than Food Costs

Our primary cost estimate assumes that the ratio of labor to food costs will remain fixed at the ratio observed in the SLBCS–II. Because we estimate a substantial increase in school food costs, our fixed labor to food cost assumption leads to a substantial increase in labor costs.

Some increase in labor costs is likely. Schools may find it necessary to prepare more meals on site to incorporate added vegetables and whole grains, and to reduce levels of sodium and fat. In addition, schools are likely to incur additional expense to train foodservice workers on the new meal requirements. However, commercial suppliers can be expected to develop and introduce healthier products for the school market ahead of implementation of a final rule; other products may be introduced after implementation. Schools may find that new training replaces some training planned in existing budgets.

At least one change reflected in the final rule is intended, in part, to help reduce labor costs relative to the proposed rule. The proposed rule included a separate meat standard for breakfast. The final rule drops that requirement, preserving schools' ability to serve meat as a substitute for grains at breakfast, but not requiring schools to offer meat. USDA expects that this change will support schools that serve breakfast in the classroom, a model that may require less labor cost than breakfast served in the school cafeteria.

Although we believe that the risk that we overstate the labor costs necessary to implement the rule is as likely as the risk that we understate labor costs, comments received from school officials and foodservice and nutrition professionals argue that our labor cost estimate may be too low. Commenters cited the need to hire new kitchen staff to prepare more meals from scratch as a factor that might change the current ratio of labor to food costs.

Our primary labor cost estimate relies on the observation that the ratio of labor to food costs was about the same at two points measured 13 years apart. We acknowledge the uncertainty inherent in the assumption that this ratio will remain unchanged even as substantial changes to the meal patterns are implemented by schools. And we therefore recognize the risk that the absolute dollar cost for labor in our final rule estimate is too low. If the cost of labor needed to implement the final rule exceeds the amount in our primary estimate by 10 percent, then the cost of the final rule would rise by $160 million.

d. Higher Food Inflation

The final rule estimate's food inflation methodology in described section III.B.1. That discussion notes that inflation over the most recent 2 years was lower for most food subgroups than inflation over the five years prior to those two. Our proposed rule estimate used a 5-year historic average to project food costs through FY 2016. In an effort to limit the effects of low recent inflation on our cost estimate, our final rule methodology uses a 7-year average to project food costs, rather than a revised 5-year estimate using only the most recent food inflation figures. This methodology retains all of the 5 years of relatively high food inflation that we used in our proposed rule methodology. We took this step to minimize the risk of understating the cost of the final rule. It is possible, nevertheless, that food inflation will accelerate in the short term. If food prices from fiscal years 2012 through 2016 match the rate of inflation over the five years that ended in FY 2009, then the cost of the final rule would increase by $240 million.[48]

e. Additional Need for Foodservice Equipment

The cost estimate in our proposed rule (and the primary estimate in this final rule analysis) does not include an additional cost for new foodservice equipment. As we discuss in section E above, commenters offer much different estimates of the need for new kitchen equipment to prepare more foods on site as a means of complying with the rule. These figures do not allow us to estimate the dollar value of that need with any certainty. Table 14 includes a revised final rule estimate that assumes half of all schools will need to invest $5,000 in new kitchen equipment soon after implementation of the rule. We show half of this $250 million cost as an upfront expense, and the other half as an expense incurred in the first full year of implementation of the rule.

Table 14 below assumes that State administrative costs are not impacted by any of the alternate assumptions (a–e) listed above.

[47] This reduction in cost comes at the expense of reduced federal meal reimbursements.

[48] This estimate includes a proportionate increase in labor costs to remain consistent with our labor cost methodology.

Table 14: Cost of Final Rule under Alternate Assumptions

	Fiscal Year					
	2012	2013	2014	2015	2016	Total
Section A. Change in Participation - 2 Percent Increase						
Food Costs	$42.9	$283.1	$333.4	$782.1	$818.8	**$2,260.3**
Labor Costs	41.9	276.3	325.3	763.2	799.1	**2,205.8**
State Admin	0.1	8.9	9.1	9.4	9.7	**37.1**
Total	**$84.9**	**$568.3**	**$667.7**	**$1,554.7**	**$1,627.5**	**$4,503.2**
Section B. Change in Participation – 2 Percent Decrease						
Food Costs	-$1.3	-$12.3	$24.0	$443.5	$466.7	**$920.7**
Labor Costs	3.8	29.2	52.2	432.8	455.4	**973.5**
State Admin	0.1	8.9	9.1	9.4	9.7	**37.1**
Total	**$2.6**	**$25.8**	**$85.3**	**$885.8**	**$931.8**	**$1,931.4**
Section C. Higher Rate of Increase in Labor Costs than Food Costs						
Food Costs	$20.8	$135.4	$178.7	$612.8	$642.8	**$1,590.5**
Labor Costs	22.8	156.1	191.8	657.9	690.0	**1,718.5**
State Admin	0.1	8.9	9.1	9.4	9.7	**37.1**
Total	**$43.7**	**$300.4**	**$379.6**	**$1,280.0**	**$1,342.4**	**$3,346.1**
Section D. Food Inflators from Proposed Rule for 2012-2016 Food Cost projections						
Food Costs	$21.5	$144.8	$195.0	$652.9	$695.4	**$1,709.5**
Labor Costs	21.4	151.2	190.3	637.1	678.6	**1,678.5**
State Admin	0.1	8.9	9.1	9.4	9.7	**37.1**
Total	**$43.0**	**$304.9**	**$394.3**	**$1,299.3**	**$1,383.6**	**$3,425.1**
Section E. Increased Equipment Cost						
Food Costs	$20.8	$135.4	$178.7	$612.8	$642.8	**$1,590.5**
Labor Costs	20.7	141.9	174.4	598.0	627.2	**1,562.3**
State Admin	0.1	8.9	9.1	9.4	9.7	**37.1**
Equip Costs	125	125	0	0	0	**250.0**
Total	**$166.6**	**$411.2**	**$362.1**	**$1,220.2**	**$1,279.7**	**$3,439.9**

G. Comparison of Proposed Rule and Final Rule Costs

The key differences between our proposed rule and final rule cost estimates are discussed in previous sections of this RIA. Most of the estimated reduction in cost is due to policy changes, but a significant reduction is also realized by lower food inflation since preparation of the proposed rule cost estimate.

Inflation and Other Economic Assumptions

The proposed rule used actual food price inflation through the end of FY 2009. The final rule incorporates nearly two additional years of actual food price inflation. Inflation over the two years ending in August 2011 was lower for most of the food groups affected by the rule than it was in the five previous years. This reduces our baseline cost of food as well as our projection of food prices through the RIA's forecast period. The final rule also uses USDA projections of school meal participation contained in the 2012 President's budget. The proposed rule relied on data in the 2011 President's budget. The more recent participation projections slightly increase the cost of the breakfast meal patterns and reduce the cost of the lunch meal patterns relative to the proposed rule. The net effect of changes to our food inflation and student participation projections is a 5-year $730 million reduction in the cost of the final rule relative to the proposal.

Breakfast Meal Patterns

The most significant reduction in the estimated cost of the final rule relative to the proposed rule is due to changes in the final rule's breakfast provisions. The final rule's phased implementation of the meal pattern's fruit and grain requirements, and elimination of the proposed rule's separate meat and meat alternate requirement reduce the cost of the rule by $2.7 billion over 5 years.

Lunch Meal Patterns

Additional savings are realized through a reduction in the final rule's lunch meal pattern grain requirement relative to the proposed rule. The final

rule also includes changes to the vegetable component of the proposed rule's lunch meal pattern. The final rule eliminates the proposed rule's 1 cup per week limit on starchy vegetables, and it replaces the proposed rule's orange vegetable subgroup with a red/orange group that now includes tomatoes. Replacement of the orange vegetable subgroup with a red/orange subgroup was prompted by the 2010 Dietary Guidelines. The final rule reduces the weekly requirement for ''other'' vegetables, which previously included tomatoes, and increases the requirement for red/orange vegetables relative to the proposed rule requirement for orange vegetables. The net effect of changes to the vegetable and grain requirements at lunch is a relatively modest $150 million reduction in cost over 5 years.

TABLE 15—CHANGES IN COST OF THE FINAL RULE RELATIVE TO THE PROPOSED RULE

	Fiscal year					
	2012	2013	2014	2015	2016	Total
Proposed rule	$181.5	$1,246.8	$1,401.9	$1,923.8	$2,041.3	$6,795.2
Updated economic and participation projections	−15.9	−114.8	−141.1	−211.3	−248.2	−731.2
Changes to breakfast meal pattern requirements	−120.5	−822.7	−871.4	−446.4	−465.6	−2,726.7
Changes to lunch meal pattern requirements	−3.4	−23.0	−27.1	−45.8	−47.8	−147.3
Final rule	41.6	286.2	362.1	1,220.2	1,279.7	3,189.9

H. Implementation of Final Rule—SFA Resources

We estimate that the new meal patterns may raise the average cost of producing and serving school lunches by about 5 cents on initial implementation of the rule. By FY 2015, when the food group components are fully phased in, the cost per lunch may be 10 cents higher than our baseline estimate; the cost per breakfast may be 27 cents higher than our baseline.

As we discuss in Section E, the Healthy, Hunger-Free Kids Act contains a comprehensive package of school meal reforms that call for an update to the meal patterns and provide for increased SFA revenue. USDA estimates that the $3.2 billion 5-year cost of this rule is more than offset by the impact of other HHFKA provisions on SFA revenues.

HHFKA's meal pattern and revenue raising provisions are linked directly in the performance-based increase in Federal financing for school lunches. Schools that successfully implement the final rule standards will receive an additional 6 cent reimbursement for each lunch served. The Congressional Budget Office estimates that an additional 6 cents per lunch would raise $1.5 billion for SFAs in the first 5 years after implementation of the rule.[49]

HHFKA contains two additional provisions to ensure that Federal reimbursements are used as intended to provide quality meals to program participants. The first requires schools to gradually raise the per-meal revenue generated from paid lunches to an amount equal to the Federal reimbursement for free lunches. That revenue could come from student payments or State or local sources. The second requires that the revenue generated from non-program foods as a percent of food costs match the revenue to food cost ratio of program meals. USDA estimates that these two provisions will raise a combined $7.5 billion in the 5 years following their July 1, 2011 effective date.[50]

Schools will face different costs to implement this final rule. Schools with menus that already emphasize fruits, a variety of vegetables, and whole grains may need to make fewer changes, and the costs of implementation in those schools may be lower than average. Because the per-meal costs of complying with the new requirements are much higher for breakfast than for lunch, the overall costs of implementation in schools that serve more school breakfasts relative to lunches may be higher than the costs faced by schools that do not serve breakfast.

Schools will also benefit differently from HHFKA's revenue provisions. Schools with relatively few students who pay full price for program meals stand to gain little from HHFKA's paid lunch provision. Similarly, schools that sell few à la carte items will realize little revenue from an increase in à la carte prices. At the same time, schools that serve mostly free and reduced-price students and sell little à la carte can rely on significant Federal funding for each SFA dollar spent to purchase and prepare school foods.

The experience of some schools suggests that substantial progress toward implementation of the rule can even be achieved with existing resources. USDA's HealthierUS Schools Challenge (HUSSC) recognizes elementary schools that meet voluntary school meal and physical activity standards. HUSSC school meal standards exceed NSLP requirements on several levels, including requirements for a variety of vegetables each week, including dark green and orange vegetables and legumes; a variety of whole fruits, and limits on fruit juice; and whole grain and low fat milk requirements. USDA has certified more than 2,161 HUSSC schools since 2004. HUSSC schools have demonstrated an ability to operate cost-effective school meals programs that emphasize many of the same foods required by the final rule. These schools receive no financial assistance from USDA beyond the meal reimbursements and USDA Foods available to other schools that participate in the Federal school lunch and breakfast programs. Like other service businesses, schools may need to consider changes to their operations to increase efficiency and meet the requirements of the rule. HUSSC schools have demonstrated an ability to operate cost-effective school meals programs that meet many of the final rule's requirements. These schools may offer models for others as implementation moves forward.

I. Impact on Participation

As noted in Table 13, the cost estimate in this analysis assumes no net change in student participation following introduction of the rule's new meal pattern requirements. This assumption reflects uncertainties in a number of areas, including how schools will reflect the new requirements in menus, the acceptance of those changes by students, and potential changes in

[49] $1.5 billion is CBO's estimate of additional budget authority for HHFKA's ''Performance-Based Rate Increase'' through FY 2016, less $100 million ($50 million for administrative expenses in fiscal years 2012 and 2013) . See Table 2 in CBO's April 20, 2010 cost estimate for HHFKA. *http://www.cbo.gov/ftpdocs/114xx/doc11451/HealthyHungerFreeKidsAct.pdf* (accessed 11/06/11).

[50] See the interim final rule and regulatory impact analysis for ''School Food Service Account Revenue Amendments Related to the Healthy, Hunger-Free Kids Act of 2010'', **Federal Register**, Vol. 76, No. 117, pp. 35301–35318.

prices for reimbursable paid meals to provide additional revenue. These factors are discussed below.

1. Acceptance of Meals

Any revision to the content of school meals or the method of preparation may have an effect on the acceptance of school meals. Concerns are often raised that students may react negatively to changes designed to improve nutrition. USDA launched the School Meals Initiative for Healthy Children (SMI) in 1995 to help schools improve the nutritional quality of NSLP and SBP meals. The SMI offers an opportunity to examine how students react to substantial changes in school meal patterns.

As a result of the SMI many school food service directors reported making changes in procurement and preparation practices (Abraham, 2002). For example, they reported increased purchases of low-fat/reduced-fat foods (81 percent) and fresh fruits and vegetables (75 percent). The majority reported no change in food waste. However, to the extent that there was change in the amount of food wasted, more respondents reported a reduction rather than an increase in food waste (with the exception of cooked vegetables). School food service directors report that the SMI has generally had a neutral-to-positive impact on program performance.

SNDA–III found that ''[c]haracteristics of NSLP lunches offered, including percent of calories from fat, whether dessert or French fries were frequently offered, and average number of fresh fruits and vegetables offered per day, were generally not significantly associated with NSLP participation.'' [51] This suggests that changes in meal patterns that enhance nutrition can be well received by students. Furthermore, the increased emphasis on a healthy school nutrition environment in recent years, and greater awareness of the importance of healthy eating habits in schools, may help to support student acceptance of changes in program meals.

There is also a strong and growing school nutrition effort and infrastructure already in place.

For example, Team Nutrition is an FNS initiative to support healthier meals through training and technical assistance for food service, nutrition education for children and their caregivers, and school and community support for healthy eating and physical activity. Similarly, in 2004 Congress required all school districts to establish local wellness policies. Through these policies schools have made changes to their school nutrition environments and improved the quality of foods offered to students. In the context of these initiatives, implementation of the final rule is only the next step in a process of ongoing local, State, and Federal efforts to promote children's nutrition and health.

2. Impact of Price on Participation

FNS estimates that the average cost of preparing and serving school meals may increase by 8 percent by FY 2015. Some SFAs may raise student prices for paid meals (above the paid lunch revenue target required by HHFKA) to compensate for some of this increase in cost. We recognize that increased paid meal prices may reduce NSLP paid meal participation. Mathematica®, Inc. modeled the effect of paid meal prices on student participation as part of the SNDA–III study.[52] All else equal, students who were not income-eligible for free or reduced-price meals were less likely to participate in the program when the full price of the meals was higher. For lunch, the model estimates a 0.11 percent decrease in participation for each 1 cent increase in paid lunch prices.[53] For breakfast, the model estimates a 0.12 percent decrease in participation per 1 cent increase in price.

The model's predicted student participation rate was 54 percent in schools that charged $2.00 for an NSLP lunch, compared to 59 percent in schools that charged $1.50. The study also predicts lower breakfast participation in schools that charged higher prices. Predicted participation was 10.3 percent in schools that charged $0.70 for an SBP breakfast versus 7.2 percent in schools that charged $1.00. Since meals meeting the new requirements will be improved in nutritional content it is not clear how this factor would balance against the effects of higher meal prices. Although price changes may be a necessary option for some SFAs, FNS expects that efforts designed to maintain participation would be concurrently implemented.

J. Benefits

As noted in the preamble to this final rule, NSLA requires that schools serving lunches and breakfasts under its program authority ensure that those meals are consistent with the goals of the most recent Dietary Guidelines for Americans and the Dietary Reference Intakes. The final rule, by updating program regulations consistent with Dietary Guidelines goals and aligning the regulations with the requirements placed on schools under the statute, will ensure that school meal nutrition requirements reflect current nutrition science, increase the availability of key food groups, better meet the nutritional needs of children, and foster healthy eating habits.

In so doing, it also provides a clear means of meeting the statutory requirements through a food-based meal pattern designed with the particular circumstances and challenges of school food service in mind, to ensure that it is feasible for school foodservice operators and does not jeopardize student and school participation in the meal programs. A related benefit of the rule is that it simplifies meal requirements to create a single, food-based approach to meal planning. This approach helps to simplify menu planning and monitoring, and streamline training and technical assistance needs.

Once implemented by schools, USDA projects that this rule will change the types and quantities of foods prepared, offered and served through the school meals programs (the sources of the costs described in this analysis). The rule is expected to result in (1) increased servings of fruits and vegetables, (2) replacement of refined-grain foods with whole-grain rich foods, and (3) replacement of higher-fat dairy products with low-fat varieties. As documented in the IOM recommendations, each of these changes corresponds to an inconsistency between the typical diets of school-aged children in the United States and the Dietary Guidelines/*MyPyramid* recommendations. In particular, the report cited an analysis of NHANES 1999–2002 data that showed that:

- *Total vegetable intake was only about 40 percent of the MyPyramid levels, with intake of dark green and orange vegetables less than 20 percent of MyPyramid levels.*
- *Total fruit intake was about 80 percent of the MyPyramid levels for children ages 5–8, with far lower levels for older children.*
- *Intake of whole grains was less than one-quarter of MyPyramid levels,*

[51] For breakfast, the study estimated that projected participation rates ''were higher in schools that offered a greater percentage of calories from fat in the SBP breakfast; however, these differences were not statistically significant at conventional levels.'' USDA 2007, vol. II, pp. 113 and 127.

[52] USDA 2007, vol. II, pp. 116–117, 123–124.

[53] This relationship between price and participation applies to prices in the range of $1.50 to $2.00 in SY 2004–2005 dollars. A much bigger price increase might trigger a bigger reduction in participation.

although total grain intake was at or above MyPyramid levels.

• *Intake of dairy products varied by age, with the intakes of the youngest children exceeding MyPyramid levels, while those of older children were below those levels. However, most dairy consumed contained 2 percent or more milk fat, while the Dietary Guidelines recommend fat-free or low-fat dairy products.*[54]

In addition, the rule would make significant changes to the level of sodium in school meals over time. Research suggests that modest population-wide reductions in dietary salt could substantially reduce cardiovascular events and medical costs.[55] More specifically, a forthcoming study suggests that reducing dietary salt in adolescents could yield substantial health benefits by decreasing the number of teenagers with hypertension and the rates of cardiovascular disease and death as these teenagers reach young and middle age adulthood.[56]

The rule also makes substantial changes in the calorie targets for meals that are designed to promote healthful energy balance for the children served by these programs. For the first time, the rule sets maximum as well as minimum calorie targets, and creates a finer gradation of calorie levels by age. As a result, minimum calorie requirements for some groups are reduced by as much as 225 calories per lunch.[57] Implemented consistent with other requirements that ensure that lunches provide appropriate nutrient content, these changes in calorie levels can help to reduce the energy imbalance that contributes to obesity among the Nation's children, without compromising nutrition to support healthy growth and development.

This approach is fully consistent with the recommendations of the Dietary Guidelines for Americans. Recognizing that the Dietary Guidelines apply to a total diet, rather than a specific meal or portion of an individual's consumption, the intention of the rule is to make changes to school meals nutrition requirements to promote diets more consistent with the *Guidelines* among program participants. Such diets, in turn, are useful behavioral contributors to health and well-being. As the report of the 2010 Dietary Guidelines Advisory Committee notes, ''evidence is accumulating that selecting diets that comply with the Guidelines reduces the risk of chronic disease and promotes health.'' [58] The report describes and synthesizes the evidence linking diet and different chronic disease risks, including cardiovascular disease and blood pressure, as well as the effects of dietary patterns on total mortality. Children are a subpopulation of particular focus for the Committee; the report emphasizes the increasing common evidence of chronic disease risk factors, such as glucose intolerance and hypertension, among children, and explains that ''[e]vidence documents the importance of optimal nutrition starting during the fetal period through childhood and adolescence because this has a substantial influence on the risk of chronic disease with age.'' [59]

In response, the report notes improvements in food at schools as a critical strategy to prevent obesity, and related health risks, among children. Indeed, the Committee recommends ''[i]mprov[ing] foods sold and served in schools, including school breakfast, lunch, and after-school meals and competitive foods so that they meet the recommendations of the IOM report on school meals (IOM, 2009) and the key findings of the 2010 DGAC. This includes all age groups of children, from preschool through high school.'' [60]

The linkage between poor diets and health problems such as childhood obesity are also a matter of particular policy concern, given their significant social costs. One in every three children (31.7 percent) ages 2–19 is overweight or obese.[61] Along with the effects on our children's health, childhood overweight and obesity imposes substantial economic costs, and the epidemic is associated with an estimated $3 billion in direct medical costs.[62] Perhaps more significantly, obese children and adolescents are more likely to become obese as adults.[63] In 2008, medical spending on adults that was attributed to obesity increased to an estimated $147 billion.[64]

Because of the complexity of factors that contribute both to overall food consumption and to obesity, we are not able to define a level of disease or cost reduction that is attributable to the changes in meals expected to result from implementation of the rule. As the rule is projected to make substantial improvements in meals served to more than half of all school-aged children on an average school day, we judge that the likelihood is reasonable that the benefits of the rule exceed the costs, and that the final rule thus represents a cost-effective means of conforming NSLP and SBP regulations to the statutory requirements for school meals.

There are other, corollary benefits to improvement in school meals that are worthy of note. The changes could increase confidence by parents and families in the nutritional quality of school meals, which may encourage more families to opt for them as a reliable source of nutritious food for their children. Improved school meals can reinforce school-based nutrition education and promotion efforts and contribute significantly to the overall effectiveness of the school nutrition environment in promoting healthful food and physical activity choices. Finally, the new requirements provide a clearer alignment between Federal program benefits and national nutrition policy, which can help to reinforce overall understanding of the linkages between diet and health.

IV. Alternatives

1. Make No Changes to Proposed Rule

The proposed rule closely followed the recommendations contained in the 2010 report of the IOM committee commissioned by USDA to propose changes to the NSLP and SBP meal patterns. Those recommendations were designed to reflect current nutrition science, the Dietary Guidelines, and IOM's Dietary Reference Intakes. The reforms contained in the proposed rule were well received by health and nutrition professionals, child advocates, academics, and parents. But, as summarized in the preamble to the final rule and in this analysis, school and SFA officials, other public sector officials, and the food industry expressed concern about the cost and feasibility of the proposed rule. The final rule reflects those concerns by scaling back the quantity of food contained in the proposal, especially at breakfast, eliminating the proposed rule's limitations on starchy vegetables, phasing in some provisions, and extending target dates for meeting the proposed rule's sodium standards. Those changes result in a significantly less costly final rule.

One alternative to the final rule is to retain the proposed rule without change. The proposed rule closely

[54] IOM 2009, pp. 49–53.

[55] See, for example, Smith-Spangler, 2010; Bibbins-Domingo, 2010.

[56] Bibbins-Domingo, 2010b.

[57] The minimum calorie level for a lunch served to Grade 7 students is 825 calories under current standards (Grades 7–12); this would change to a range of 600 calories minimum, 700 calories maximum under the new standards (Grades 6–8).

[58] *Dietary Guidelines* Advisory Committee, p. B1–2.

[59] *Dietary Guidelines* Advisory Committee, pp. B1–2, B1–3.

[60] *Dietary Guidelines* Advisory Committee, p. B3–6.

[61] Ogden *et al.,* 2010.

[62] Trasande *et al.,* 2009.

[63] Whitaker *et al.,* 1997; Serdula *et al.,* May 1993.

[64] Finkelstein *et al.,* 2009

followed IOM's recommendations. IOM developed its recommendations to encourage student consumption of foods recommended by the Dietary Guidelines in quantities designed to provide necessary nutrients without excess calories. The final rule still achieves that goal. Students will still be presented with choices from the food groups and vegetable subgroups recommended by the Dietary Guidelines. In that way, the final rule, like the proposed rule, will help children recognize and choose foods consistent with a healthy diet.

The most significant differences between the proposed and final rules are in the breakfast meal patterns, and those differences are largely a matter of timing. The final rule allows schools more time to phase-in key IOM recommendations on fruit and grains at breakfast. Once fully implemented, the most important difference between the final and proposed rule breakfast meal patterns is the elimination of a separate meat/meat alternate requirement. That change preserves current rules that allow the substitution of meat for grains at breakfast. It also responds to general public comments on cost, and on the need to preserve schools' flexibility to serve breakfast outside of a traditional cafeteria setting.

Even with these changes, and with the less significant changes to the proposed lunch standards, the final rule remains consistent with Dietary Guidelines recommendations. The added flexibility and reduced cost of the final rule relative to the proposed rule should increase schools' ability to comply with the new meal patterns. The final rule's less costly breakfast patterns will make it easier for schools to maintain or expand current breakfast programs, and may encourage other schools to adopt a breakfast program.

Table 16 estimates the cost of the proposed rule using updated projections of student participation and food inflation. The estimated 5-year cost of the final rule, from Table 6, is $2.9 billion lower than this updated cost estimate of the proposed rule.

[Note that the estimate in Table 16 is about 10 percent lower than our cost estimate for the same set of provisions in the proposed rule Regulatory Impact Analysis. The difference between the two estimates reflects lower food inflation for most food groups since preparation of the proposed rule estimate.[65] As we discuss in Section III.B.1., lower recent inflation also reduces our projection of future price increases.]

Table 16: Alternative 1
Estimated Cost of Proposed Rule

	Fiscal Year					
	2012	2013	2014	2015	2016	Total
Food Costs	$84.3	$572.1	$637.4	$866.1	$906.9	**$3,066.7**
Labor Costs	82.3	558.3	622.0	845.2	885.0	**2,992.8**
State Agency Administrative Costs	0.1	8.9	9.1	9.4	9.7	**37.1**
Total	**$166.7**	**$1,139.3**	**$1,268.4**	**$1,720.6**	**$1,801.6**	**$6,096.6**

2. Adopt Final Rule Lunch Meal Pattern Changes; Retain Proposed Rule Breakfast Patterns

From Alternative 1, above, we estimate that cost of the final rule is $2.9 billion lower than the cost of the proposed rule. Table 17 makes clear that most of this reduction is due to the final rule's breakfast meal pattern changes. Adopting all of the lunch provisions contained in the final rule,[66] but retaining the proposed rule's breakfast provisions, would cost an estimated $5.9 billion over 5 years, or $2.7 billion more than final rule. This alternative responds less effectively than the final rule to comments received by USDA from SFA and school administrators who expressed concerns about the cost of the proposed rule.

Table 17: Alternative 2
Adopt Final Rule Lunch Meal Patterns; Retain Proposed Rule Breakfast Meal Patterns

	Fiscal Year					
	2012	2013	2014	2015	2016	Total
Food Costs	$82.0	$556.7	$619.7	$838.8	$878.4	**$2,975.6**
Labor Costs	80.0	543.3	604.8	818.5	857.2	**2,903.8**
State Agency Administrative Costs	0.1	8.9	9.1	9.4	9.7	**37.1**
Total	**$162.1**	**$1,108.9**	**$1,233.6**	**$1,666.7**	**$1,745.3**	**$5,916.6**

[65] Table 16 also includes the effect of reclassifying tomatoes as a ''red/orange'' vegetable. Tomatoes were included in the ''other'' vegetable subgroup in our proposed rule cost estimate. Moving tomatoes from the ''other'' vegetable subgroup to the new ''red/orange'' subgroup is one of the changes contained in the 2010 *Dietary Guidelines.* Moving tomatoes back to the ''other'' vegetable subgroup for school meals was not considered by USDA and is therefore not reflected in this alternative to the final rule.

[66] For purposes of this estimate, reclassifying tomatoes as a ''red/orange'' vegetable is considered to be one of the final rule's lunch meal pattern changes.

3. Adopt Final Rule Breakfast Meal Pattern Changes; Retain Proposed Rule Lunch Patterns

This alternative highlights the relatively small difference in the cost of the proposed and final rule lunch provisions. The two key differences in the proposed and final rule lunch provisions have largely offsetting costs. The combined effect of moving tomatoes to the new red/orange vegetable subgroup, and the associated changes in the minimum cup requirements of the red/orange, starchy, and ''other'' vegetable subgroups have the effect of increasing the cost of the final rule relative to the proposed rule. The final rule's reduction in the lunch meal pattern's grain ounce equivalent requirement reduces the cost of the final rule relative to the proposed rule.

Table 18: Alternative 3

Adopt Final Rule Breakfast Meal Patterns; Retain Proposed Rule Lunch Meal Patterns

	Fiscal Year					
	2012	**2013**	**2014**	**2015**	**2016**	**Total**
Food Costs	$23.1	$150.8	$196.3	$640.1	$671.3	**$1,681.6**
Labor Costs	22.9	156.9	191.6	624.7	655.1	**1,651.2**
State Agency Administrative Costs	0.1	8.9	9.1	9.4	9.7	**37.1**
Total	**$46.1**	**$316.6**	**$397.0**	**$1,274.2**	**$1,336.0**	**$3,369.9**

V. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf*), we have prepared an accounting statement showing the annualized estimates of benefits, costs and transfers associated with the provisions of this final rule.

	Primary Estimate	Year Dollar	Discount Rate	Period Covered
Benefits				
Qualitative: The primary benefit of this rule is to align the regulations with the requirements placed on schools under NSLA to ensure that meals are consistent with the goals of the most recent Dietary Guidelines and the Dietary Reference Intakes. In increasing access to children for such meals it will address key inconsistencies between the diets of school children and Dietary Guidelines by 1) increasing servings of fruits and vegetables, 2) replacing refined-grain foods with whole-grain rich foods, and 3) replacing higher-fat dairy products with low-fat varieties.				
Costs				
Annualized Monetized ($millions/year)	$592.1	2012	7%	FY2012-2016
	$617.9	2012	3%	
Notes: Local School Food Authorities will incur food, labor, and administrative costs to comply with new NSLP and SBP meal requirements. State education agencies will incur additional training, technical assistance, and SFA monitoring and compliance costs. No direct regulation of small business.				
Transfers				
Annualized Monetized ($millions/year)	$0	2012	7%	FY2012-2016
	$0	2012	3%	

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VII. Appendix A

The following tables detail the major steps in the computation of food cost estimates described in the main body of the impact analysis. The tables develop both a baseline food cost estimate and an estimate under the proposed rule.

Table A–1 contains total food and labor cost estimates for the baseline and under the proposed rule. The difference is summarized in the shaded panel at the bottom of the table. That difference is the estimated cost of the rule, as presented in Table 6 in section III.A.1.

Table A–2 shows each of the major inputs into our baseline cost estimate. The first 5 columns give the estimated food cost per school meal served. We inflate each of the meal components by historic and projected changes in food group specific prices to estimate per meal costs through FY 2016. Inflation factors, not shown in Table A–2, are weighted averages, computed from CPI–U data from the Bureau of Labor Statistics. The next set of columns contains projections of meals served through FY 2016. Total baseline costs, in the five rightmost columns of Table A–2, are the product of the estimated costs per meal and FNS projections of the number of meals served.

Our estimate of total cost under the proposed rule is developed in Table A–3. Table A–3 summarizes the steps that we took to estimate a per-meal food cost in FY 2012, the year in which the rule is expected to take effect, and shows our projection of total costs through FY 2016.

Table A–3 resembles Table A–2. It takes the weighted average prices per meal by meal component for FY 2012, projects them through FY 2016 using food group specific inflation factors, then multiplies those inflated per meal figures by FNS projections of meals served. The final estimated cost of meals served under the proposed rule is displayed in the last five columns of the table.

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Table A-1: Cost of Proposed Rule – Summary

Cost Effect Summary

	Cost Category		Fiscal Year Costs (millions)					
			2012[1]	2013	2014	2015	2016	2012 - 2016
Current Rule	Breakfast	Food	$240.0	$1,620.8	$1,694.0	$1,761.9	$1,832.5	$7,149.1
		Labor[2]	234.2	1,581.7	1,653.1	1,719.4	1,788.3	6,976.7
	Lunch	Food	843.5	5,629.5	5,860.6	6,089.4	6,327.5	24,750.5
		Labor[2]	823.1	5,493.7	5,719.2	5,942.5	6,174.8	24,153.4
	Total		**$2,140.9**	**$14,325.6**	**$14,926.9**	**$15,513.2**	**$16,123.0**	**$63,029.6**
Final Rule	Breakfast	Food	$239.6	$1,610.8	$1,698.5	$2,083.3	$2,167.0	$7,799.2
		Labor[2]	234.2	1,581.7	1,657.5	2,033.0	2,114.7	7,621.2
	Lunch	Food	864.7	5,774.9	6,034.8	6,380.8	6,635.7	25,690.9
		Labor[2]	843.8	5,635.6	5,889.2	6,226.9	6,475.6	25,071.1
	Total		**$2,182.4**	**$14,602.9**	**$15,280.0**	**$16,724.0**	**$17,393.0**	**$66,182.4**
Difference	Food :		$20.8	$135.4	$178.7	$612.8	$642.8	$1,590.5
	Labor :		20.7	141.9	174.4	598.0	627.2	1,562.3
	State Agency Administration[3] :		0.1	8.9	9.1	9.4	9.7	37.1
	Total :		**$41.6**	**$286.2**	**$362.1**	**$1,220.2**	**$1,279.7**	**$3,189.9**

notes:

1. FY 2012 is a 3 month figure. The rule is assumed to take effect at the beginning of SY 2012-2013

2. The SLBCS II estimated that labor costs are 44.5% of total reported SFA costs; food costs are 45.6% of the total. The labor costs shown here are equal to food costs multiplied by (.445/.456) for all cells ezcept breakfast in fiscal years 2012 and 2013. Although we estimate a minimal reduction in food costs for breakfast in FY 2012 and FY 2013, we do not assume a reduction in breakfast labor costs; instead we assume that breakfast labor costs will remain unchanged from the baseline in those years.

3. State agency administrative costs include training and technical assistance to SFAs, monitoring and compliance, and associated reporting and recordkeeping.

Table A-2: Detail of Baseline (Current Rule) Food Cost Estimate – Prices per Meal, Participation, and Total Projected Food Cost

Current Rule

Meal	Food Item	Weighted Average Price (inflated to)					Participation					Total Food Cost ($ millions) for number of months				
		dollar cost per meal					meals served (millions)					3	12	12	12	12
		FY2012	FY2013	FY2014	FY2015	FY2016	FY2012	FY2013	FY2014	FY2015	FY2016	FY2012	FY2013	FY2014	FY2015	FY2016
Breakfast																
	Grades K-12															
	Milk	$0.1830	$0.1867	$0.1905	$0.1944	$0.1983	342	2,253	2,298	2,332	2,367	$62.6	$420.7	$437.8	$453.4	$469.5
	Fruit	0.0353	0.0362	0.0372	0.0382	0.0392	342	2,253	2,298	2,332	2,367	12.1	81.6	85.4	89.0	92.8
	Fruit Juice	0.1110	0.1141	0.1173	0.1206	0.1240	342	2,253	2,298	2,332	2,367	37.9	257.0	269.6	281.3	293.6
	Refined Grain	0.1920	0.1968	0.2017	0.2068	0.2119	342	2,253	2,298	2,332	2,367	65.6	443.3	463.5	482.2	501.6
	Whole Grain	0.0853	0.0874	0.0896	0.0918	0.0941	342	2,253	2,298	2,332	2,367	29.1	196.9	205.8	214.2	222.8
	Meat/Meat Alternate	0.0910	0.0934	0.0959	0.0984	0.1010	342	2,253	2,298	2,332	2,367	31.1	210.4	220.3	229.4	239.0
	Vegetable	0.0046	0.0048	0.0051	0.0053	0.0056	342	2,253	2,298	2,332	2,367	1.6	10.9	11.6	12.4	13.2
	Total K-12	**$0.7022**	**$0.7195**	**$0.7373**	**$0.7555**	**$0.7741**						**$240.0**	**$1,620.8**	**$1,694.0**	**$1,761.9**	**$1,832.5**
Lunch																
	Grades K-12															
	Milk	$0.1841	$0.1878	$0.1916	$0.1955	$0.1995	854	5,531	5,586	5,631	5,676	$157.2	$1,038.8	$1,070.5	$1,101.0	$1,132.4
	Fruit	0.0970	0.0998	0.1026	0.1055	0.1085	854	5,531	5,586	5,631	5,676	82.9	551.9	573.1	594.0	615.6
	Fruit Juice	0.0224	0.0230	0.0237	0.0244	0.0250	854	5,531	5,586	5,631	5,676	19.1	127.4	132.3	137.1	142.1
	Refined Grain	0.1724	0.1790	0.1859	0.1930	0.2005	854	5,531	5,586	5,631	5,676	147.2	990.0	1,038.4	1,087.0	1,137.8
	Whole Grain	0.0173	0.0179	0.0186	0.0194	0.0201	854	5,531	5,586	5,631	5,676	14.8	99.3	104.1	109.0	114.1
	Meat/Meat Alternate	0.3049	0.3133	0.3219	0.3308	0.3399	854	5,531	5,586	5,631	5,676	260.4	1,732.7	1,798.2	1,862.5	1,929.1
	Vegetable	0.1894	0.1970	0.2048	0.2129	0.2213	854	5,531	5,586	5,631	5,676	161.8	1,089.3	1,143.9	1,198.8	1,256.3
	Total K-12	**$0.9875**	**$1.0178**	**$1.0491**	**$1.0814**	**$1.1148**						**$843.5**	**$5,629.5**	**$5,860.6**	**$6,089.4**	**$6,327.5**

notes:

1. Average grams per meal served is calculated using SNDA-III (SY 2004-2005)
2. Price is calculated using SLBCS II data (SY 2005-2006) and inflated to FY 2012 using the Bureau of Labor Statistics CPI-U.

Table A-3: Detail of Proposed Rule Food Cost Estimate – Prices per Meal, Participation, and Total Projected Food Cost

Final Rule

Meal	Food Item	Weighted Average Price (inflated to) dollar cost per meal					Participation meals served (thousands)					Total Food Cost ($ millions) for number of months				
												3	12	12	12	12
		FY2012	FY2013	FY2014	FY2015	FY2016	FY2012	FY2013	FY2014	FY2015	FY2016	FY2012	FY2013	FY2014	FY2015	FY2016
Breakfast																
	Grades K-12															
	Milk	$0.1819	$0.1856	$0.1893	$0.1932	$0.1971	342	2,253	2,298	2,332	2,367	$62.2	$418.0	$435.0	$450.5	$466.6
	Fruit	0.0353	0.0362	0.0562	0.1632	0.1675	342	2,253	2,298	2,332	2,367	12.1	81.6	129.2	380.6	396.5
	Fruit Juice	0.1110	0.1141	0.1173	0.1206	0.1240	342	2,253	2,298	2,332	2,367	37.9	257.0	269.6	281.3	293.6
	Refined Grains	0.1920	0.1828	0.0927	0.0000	0.0000	342	2,253	2,298	2,332	2,367	65.6	411.8	213.0	-	-
	Whole Grains	0.0853	0.0981	0.1836	0.3189	0.3269	342	2,253	2,298	2,332	2,367	29.1	221.1	422.0	743.8	773.8
	Meat/Meat Alternate	0.0910	0.0934	0.0959	0.0984	0.1010	342	2,253	2,298	2,332	2,367	31.1	210.4	220.3	229.4	239.0
	Vegetable	0.0046	0.0048	0.0041	-0.0010	-0.0011	342	2,253	2,298	2,332	2,367	1.6	10.9	9.5	(2.4)	(2.5)
	Total K-12	**$0.7010**	**$0.7151**	**$0.7392**	**$0.8933**	**$0.9154**						**$239.6**	**$1,610.8**	**$1,698.5**	**$2,083.3**	**$2,167.0**
Lunch																
	Grades K-12															
	Milk	$0.1792	$0.1829	$0.1866	$0.1904	$0.1943	854	5,531	5,586	5,631	5,676	$153.1	$1,011.5	$1,042.4	$1,072.0	$1,102.6
	Fruit	0.0976	0.1003	0.1032	0.1061	0.1091	854	5,531	5,586	5,631	5,676	83.4	555.0	576.3	597.3	619.1
	Fruit Juice	0.0224	0.0230	0.0237	0.0244	0.0250	854	5,531	5,586	5,631	5,676	19.1	127.4	132.3	137.1	142.1
	Refined Grains	0.0787	0.0817	0.0716	0.0000	0.0000	854	5,531	5,586	5,631	5,676	67.2	452.0	400.0	-	-
	Whole Grains	0.0810	0.0842	0.1040	0.2012	0.2089	854	5,531	5,586	5,631	5,676	69.2	465.5	581.1	1,132.9	1,185.9
	Meat/Meat Alternate	0.2752	0.2827	0.2905	0.2985	0.3067	854	5,531	5,586	5,631	5,676	235.0	1,563.7	1,622.9	1,680.9	1,741.0
	Vegetable	0.2782	0.2892	0.3007	0.3127	0.3251	854	5,531	5,586	5,631	5,676	237.6	1,599.8	1,679.9	1,760.5	1,845.0
	Total K-12	**$1.0123**	**$1.0441**	**$1.0803**	**$1.1332**	**$1.1691**						**$864.7**	**$5,774.9**	**$6,034.8**	**$6,380.8**	**$6,635.7**

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Final Regulatory Flexibility Analysis

Final rule: Nutrition Standards in the National School Lunch and School Breakfast Programs

[RIN 0584–AD59]

AGENCY: Food and Nutrition Service, USDA.

Background: The Regulatory Flexibility Act (RFA) requires agencies to consider the impact of their rules on small entities and to evaluate alternatives that would accomplish the objectives of the rules without unduly burdening small entities when the rules impose a significant economic impact on a substantial number of small entities. Inherent in the RFA is Congress' desire to remove barriers to competition and encourage agencies to consider ways of tailoring regulations to the size of the regulated entities.

The RFA does not require that agencies necessarily minimize a rule's impact on small entities if there are significant legal, policy, factual, or other reasons for the rule's having such an impact. The RFA requires only that agencies determine, to the extent feasible, the rule's economic impact on small entities, explore regulatory alternatives for reducing any significant economic impact on a substantial number of such entities, and explain the reasons for their regulatory choices.

Reasons That Action Is Being Considered

Section 103 of the Child Nutrition and WIC Reauthorization Act of 2004 inserted Section 9(a)(4) into the National School Lunch Act requiring the Secretary to promulgate rules revising nutrition requirements, based on the most recent *Dietary Guidelines for Americans,* that reflect specific recommendations for increased consumption of foods and food ingredients offered in school meal programs. In addition, Section 201 of the Healthy, Hunger-Free Kids Act of 2010 (HHFKA) requires the Secretary to issue regulations to update the school meal patterns based on recommendations of the Institute of Medicine. This final rule amends Sections 210 and 220 of the regulations that govern the National School Lunch Program (NSLP) and the School Breakfast Program (SBP). USDA published a proposed rule in the **Federal Register** on January 13, 2011 (76 FR 2494) that closely followed IOM's recommendations. USDA received and processed more than 130,000 comments on the proposed rule. USDA considered those comments in developing a final rule that continues to advance the goals of the IOM while responding to concerns about the cost of implementation, and the need for flexibility in administration at the school district level.

Objectives of, and Legal Basis for, the Final Rule

Under Section 9(a)(4) and Section 9(f)(1) of the NSLA, schools that participate in the NSLP or SBP must offer lunches and breakfasts that are consistent with the goals of the most recent *Dietary Guidelines for Americans.* Current nutrition requirements for school lunches and breakfasts are based on the 1995 *Dietary Guidelines* and the 1989 RDAs. (School lunches and breakfasts were not updated when the 2000 Dietary Guidelines were issued because those recommendations did not require significant changes to the school meal patterns.) The 2005 and 2010 Dietary Guidelines provide more prescriptive and specific nutrition guidance than earlier releases and require significant changes to school meal requirements.

Number of Small Entities To Which the Final Rule Will Apply

This rule directly regulates the 55 State education agencies and 2 State Departments of Agriculture (SAs) that operate the NSLP and SBP pursuant to agreements with USDA's Food and Nutrition Service (FNS); in turn, its provisions apply to entities that prepare and provide NSLP and SBP meals to students. While SAs are not small entities under the RFA as State populations exceed the 50,000 threshold for a small government jurisdiction, many of the service-providing institutions that work with them to implement the program do meet definitions of small entities:

- There are currently about 19,000 School Food Authorities (SFAs) participating in NSLP and SBP. More than 99 percent of these have fewer than 50,000 students.[67] About 26 percent of SFAs with fewer than 50,000 students are private. However, private school SFAs account for only 3 percent of all students in SFAs with enrollments under 50,000.[68]
- Nearly 102,000 schools and residential child care institutions participate in the NSLP. These include more than 90,000 public schools, 6,000 private schools, and about 5,000 residential child care institutions (RCCIs).[69] We focus on the impact at the SFA level in this document, rather than the school level, because SFAs are responsible for the administration of the NSLP and the SBP.
- Food service management companies (FSMCs) that prepare school meals or menus under contract to SFAs are affected indirectly by the proposed rule. Thirteen percent of public school SFAs contracted with FSMCs in school year (SY) 2004–2005.[70] Of the 2,460 firms categorized as ''food service contractors'' under NAICS code 72231, 96 percent employ fewer than 500 workers.[71]

Response to Public Comments on Initial Regulatory Flexibility Analysis

USDA received comments on the Initial Regulatory Flexibility Analysis from school, SFA, and State education officials, advocacy organizations, and foodservice industry representatives. Most of those individuals were concerned with the cost of complying with the rule. Commenters pointed to the particular cost challenges faced by small schools with few foodservice employees, limited space for storage and on-site meal preparation, and the inability to purchase food in quantities necessary to get the lowest prices. These comments are discussed in the relevant sections below.

Projected Reporting, Recordkeeping and Other Compliance Requirements

The analysis below covers only those organizations impacted by the final rule that were determined to be small entities.

School Food Authorities (SFA)/Schools

Increased Cost To Produce School Meals

USDA estimates that the proposed rule will raise the average cost of producing and serving school lunches by 5 cents on initial implementation. Phased implementation of the rule's breakfast meal patterns results in no first year costs. By FY 2015, when all of the lunch and breakfast food group requirements are in place, the cost per lunch will be about 10 cents higher than our baseline estimate; the cost per breakfast will be about 27 cents higher. Across all SFAs we estimate that the total cost of compliance will be $3.2 billion over five years. Although about 99 percent of SFAs enroll fewer than

[67] FNS 742 School Food Verification Survey, School Year 2009–2010. This number is approximate, not all SFAs are required to submit the 742 form.

[68] Ibid. RCCIs include but are not limited to juvenile detention centers, orphanages, and medical institutions. We do not have information on the number of children enrolled in these institutions.

[69] FNS program data for FY 2010.

[70] U.S. Department of Agriculture, Food and Nutrition Service, Office of Research, Nutrition and Analysis, *School Nutrition Dietary Assessment Study-III, Vol. I,* 2007, p. 34 *http://www.fns.usda.gov/ora/MENU/Published/CNP/FILES/SNDAIII-Vol1.pdf.*

[71] Ibid.

50,000 students, they enroll only about 80 percent of all students. If they serve about 80 percent of all meals (we do not have data on meals served by SFA size) then these small entities would incur roughly 80 percent of estimated costs.

With exceptions for individual schools, USDA expects that the cost of the rule will increase with meals served and will not be proportionately higher for small schools. Small schools that face average labor and food costs, and have menus typical of the average school are expected to incur per-meal costs comparable to larger schools. We expect that those costs will equal our estimated cost per meal multiplied by the number of meals served.

The most important factors that separate schools with higher than average per-meal costs from those with lower than average costs are not necessarily associated with the size of the SFA. For instance, schools with menus that already emphasize fruits, non-starchy vegetables, and whole grains will need to make fewer changes, and the costs of implementation in those schools should be lower than average. Also, because the per-meal cost of complying with the proposed requirements is much higher for breakfast than for lunch, the overall costs of implementation in schools that serve the most school breakfasts relative to lunches will be higher than the costs faced by schools that do not serve breakfast.

Some commenters note that small districts pay more for food than larger districts that benefit from volume discounts. Others suggest that prices for whole grain and reduced fat products are higher in small, rural communities. USDA's School Lunch and Breakfast Cost Study II (SLBCS) finds that the per-meal costs of producing school breakfasts are higher in small districts than in large districts.[72] But the study finds no statistically significant difference by SFA size in the cost of producing a school lunch.

SLBCS finds that at least some of the higher cost incurred by small districts to produce a school breakfast is due to the fixed costs of operating a small program. The study does not, however, address how much might be due to higher food prices. USDA's School Food Purchase Study (SFPS) found that large districts do tend to pay less than small districts for food on a per-unit basis.[73] But the study also found that ''the relationship [between small SFA size and higher food costs] is weak for districts of less than 5,000 enrollment.'' Although SFPS found that small districts tend to pay more for food, it also found that small districts charge students the least for full-price school meals.[74]

Increased Cost of Administering School Meals Programs

USDA expects that SFAs will incur additional administrative costs for staff training during implementation of the new standards. The final rule replaces the Coordinated Review Effort (CRE) and School Meals Initiative (SMI) with a combined State Agency administrative review. The new review will be held once every 3 years, instead of once every 5 years. The increased frequency of the combined review will increase administrative costs for many SFAs. However, SFAs that previously had separate CREs and SMIs may experience a decrease in burden, because they will undergo just one CRE every three years, rather than two reviews (one CRE and one SMI) every five years.

USDA estimates that the proposed rule will result in an average 8.2 hour net increase in the annual reporting and recordkeeping burden for each of 7,000 SFAs. That increase appears to fall below the threshold for recognition as a significant impact for RFA purposes.[75]

Increased Equipment Costs

SFAs may need to purchase new equipment to prepare and serve meals that comply with the proposed standards. For example, some SFAs may need to replace fryers with ovens or steamers. In FY 2009, FNS solicited requests from SFAs for food service equipment grants, awarding $100 million in 2009 American Recovery and Reinvestment Act (ARRA) Equipment Grants and an additional $25 million in one-time funds included in the FY 2010 Appropriations Act. In response to their solicitations for these funds, State agencies received a total of approximately $600 million in grant requests from SFAs. The strong response to these grant programs indicates a substantial demand for investment in kitchen equipment.

We do not have the data necessary to measure the remaining unmet demand in smaller SFAs or in SFAs that did not receive grants. However, much of that demand is driven by the routine need to replace equipment that is nearing the end of its useful life—a cost that is appropriately covered by USDA meal reimbursements and other sources of food service revenue. For recipient SFAs, the grants temporarily freed some of those revenue sources for other priorities. In the absence of additional Congressional action, SFAs must again turn to those sources to meet their ongoing equipment needs.

Data from the SLBCS confirm that small SFAs spend more, on average, to produce a school breakfast than do large SFAs.[76] SLBCS found that higher per-meal breakfast costs in small SFAs are due, in part, to the fixed costs of operating a breakfast program. For example, schools that choose to offer breakfast must pay staff to serve meals, no matter how few students participate. As schools serve more breakfasts, SLBCS data show that the cost per unit decreases; this is the case for both small and large SFAs.[77]

If the fixed costs of starting up a breakfast program were the only factors responsible for higher average breakfast costs in small school districts, then we would not expect the final rule to have a disproportionate effect on those districts. The main costs of the rule are variable rather than fixed: Schools must offer a greater variety and additional quantities of certain foods to each student. Some commenters point out, though, that the rule might require additional investment in food preparation and storage equipment, and that this imposes a special burden on smaller districts. But these costs are variable too; larger districts will spend more than smaller districts on similar types of equipment to handle a greater volume of food. Of course, kitchen equipment is not variable in the same sense as food. Small districts may have to purchase new equipment as a result of the final rule that they may not use

[72] U.S. Department of Agriculture, Food and Nutrition Service, Office of Research, Nutrition and Analysis, *School Lunch and Breakfast Cost Study-II, Final Report,* by Susan Bartlett, *et al.,* 2008, pp. 3–2—3–5. *http://www.fns.usda.gov/ora/MENU/Published/CNP/FILES/MealCostStudy.pdf.*

[73] The study could not conclude whether the price advantage of large districts was a result of ''an economy of scale based on the volume of food they are purchasing, the use of highly centralized procurement systems or formal procurement and pricing methods typically found in large school districts, the accessibility to more vendors leading to a more competitive marketplace, or a combination of factors.'' U.S. Department of Agriculture, Food and Nutrition Service, Office of Analysis and Evaluation, *School Food Purchase Study Final Report* (Executive Summary), by Lynn Daft, *et al.,* 1998 *http://www.fns.usda.gov/ora/MENU/Published/CNP/FILES/SFPS–Execsum.pdf.*

[74] School Food Purchase Study Final Report, pp. III–14—III–15.

[75] SBA's ''A Guide for Government Agencies'' identifies several examples of significant impact: A rule that provides a strong disincentive to seek capital; 175 staff hours per year for recordkeeping; impacts greater than the $500 fine (in 1980 dollars) imposed for noncompliance; new capital requirements beyond the reach of the entity; and any impact less cost-efficient than another reasonable regulatory alternative.

[76] *School Food Purchase Study Final Report,* p. VII–1.

[77] Ibid.

as intensively as districts that prepare more meals. In that way, expenditures on kitchen equipment may add more to per-meal costs in small districts than in bigger districts.

USDA Response to Public Comments on the Cost of the Proposed Rule

USDA considered all comments submitted by the public on the proposed rule. Comments from school district and school officials, foodservice industry professionals, and others concerned with the cost of the proposed rule were instrumental in guiding USDA's development of a less costly final rule. The modifications offer schools short term savings, relative to the proposed rule, by phasing in the rule's breakfast fruit and grain requirements. As a result of elimination of the proposed rule's breakfast meat requirement, the ongoing cost of the final rule after full implementation is also reduced. Eliminating the proposed limit on the amount of starchy vegetables that schools may offer at lunch has little effect on the cost of the final rule relative to the proposed rule. Significant savings are realized through a reduction in the lunch pattern's grain requirement.

USDA estimated that the proposed rule would increase the costs of preparing and serving school meals by $6.8 billion over 5 years. With the changes discussed above, the 5-year cost of the rule is reduced to $3.2 billion.[78] The reduction in cost will benefit SFAs of any size that might have had difficulty implementing the proposed rule standards.

Options for Addressing Increased Costs

Although changes to the final rule significantly reduce the implementation costs faced by SFAs, the rule still requires a substantial investment by schools and school districts to improve the nutritional quality of school meals.

The Healthy, Hunger-Free Kids Act of 2010 (HHFKA), which is one of the 2 statutory directives behind this rulemaking, also contains provisions intended to reform school meal financing. USDA estimates that those provisions will increase SFA revenues enough to fully offset the cost of this rule.

HHFKA's meal pattern and revenue raising provisions are linked directly in the performance-based increase in Federal financing for school lunches. Schools and SFAs that successfully implement the final rule standards will receive an additional 6 cent reimbursement for each lunch served. The Congressional Budget Office estimates that an additional 6 cents per lunch would raise $1.5 billion for SFAs in the first 5 years after implementation of the rule.[79]

HHFKA contains two additional provisions to ensure that Federal reimbursements are used as intended to provide quality meals to program participants. The first requires SFAs to gradually raise the per-meal revenue generated from paid lunches to an amount equal to the Federal reimbursement for free lunches. That revenue could come from student payments or State or local sources. The second requires that the revenue generated from non-program foods as a percent of food costs match the revenue to food cost ratio of program meals. USDA estimates that these two provisions will raise a combined $7.5 billion in the 5 years following their July 1, 2011 effective date.[80]

SFAs will benefit differently from HHFKA's revenue provisions. SFAs with relatively few students who pay full price for program meals stand to gain little from HHFKA's paid lunch provision. Similarly, schools that sell few à la carte items will realize little revenue from an increase in à la carte prices. At the same time, schools that serve mostly free and reduced-price students and sell little à la carte can rely on significant Federal funding for each SFA dollar spent to purchase and prepare school foods.

The experience of some schools suggests that substantial progress toward implementation of the rule can even be achieved with existing resources. USDA's HealthierUS Schools Challenge (HUSSC) recognizes elementary schools that meet voluntary school meal and physical activity standards. HUSSC school meal standards exceed NSLP requirements on several levels, including requirements for a variety of vegetables each week, including dark green and orange vegetables and legumes; a variety of whole fruits, and limits on fruit juice; and whole grain and low fat milk requirements. USDA has certified more than 1,600 HUSSC schools since 2004. HUSSC schools have demonstrated an ability to operate cost-effective school meals programs that emphasize many of the same foods required by the final rule. These schools receive no financial assistance from USDA beyond the meal reimbursements and USDA Foods available to other schools that participate in the Federal school lunch and breakfast programs. Like other service businesses, schools may need to consider changes to their operations to increase efficiency and meet the requirements of the rule. HUSSC schools have demonstrated an ability to operate cost-effective school meals programs that meet many of the final rule's requirements. These schools may offer models for others as implementation moves forward.

We recognize that small SFAs, like others, will face substantial costs and potential challenges in implementing the proposed rule. These costs should not be significantly greater for small SFAs than for larger ones, as implementation costs are driven primarily by factors other than SFA size. Nevertheless, we do not discount the special challenges that may face some smaller SFAs. As a group, small SFAs may have less flexibility to adjust resources in response to immediate budgetary needs. Phased implementation of the final rule's breakfast provisions, which will reduce up-front costs of implementation, may be particularly valuable to small SFAs.

Food Service Management Companies

FSMCs are potentially indirectly affected by the proposed rule. FSMCs that provide school meals under contract to SFAs will need to alter those products to conform to the proposed changes in meal requirements. In addition, FSMCs may find new opportunities to work with SFAs that currently do not contract for food service assistance. Consistent with SBA guidance, which notes that ''[t]he courts have held that the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates them'',[81] we do not attempt to quantify the economic effect of the proposed rule on FSMCs.

Federal Rules That May Duplicate, Overlap or Conflict With the Final Rule

FNS is unaware of any such Federal rules or laws.

Significant Alternatives

One alternative to the final rule is to retain the proposed rule without change. The proposed rule closely

[78] Part of the reduction in cost is due to a recent reduction in food inflation. See the Regulatory Impact Analysis for additional detail.

[79] See Table 2 in CBO's April 20, 2010 cost estimate for HHFKA. *http://www.cbo.gov/ftpdocs/114xx/doc11451/HealthyHungerFreeKidsAct.pdf.* The total increase in budget authority through FY 2016 includes $100 million for administrative expenses ($50 million in each of the first 2 years).

[80] See the interim final rule and regulatory impact analysis for ''School Food Service Account Revenue Amendments Related to the Healthy, Hunger-Free Kids Act of 2010'', **Federal Register,** Vol. 76, No. 117, pp. 35301–35318.

[81] SBA, ''A Guide for Government Agencies'', p. 20.

followed IOM's recommendations. IOM developed its recommendations to encourage student consumption of foods recommended by the *Dietary Guidelines* in quantities designed to provide necessary nutrients without excess calories. The final rule still achieves that goal. Students will still be presented with choices from the food groups and vegetable subgroups recommended by the *Dietary Guidelines.* In that way, the final rule, like the proposed rule, will help children recognize and choose foods consistent with a healthy diet.

The most significant differences between the proposed and final rules are in the breakfast meal patterns, and those differences are largely a matter of timing. The final rule allows schools more time to phase-in key IOM recommendations on fruit and grains at breakfast. Once fully implemented, the most important difference between the final and proposed rule breakfast meal patterns is the elimination of a separate meat/meat alternate requirement. That change preserves current rules that allow the substitution of meat for grains at breakfast. It also responds to general public comments on cost, and on the need to preserve schools' flexibility to serve breakfast outside of a traditional cafeteria setting.

Even with these changes, and with the less significant changes to the proposed lunch standards, the final rule remains consistent with *Dietary Guidelines* recommendations. The added flexibility and reduced cost of the final rule relative to the proposed rule should increase schools' ability to comply with the new meal patterns. The final rule's less costly breakfast patterns will make it easier for schools to maintain or expand current breakfast programs, and may encourage other schools to adopt a breakfast program.

Implementing the proposed rule, without changes, would increase the cost to SFAs of implementing the new meal patterns, relative to the final rule, by an estimated $2.9 billion over 5 years.

List of Subjects

7 CFR Part 210

Grant programs—education, Grant programs—health, Infants and children, Nutrition, Penalties, Reporting and recordkeeping requirements, School breakfast and lunch programs, Surplus agricultural commodities.

7 CFR Part 220

Grant programs—education, Grant programs—health, Infants and children, Nutrition, Reporting and recordkeeping requirements, School breakfast and lunch programs.

Accordingly, 7 CFR parts 210 and 220 are amended as follows:

PART 210—NATIONAL SCHOOL LUNCH PROGRAM

■ 1. The authority citation for 7 CFR part 210 continues to read as follows:

Authority: 42 U.S.C. 1751–1760, 1779.

■ 2. In § 210.2:
■ a. Revise the definition of *Food component;*
■ b. Revise the definition of *Food item;*
■ c. Amend the definition of *Lunch* by removing the words ''applicable nutrition standards and portion sizes'' and adding in their place the words ''meal requirements'';
■ d. Remove the definition of *Menu item;*
■ e. Remove the definition of *Nutrient Standard Menu Planning/Assisted Nutrient Standard Menu Planning;*
■ f. Revise the definition of *School week;* and
■ g. Add definitions of *Tofu* and *Whole grains.*

The revisions and additions read as follows:

§ 210.2 Definitions.

* * * * *

Food component means one of the five food groups which comprise reimbursable meals. The five food components to be offered to students in grades K–5 are: Meats/meat alternates, grains, vegetables, fruits, and fluid milk. Meals offered to preschoolers must consist of four food components: Meats/meat alternates, grains, vegetables/fruits, and fluid milk.

Food item means a specific food offered within the five food components: Meats/meat alternates, grains, vegetables, fruits, and fluid milk.

* * * * *

School week means the period of time used to determine compliance with the meal requirements in § 210.10. The period shall be a normal school week of five consecutive days; however, to accommodate shortened weeks resulting from holidays and other scheduling needs, the period shall be a minimum of three consecutive days and a maximum of seven consecutive days. Weeks in which school lunches are offered less than three times shall be combined with either the previous or the coming week.

* * * * *

Tofu means a soybean-derived food, made by a process in which soybeans are soaked, ground, mixed with water, heated, filtered, coagulated, and formed into cakes. Basic ingredients are whole soybeans, one or more food-grade coagulants (typically a salt or an acid), and water. Tofu products must conform to FNS guidance to count toward the meats/meat alternates component.

Whole grains means grains that consist of the intact, ground, cracked, or flaked grain seed whose principal anatomical components—the starchy endosperm, germ and bran—are present in the same relative proportions as they exist in the intact grain seed. Whole grain-rich products must conform to FNS guidance to count toward the grains component.

* * * * *

■ 3. Revise § 210.10 to read as follows:

§ 210.10 Meal requirements for lunches and requirements for afterschool snacks.

(a) *General requirements.* (1) *General nutrition requirements.* Schools must offer nutritious, well-balanced, and age-appropriate meals to all the children they serve to improve their diets and safeguard their health.

(i) *Requirements for lunch.* School lunches offered to children age 5 or older must meet, at a minimum, the meal requirements in paragraph (b) of this section. Schools must follow a food-based menu planning approach and produce enough food to offer each child the quantities specified in the meal pattern established in paragraph (c) of this section for each age/grade group served in the school. In addition, school lunches must meet the dietary specifications in paragraph (f) of this section. Schools offering lunches to children ages 1 to 4 and infants must meet the meal pattern requirements in paragraph (p) of this section.

(ii) *Requirements for afterschool snacks.* Schools offering afterschool snacks in afterschool care programs must meet the meal pattern requirements in paragraph (o) of this section. Schools must plan and produce enough food to offer each child the minimum quantities under the meal pattern in paragraph (o) of this section. The component requirements for meal supplements served under the Child and Adult Care Food Program authorized under part 226 of this chapter also apply to afterschool snacks served in accordance with paragraph (o) of this section.

(2) *Unit pricing.* Schools must price each meal as a unit. Schools need to consider participation trends in an effort to provide one reimbursable lunch and, if applicable, one reimbursable afterschool snack for each child every school day. If there are leftover meals, schools may offer them to the students but cannot get Federal reimbursement

for them. Schools must identify, near or at the beginning of the serving line(s), the food items that constitute the unit-priced reimbursable school meal(s). The price of a reimbursable lunch does not change if the student does not take a food item or requests smaller portions.

(3) *Production and menu records.* Schools or school food authorities, as applicable, must keep production and menu records for the meals they produce. These records must show how the meals offered contribute to the required food components and food quantities for each age/grade group every day. Labels or manufacturer specifications for food products and ingredients used to prepare school meals must indicate zero grams of *trans* fat per serving (less than 0.5 grams). Schools or school food authorities must maintain records of the latest nutritional analysis of the school menus conducted by the State agency. Production and menu records must be maintained in accordance with FNS guidance.

(b) *Meal requirements for school lunches.* School lunches for children ages 5 and older must reflect food and nutrition requirements specified by the Secretary. Compliance with these requirements is measured as follows:

(1) *On a daily basis:* (i) Meals offered to each age/grade group must include the food components and food quantities specified in the meal pattern in paragraph (c) of this section;

(ii) Food products or ingredients used to prepare meals must contain zero grams of *trans* fat per serving or a minimal amount of naturally occurring *trans* fat; and

(iii) The meal selected by each student must have the number of food components required for a reimbursable meal and include at least one fruit or vegetable.

(2) *Over a 5-day school week:* (i) Average calorie content of meals offered to each age/grade group must be within the minimum and maximum calorie levels specified in paragraph (f) of this section;

(ii) Average saturated fat content of the meals offered to each age/grade group must be less than 10 percent of total calories; and

(iii) Average sodium content of the meals offered to each age/grade group must not exceed the maximum level specified in paragraph (f) of this section.

(c) *Meal pattern for school lunches.* Schools must offer the food components and quantities required in the lunch meal pattern established in the following table:

Meal pattern	Lunch meal pattern		
	Grades K–5	Grades 6–8	Grades 9–12
	Amount of food [a] per week (minimum per day)		
Fruits (cups) [b]	2½ (½)	2½ (½)	5 (1)
Vegetables (cups) [b]	3¾ (¾)	3¾ (¾)	5 (1)
Dark green [c]	½	½	½
Red/Orange [c]	¾	¾	1¼
Beans and peas (legumes) [c]	½	½	½
Starchy [c]	½	½	½
Other [c d]	½	½	¾
Additional Veg to Reach Total [e]	1 [e]	1 [e]	1½ [e]
Grains (oz eq) [f]	8–9 (1)	8–10 (1)	10–12 (2)
Meats/Meat Alternates (oz eq)	8–10 (1)	9–10 (1)	10–12 (2)
Fluid milk (cups) [g]	5 (1)	5 (1)	5 (1)
Other Specifications: Daily Amount Based on the Average for a 5-Day Week			
Min-max calories (kcal) [h]	550–650	600–700	750–850
Saturated fat (% of total calories) [h]	< 10	< 10	< 10
Sodium (mg) [h i]	≤ 640	≤ 710	≤ 740
Trans fat [h]	Nutrition label or manufacturer specifications must indicate zero grams of *trans* fat per serving.		

[a] Food items included in each group and subgroup and amount equivalents. Minimum creditable serving is ⅛ cup.

[b] One quarter-cup of dried fruit counts as ½ cup of fruit; 1 cup of leafy greens counts as ½ cup of vegetables. No more than half of the fruit or vegetable offerings may be in the form of juice. All juice must be 100% full-strength.

[c] Larger amounts of these vegetables may be served.

[d] This category consists of ''Other vegetables'' as defined in § 210.10(c)(2)(iii)(E). For the purposes of the NSLP, the ''Other vegetables'' requirement may be met with any additional amounts from the dark green, red/orange, and beans/peas (legumes) vegetable subgroups as defined in § 210.10(c)(2)(iii).

[e] Any vegetable subgroup may be offered to meet the total weekly vegetable requirement.

[f] Beginning July 1, 2012 (SY 2012–2013), at least half of grains offered must be whole grain-rich. Beginning July 1, 2014 (SY 2014–15), all grains must be whole grain-rich.

[g] Beginning July 1, 2012 (SY 2012–2013), all fluid milk must be low-fat (1 percent or less, unflavored) or fat-free (unflavored or flavored).

[h] Discretionary sources of calories (solid fats and added sugars) may be added to the meal pattern if within the specifications for calories, saturated fat, *trans* fat, and sodium. Foods of minimal nutritional value and fluid milk with fat content greater than 1 percent are not allowed.

[i] Final sodium targets must be met no later than July 1, 2022 (SY 2022–2023). The first intermediate target must be met no later than SY 2014–2015 and the second intermediate target must be met no later than SY 2017–2018. See required intermediate specifications in § 210.10(f)(3).

(1) *Age/grade groups.* Schools must plan menus for students using the following age/grade groups: Grades K–5 (ages 5–10), grades 6–8 (ages 11–13), and grades 9–12 (ages 14–18). If an unusual grade configuration in a school prevents the use of these established age/grade groups, students in grades K–5 and grades 6–8 may be offered the same food quantities at lunch provided that the calorie and sodium standards for each age/grade group are met. No customization of the established age/grade groups is allowed.

(2) *Food components.* Schools must offer students in each age/grade group the food components specified in paragraph (c) of this section.

(i) *Meats/meat alternates component.* Schools must offer meats/meat alternates daily as part of the lunch meal pattern. The quantity of meats/meat alternates must be the edible portion as served. This component must be served in a main dish or in a main dish and only one other food item. Schools without daily choices in this component should not serve any one meat alternate or form of meat (for example, ground, diced, pieces) more than three times in the same week. If a portion size of this component does not meet the daily requirement for a particular age/grade group, schools may supplement it with another meats/meat alternates to meet the full requirement. Schools may adjust the daily quantities of this component provided that a minimum of one ounce is offered daily to students in grades K–8 and a minimum of two ounces is offered daily to students in grades 9–12, and the total weekly requirement is met over a five-day period.

(A) *Enriched macaroni.* Enriched macaroni with fortified protein as defined in Appendix A to this part may be used to meet part of the meats/meat alternates requirement when used as specified in Appendix A to this part. An enriched macaroni product with fortified protein as defined in Appendix A to this part may be used to meet part of the meats/meat alternates component or the grains component but may not meet both food components in the same lunch.

(B) *Nuts and seeds.* Nuts and seeds and their butters are allowed as meat alternates in accordance with FNS guidance. Acorns, chestnuts, and coconuts may not be used because of their low protein and iron content. Nut and seed meals or flours may be used only if they meet the requirements for Alternate Protein Products established in Appendix A to this part. Nuts or seeds may be used to meet no more than one-half (50 percent) of the meats/meat alternates component with another meats/meat alternates to meet the full requirement.

(C) *Yogurt.* Yogurt may be used to meet all or part of the meats/meat alternates component. Yogurt may be plain or flavored, unsweetened or sweetened. Noncommercial and/or non-standardized yogurt products, such as frozen yogurt, drinkable yogurt products, homemade yogurt, yogurt flavored products, yogurt bars, yogurt covered fruits and/or nuts or similar products are not creditable. Four ounces (weight) or ½ cup (volume) of yogurt equals one ounce of the meats/meat alternates requirement.

(D) *Tofu and soy products.* Commercial tofu and soy products may be used to meet all or part of the meats/meat alternates component in accordance with FNS guidance. Noncommercial and/or non-standardized tofu and soy products are not creditable.

(E) *Beans and Peas (legumes).* Cooked dry beans and peas (legumes) may be used to meet all or part of the meats/meat alternates component. Beans and peas (legumes) are identified in this section and include foods such as black beans, garbanzo beans, lentils, kidney beans, mature lima beans, navy beans, pinto beans, and split peas.

(F) *Other Meat Alternates.* Other meat alternates, such as cheese and eggs, may be used to meet all or part of the meats/meat alternates component in accordance with FNS guidance.

(ii) *Fruits component.* Schools must offer fruits daily as part of the lunch menu. Fruits that are fresh; frozen without added sugar; canned in light syrup, water or fruit juice; or dried may be offered to meet the requirements of this paragraph. All fruits are credited based on their volume as served, except that ¼ cup of dried fruit counts as ½ cup of fruit. Only pasteurized, full-strength fruit juice may be used, and may be credited to meet no more than one-half of the fruits component.

(iii) *Vegetables component.* Schools must offer vegetables daily as part of the lunch menu. Fresh, frozen, or canned vegetables and dry beans and peas (legumes) may be offered to meet this requirement. All vegetables are credited based on their volume as served, except that 1 cup of leafy greens counts as ½ cup of vegetables and tomato paste and puree are credited based on calculated volume of the whole food equivalency. Pasteurized, full-strength vegetable juice may be used to meet no more than one-half of the vegetables component. Cooked dry beans or peas (legumes) may be counted as either a vegetable or as a meat alternate but not as both in the same meal. Vegetable offerings at lunch over the course of the week must include the following vegetable subgroups, as defined in this section in the quantities specified in the meal pattern in paragraph (c) of this section:

(A) *Dark green vegetables.* This subgroup includes vegetables such as bok choy, broccoli, collard greens, dark green leafy lettuce, kale, mesclun, mustard greens, romaine lettuce, spinach, turnip greens, and watercress;

(B) *Red-orange vegetables.* This subgroup includes vegetables such as acorn squash, butternut squash, carrots, pumpkin, tomatoes, tomato juice, and sweet potatoes;

(C) *Beans and peas (legumes).* This subgroup includes vegetables such as black beans, black-eyed peas (mature, dry), garbanzo beans (chickpeas), kidney beans, lentils, navy beans pinto beans, soy beans, split peas, and white beans;

(D) *Starchy vegetables.* This subgroup includes vegetables such as black-eyed peas (not dry), corn, cassava, green bananas, green peas, green lima beans, plantains, taro, water chestnuts, and white potatoes; and

(E) *Other vegetables.* This subgroup includes all other fresh, frozen, and canned vegetables, cooked or raw, such as artichokes, asparagus, avocado, bean sprouts, beets, Brussels sprouts, cabbage, cauliflower, celery, cucumbers, eggplant, green beans, green peppers, iceberg lettuce, mushrooms, okra, onions, parsnips, turnips, wax beans, and zucchini.

(iv) *Grains component.* (A) *Enriched and whole grains.* All grains must be made with enriched and whole grain meal or flour, in accordance with the most recent grains FNS guidance. Whole grain-rich products must contain at least 51 percent whole grains and the remaining grains in the product must be enriched.

(B) *Daily and weekly servings.* The grains component is based on minimum daily servings plus total servings over a five-day school week. Beginning July 1, 2012 (SY 2012–2013), half of the grains offered during the school week must meet the whole grain-rich criteria specified in FNS guidance. Beginning July 1, 2014 (SY 2014–2015), all grains must meet the whole grain-rich criteria specified in FNS guidance. The whole grain-rich criteria provided in FNS guidance may be updated to reflect additional information provided voluntarily by industry on the food label or a whole grains definition by the Food and Drug Administration. Schools serving lunch 6 or 7 days per week must increase the weekly grains quantity by approximately 20 percent (1/5) for each additional day. When schools operate less than 5 days per week, they may decrease the weekly quantity by approximately 20 percent (1/5) for each day less than five. The servings for biscuits, rolls, muffins, and other grain/bread varieties are specified in FNS guidance.

(C) *Desserts.* Schools may count up to two grain-based desserts per week towards meeting the grains requirement as specified in FNS guidance.

(v) *Fluid milk component.* Fluid milk must be offered daily in accordance with paragraph (d) of this section.

(3) *Food components in outlying areas.* Schools in American Samoa, Puerto Rico and the Virgin Islands may

serve vegetables such as yams, plantains, or sweet potatoes to meet the grains component.

(4) *Adjustments to the school menus.* Schools must adjust future menu cycles to reflect production and how often the food items are offered. Schools may need to change the foods offerings given students' selections and may need to modify recipes and other specifications to make sure that meal requirements are met.

(5) *Standardized recipes.* All schools must develop and follow standardized recipes. A standardized recipe is a recipe that was tested to provide an established yield and quantity using the same ingredients for both measurement and preparation methods. Standardized recipes developed by USDA/FNS are in the Child Nutrition Database. If a school has its own recipes, they may seek assistance from the State agency or school food authority to standardize the recipes. Schools must add any local recipes to their local database as outlined in FNS guidance.

(6) *Processed foods.* The Child Nutrition Database includes a number of processed foods. Schools may use purchased processed foods that are not in the Child Nutrition Database. Schools or the State agency must add any locally purchased processed foods to their local database as outlined in FNS guidance. The State agencies must obtain the levels of calories, saturated fat, and sodium in the processed foods.

(7) *Menu substitutions.* Schools should always try to substitute nutritionally similar foods.

(d) *Fluid milk requirement.* (1) *Types of fluid milk.* (i) Schools must offer students a variety (at least two different options) of fluid milk. All milk must be fat-free or low-fat. Milk with higher fat content is not allowed. Fat-free fluid milk may be flavored or unflavored, and low-fat fluid milk must be unflavored. Low fat or fat-free lactose-free and reduced-lactose fluid milk may also be offered.

(ii) All fluid milk served in the Program must be pasteurized fluid milk which meets State and local standards for such milk. All fluid milk must have vitamins A and D at levels specified by the Food and Drug Administration and must be consistent with State and local standards for such milk.

(2) *Inadequate fluid milk supply.* If a school cannot get a supply of fluid milk, it can still participate in the Program under the following conditions:

(i) If emergency conditions temporarily prevent a school that normally has a supply of fluid milk from obtaining delivery of such milk, the State agency may allow the school to serve meals during the emergency period with an alternate form of fluid milk or without fluid milk.

(ii) If a school is unable to obtain a supply of any type of fluid milk on a continuing basis, the State agency may approve the service of meals without fluid milk if the school uses an equivalent amount of canned milk or dry milk in the preparation of the meals. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, and the Virgin Islands, if a sufficient supply of fluid milk cannot be obtained, ''fluid milk'' includes reconstituted or recombined fluid milk, or as otherwise allowed by FNS through a written exception.

(3) *Fluid milk substitutes.* If a school chooses to offer one or more substitutes for fluid milk for non-disabled students with medical or special dietary needs, the nondairy beverage(s) must provide the nutrients listed in the following table. Fluid milk substitutes must be fortified in accordance with fortification guidelines issued by the Food and Drug Administration. A school need only offer the nondairy beverage(s) that it has identified as allowable fluid milk substitutes according to the following chart.

Nutrient	Per cup (8 fl oz)
Calcium	276 mg.
Protein	8 g.
Vitamin A	500 IU.
Vitamin D	100 IU.
Magnesium	24 mg.
Phosphorus	222 mg.
Potassium	349 mg.
Riboflavin	0.44 mg.
Vitamin B–12	1.1 mcg.

(4) *Restrictions on the sale of fluid milk.* A school participating in the Program, or a person approved by a school participating in the Program, must not directly or indirectly restrict the sale or marketing of fluid milk (as identified in paragraph (d)(1) of this section) at any time or in any place on school premises or at any school-sponsored event.

(e) *Offer versus serve.* School lunches must offer daily the five food components specified in the meal pattern in paragraph (c) of this section. Under offer versus serve, students must be allowed to decline two items at lunch, *except that* the students must select at least ½ cup of either the fruit or vegetable component. Senior high schools (as defined by the State educational agency) must participate in offer versus serve. Schools below the senior high level may participate in offer versus serve at the discretion of the school food authority.

(f) *Dietary specifications.* (1) *Calories.* School lunches offered to each age/grade group must meet, on average over the school week, the minimum and maximum calorie levels specified in the following table:

	Calorie ranges for lunch		
	Grades K–5	Grades 6–8	Grades 9–12
Min-max calories (kcal) [ab]	550–650	600–700	750–850

[a] The average daily amount for a 5-day school week must fall within the minimum and maximum levels.

[b] Discretionary sources of calories (solid fats and added sugars) may be added to the meal pattern if within the specifications for calories, saturated fat, *trans* fat, and sodium.

(2) *Saturated fat.* School lunches offered to all age/grade groups must, on average over the school week, provide less than 10 percent of total calories from saturated fat.

(3) *Sodium.* Schools lunches offered to each age/grade group must meet, on average over the school week, the levels of sodium specified in the following table within the established deadlines:

National school lunch program		Sodium reduction: Timeline & amount		
Age/grade group	Baseline: Average current sodium levels in meals as offered [1] (mg)	Target 1: July 1, 2014 (SY 2014–2015) (mg)	Target 2: July 1, 2017 (SY 2017–2018) (mg)	Final Target: July 1, 2022 (SY 2022–2023) (mg)
K–5	1,377 (elementary)	≤ 1,230	≤ 935	≤ 640
6–8	1,520 (middle)	≤ 1,360	≤ 1,035	≤ 710
9–12	1,588 (high)	≤ 1,420	≤ 1,080	≤ 740

[1] SNDA–III.

(4) *Trans fat.* Food products and ingredients used to prepare school meals must contain zero grams of *trans* fat (less than 0.5 grams) per serving. Schools must add the *trans* fat specification and request the required documentation (nutrition label or manufacturer specifications) in their procurement contracts. Documentation for food products and food ingredients must indicate zero grams of *trans* fat per serving. Meats that contain a minimal amount of naturally-occurring *trans* fats are allowed in the school meal programs.

(g) *Compliance assistance.* The State agency and school food authority must provide technical assistance and training to assist schools in planning lunches that meet the meal pattern in paragraph (c) of this section and the calorie, saturated fat, sodium, and *trans* fat specifications established in paragraph (f) of this section. Compliance assistance may be offered during trainings, onsite visits, and/or administrative reviews.

(h) *State agency responsibilities for monitoring dietary specifications.* (1) *Calories, saturated fat and sodium.* As part of the administrative review authorized under § 210.18 of this chapter, State agencies must conduct a weighted nutrient analysis for the school(s) selected for review to evaluate the average levels of calories, saturated fat, and sodium of the lunches offered to students in grades K and above during one week of the review period. The nutrient analysis must be conducted in accordance with the procedures established in paragraph (i)(3) of this section. If the results of the nutrient analysis indicate that the school lunches are not meeting the specifications for calories, saturated fat, and sodium specified in paragraph (f) of this section, the State agency or school food authority must provide technical assistance and require the reviewed school to take corrective action to meet the requirements.

(2) *Trans* fat. State agencies must review product labels or manufacturer specifications to verify that the food products or ingredients used by the reviewed school(s) contain zero grams of *trans* fat (less than 0.5 grams) per serving.

(i) *State agency's responsibilities for nutrient analyses.* (1) *Conducting the nutrient analyses.* State agencies must conduct a weighted nutrient analysis of the reimbursable meals offered to children in grades K and above by a school selected for administrative review under § 210.18 of this chapter. The nutrient analysis must be conducted in accordance with the procedures established in paragraph (i)(3) of this section. The purpose of the nutrient analysis is to determine the average levels of calories, saturated fat, and sodium in the meals offered over a school week within the review period. Unless offered as part of a reimbursable meal, foods of minimal nutritional value (see appendix B to part 210) are not included in the nutrient analysis.

(2) *Software elements.* (i) *The Child Nutrition Database.* The nutrient analysis is based on the USDA Child Nutrition Database. This database is part of the software used to do a nutrient analysis. Software companies or others developing systems for schools may contact FNS for more information about the database.

(ii) *Software evaluation.* FNS or an FNS designee evaluates any nutrient analysis software before it may be used in schools. FNS or its designee determines if the software, as submitted, meets the minimum requirements. The approval of software does not mean that FNS or USDA endorses it. The software must be able to perform a weighted average analysis after the basic data is entered. The combined analysis of the lunch and breakfast programs is not allowed.

(3) *Nutrient analysis procedures.* (i) *Weighted averages.* State agencies must include in the nutrient analysis all foods offered as part of the reimbursable meals during one week within the review period. Foods items are included based on the portion sizes and projected serving amounts. They are also weighted based on their proportionate contribution to the meals offered. This means that food items offered more frequently are weighted more heavily than those not offered as frequently. State agencies conduct the nutrient analysis and calculate weighting as indicated by FNS guidance.

(ii) *Analyzed nutrients.* The analysis determines the average levels of calories, saturated fat, and sodium in the meals offered over a school week. It includes all food items offered by the reviewed school over a one-week period.

(4) *Comparing the results of the nutrient analysis.* Once the procedures in paragraph (i)(3) of this section are completed, State agencies must compare the results of the analysis to the calorie, saturated fat, and sodium levels established in § 210.10 or § 220.8, as appropriate, for each age/grade group to evaluate the school's compliance with the dietary specifications.

(j) *State agency's responsibilities for compliance monitoring.* Compliance with the meal requirements in paragraph (b) of this section, including dietary specifications for calories, saturated fat, sodium and *trans* fat, will be monitored by the State agency through administrative reviews authorized in § 210.18 of this chapter.

(k) *Menu choices at lunch.* (1) *Availability of choices.* Schools may offer children a selection of nutritious foods within a reimbursable lunch to encourage the consumption of a variety of foods. Children who are eligible for free or reduced price lunches must be allowed to take any reimbursable lunch or any choices offered as part of a reimbursable lunch. Schools may establish different unit prices for each reimbursable lunch offered provided that the benefits made available to children eligible for free or reduced price lunches are not affected.

(2) *Opportunity to select.* Schools that choose to offer a variety of reimbursable lunches, or provide multiple serving lines, must make all required food components available to all students, on every lunch line, in at least the minimum required amounts.

(l) *Requirements for lunch periods.* (1) *Timing.* Schools must offer lunches meeting the requirements of this section during the period the school has designated as the lunch period. Schools must offer lunches between 10 a.m. and

2 p.m. Schools may request an exemption from these times from the State agency.

(2) *Adequate lunch periods.* FNS encourages schools to provide sufficient lunch periods that are long enough to give all students adequate time to be served and to eat their lunches.

(m) *Exceptions and variations allowed in reimbursable meals.* (1) *Exceptions for disability reasons.* Schools must make substitutions in lunches and afterschool snacks for students who are considered to have a disability under 7 CFR 15b.3 and whose disability restricts their diet. Substitutions must be made on a case by case basis only when supported by a written statement of the need for substitution(s) that includes recommended alternate foods, unless otherwise exempted by FNS. Such statement must be signed by a licensed physician.

(2) *Exceptions for non-disability reasons.* Schools may make substitutions for students without disabilities who cannot consume the regular lunch or afterschool snack because of medical or other special dietary needs. Substitutions must be made on a case by case basis only when supported by a written statement of the need for substitutions that includes recommended alternate foods, unless otherwise exempted by FNS. Except with respect to substitutions for fluid milk, such a statement must be signed by a recognized medical authority.

(i) *Fluid milk substitutions for non-disability reasons.* Schools may make substitutions for fluid milk for non-disabled students who cannot consume fluid milk due to medical or special dietary needs. A school that selects this option may offer the nondairy beverage(s) of its choice, provided the beverage(s) meets the nutritional standards established under paragraph (d) of this section. Expenses incurred when providing substitutions for fluid milk that exceed program reimbursements must be paid by the school food authority.

(ii) *Requisites for fluid milk substitutions.* (A) A school food authority must inform the State agency if any of its schools choose to offer fluid milk substitutes other than for students with disabilities; and

(B) A medical authority or the student's parent or legal guardian must submit a written request for a fluid milk substitute identifying the medical or other special dietary need that restricts the student's diet.

(iii) *Substitution approval.* The approval for fluid milk substitution must remain in effect until the medical authority or the student's parent or legal guardian revokes such request in writing, or until such time as the school changes its substitution policy for non-disabled students.

(3) *Variations for ethnic, religious, or economic reasons.* Schools should consider ethnic and religious preferences when planning and preparing meals. Variations on an experimental or continuing basis in the food components for the meal pattern in paragraph (c) of this section may be allowed by FNS. Any variations must be consistent with the food and nutrition requirements specified under this section and needed to meet ethnic, religious, or economic needs.

(4) *Exceptions for natural disasters.* If there is a natural disaster or other catastrophe, FNS may temporarily allow schools to serve meals for reimbursement that do not meet the requirements in this section.

(n) *Nutrition disclosure.* To the extent that school food authorities identify foods in a menu, or on the serving line or through other communications with program participants, school food authorities must identify products or dishes containing more than 30 parts fully hydrated alternate protein products (as specified in appendix A of this part) to less than 70 parts beef, pork, poultry or seafood on an uncooked basis, in a manner which does not characterize the product or dish solely as beef, pork, poultry or seafood. Additionally, FNS encourages schools to inform the students, parents, and the public about efforts they are making to meet the meal requirements for school lunches.

(o) *Afterschool snacks.* Eligible schools operating afterschool care programs may be reimbursed for one afterschool snack served to a child (as defined in § 210.2) per day.

(1) ''Eligible schools'' means schools that:

(i) Operate school lunch programs under the Richard B. Russell National School Lunch Act; and

(ii) Sponsor afterschool care programs as defined in § 210.2.

(2) Afterschool snacks shall contain two different components from the following four:

(i) A serving of fluid milk as a beverage, or on cereal, or used in part for each purpose;

(ii) A serving of meat or meat alternate. Nuts and seeds and their butters listed in FNS guidance are nutritionally comparable to meat or other meat alternates based on available nutritional data. Acorns, chestnuts, and coconuts are excluded and shall not be used as meat alternates due to their low protein content. Nut or seed meals or flours shall not be used as a meat alternate except as allowed under appendix A of this part;

(iii) A serving of vegetable(s) or fruit(s) or full-strength vegetable or fruit juice, or an equivalent quantity of any combination of these foods. Juice may not be served when fluid milk is served as the only other component;

(iv) A serving of whole-grain or enriched bread; or an equivalent serving of a bread product, such as cornbread, biscuits, rolls, or muffins made with whole-grain or enriched meal or flour; or a serving of cooked whole-grain or enriched pasta or noodle products such as macaroni, or cereal grains such as enriched rice, bulgur, or enriched corn grits; or an equivalent quantity of any combination of these foods.

(3) Afterschool snacks served to infants ages birth through 11 months must meet the requirements in paragraph (o)(3)(iv) of this section. Foods offered as meal supplements must be of a texture and a consistency that are appropriate for the age of the infant being served. The foods must be served during a span of time consistent with the infant's eating habits. For those infants whose dietary needs are more individualized, exceptions to the meal pattern must be made in accordance with the requirements found in paragraph (m) of this section.

(i) *Breastmilk and iron-fortified formula.* Either breastmilk or iron-fortified infant formula, or portions of both, must be served for the entire first year. Snacks containing breastmilk and snacks containing iron-fortified infant formula served by the school are eligible for reimbursement. However, infant formula provided by a parent (or guardian) and breastmilk fed directly by the infant's mother, during a visit to the school, contribute to a reimbursable snack only when the school supplies at least one component of the infant's snack.

(ii) *Fruit juice.* Juice should not be offered to infants until they are 6 months of age and ready to drink from a cup. Fruit juice served as part of the meal pattern for infants 8 through 11 months must be full-strength and pasteurized.

(iii) *Solid foods.* Solid foods of an appropriate texture and consistency are required only when the infant is developmentally ready to accept them. The school should consult with the infant's parent (or guardian) in making the decision to introduce solid foods. Solid foods should be introduced one at a time, on a gradual basis, with the intent of ensuring the infant's health and nutritional well-being.

(iv) *Infant meal pattern.* Meal supplements for infants must include, at a minimum, breastmilk or iron-fortified infant formula, or portions of both, in the appropriate amount indicated for the infant's age. For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered. In these situations, additional breastmilk must be offered if the infant is still hungry. Some infants may be developmentally ready to accept an additional food component. Meal supplements are reimbursable when schools provide all of the components in the Supplements for Infants table that the infant is developmentally ready to accept.

(4) The minimum amounts of food components to be served as meal supplements follow. Select two different components from the four listed in the Supplements for Infants table (Juice may not be served when fluid milk is served as the only other component). A serving of bread/bread alternate must be made from whole-grain or enriched meal or flour. It is required only when the infant is developmentally ready to accept it.

SUPPLEMENTS FOR INFANTS

	Birth through 3 months	4 through 7 months	8 through 11 months
Supplement (snack)	4–6 fl. oz. breastmilk [1 2] or formula [3].	4–6 fl. oz. breastmilk [1 2] or formula [3].	2–4 fl. oz. breastmilk [1 2], formula [3], or fruit juice [4]; 0–1/2 bread [5] or 0–2 crackers [5].

[1] It is recommended that breastmilk be served in place of formula from birth through 11 months.
[2] For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered with additional breast milk offered if the infant is still hungry.
[3] Infant formula must be iron-fortified.
[4] Fruit juice must be full-strength and pasteurized.
[5] Bread and bread alternates must be made from whole grain or enriched meal or flour. A serving of this component must be optional.

(p) *Lunches for preschoolers and infants.* (1) *Requirements for preschooler's lunch pattern.* (i) *General.* Until otherwise instructed by the Secretary, lunches for children ages 1 to 4 must meet the nutrition standards in paragraph (p)(2) of this section, the nutrient and calorie levels in paragraph (p)(3) of this section, and meal pattern in paragraph (p)(4) of this section.

(ii) *Unit pricing.* Schools must price each meal as a unit. Schools need to consider participation trends in an effort to provide one reimbursable lunch for each child every day. If there are leftover meals, schools may offer them to the students but cannot receive Federal reimbursement for them.

(iii) *Production and menu records.* Schools must keep production and menu records for the meals they produce. These records must show how the meals contribute to the required food components and quantities every day. In addition, these records must show how the lunches contribute to the nutrition standards in paragraph (p)(2) of this section and the appropriate calorie and nutrient requirements for the children served. Schools or school food authorities must maintain records of the latest nutritional analysis of the school menus conducted by the State agency.

(2) *Nutrition standards for preschoolers' lunches.* Children ages 1 to 4 must be offered lunches that meet the following nutrition standards for their age group:

(i) Provision of one-third of the Recommended Dietary Allowances (RDAs) for protein, calcium, iron, vitamin A, and vitamin C in the appropriate levels for the ages/grades (see paragraph (p)(3) of this section).

(ii) Provision of the lunchtime energy allowances (calories) in the appropriate levels (see paragraph (p)(3) of this section);

(iii) The following dietary recommendations:

(A) Eat a variety of foods;

(B) Limit total fat to 30 percent of total calories;

(C) Limit saturated fat to less than 10 percent of total calories;

(D) Choose a diet low in cholesterol;

(E) Choose a diet with plenty of grain products, vegetables, and fruits; and

(F) Choose a diet moderate in salt and sodium.

(iv) The following measures of compliance:

(A) Limit the percent of calories from total fat to 30 percent of the actual number of calories offered;

(B) Limit the percent of calories from saturated fat to less than 10 percent of the actual number of calories offered;

(C) Reduce sodium and cholesterol levels; and

(D) Increase the level of dietary fiber.

(v) Compliance with the nutrition standards and the appropriate nutrient and calorie levels is determined by the State agency in accordance with the procedures in paragraph (p)(10) of this section.

(3) *Nutrient and calorie levels.* The minimum levels of nutrients and calories that lunches for preschoolers must offer are specified in the following table:

MINIMUM NUTRIENT AND CALORIE LEVELS FOR LUNCHES—TRADITIONAL FOOD-BASED MENU PLANNING APPROACH [1]

Nutrients and energy allowances	Group II preschool ages 3–4
	School week averages
Energy allowances (calories)	517
Total fat (as a percentage of actual total food energy)	(2)
Saturated fat (as a percentage of actual total food energy)	(2)
RDA for protein (g)	7
RDA for calcium (mg)	267
RDA for iron (mg)	3.3
RDA for Vitamin A (RE)	150

MINIMUM NUTRIENT AND CALORIE LEVELS FOR LUNCHES—TRADITIONAL FOOD-BASED MENU PLANNING APPROACH [1]—Continued

Nutrients and energy allowances	Group II preschool ages 3–4
	School week averages
RDA for Vitamin C (mg)	14

[1] Current regulations only specify minimum nutrient and calorie levels for lunches for children ages 3–4.
[2] The 1995 Dietary Guidelines recommend that after 2 years of age "* * * children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."

(4) *Meal pattern for preschoolers' lunches.* Schools must follow the traditional food-based menu planning approach to plan lunches for children ages 1–2 and ages 3–4.

(i) *Food components and quantities.* Lunches must offer the food components and quantities specified in the following meal pattern:

TRADITIONAL FOOD-BASED MENU PLANNING APPROACH—MEAL PLAN FOR LUNCHES

	Group I ages 1–2 preschool	Group II ages 3–4 preschool
Food components and food items	Minimum quantities	
Fluid milk (as a beverage)	6 fluid ounces	6 fluid ounces.[1]
Meat or Meat Alternates:		
Lean meat, poultry, or fish	1 ounce	1½ ounces.
Alternate Protein Products [2]	1 ounce	1½ ounces.
Cheese	1 ounce	1½ ounces.
Large egg	½	¾.
Cooked dry beans and peas	¼ cup	⅜ cup.
Peanut butter or other nut or seed butters	2 tablespoons	3 tablespoons.
Yogurt, plain or flavored, unsweetened or sweetened	4 ounces or ½ cup	6 ounces or ¾ cup.
The following may be used to meet no more than 50% of the requirement and must be used in combination with any of the above:		
Peanuts, soy nuts, tree nuts, or seeds, as listed in program guidance, or an equivalent quantity of any combination of the above meat/meat alternate (1 ounce of nuts/seeds = 1 ounce of cooked lean meat, poultry or fish).	½ ounce = 50%	¾ ounce = 50%.
Vegetable or Fruit: 2 or more servings of vegetables, fruits or both	½ cup	½ cup.
Grains/Breads (servings per week): Must be enriched or whole grain. A serving is a slice of bread or an equivalent serving of biscuits, rolls, etc., or ½ cup of cooked rice, macaroni, noodles, other pasta products or cereal grains.	5 servings per week [3]—minimum of ½ serving per day.	8 servings per week [3]—minimum of 1 serving per day.

[1] Beginning July 1, 2012 (SY 2012–2013), fluid milk for children Ages 3–4 must be fat-free (unflavored or flavored) or low-fat (unflavored only).
[2] Must meet the requirements in Appendix A of this part.
[3] For the purposes of this table, a week equals five days.

(ii) *Meat/meat alternate component.*—The quantity of the meat/meat alternate component must be the edible portion as served. If the portion size of a food item for this component is excessive, the school must reduce that portion and supplement it with another meat/meat alternate to meet the full requirement. This component must be served in a main dish or in a main dish and only one other food item. Schools without daily choices in this component should not serve any one meat alternate or form of meat (for example, ground, diced, pieces) more than three times in the same week. Schools may adjust the daily quantities of this component provided that a minimum of one ounce is offered daily and the total weekly requirement is met over a five-day period.

(A) *Enriched macaroni.*—Enriched macaroni with fortified protein as defined in appendix A to this part may be used to meet part of the meat/meat alternate requirement when used as specified in appendix A to this part. An enriched macaroni product with fortified protein as defined in appendix A to this part may be used to meet part of the meat/meat alternate component or the grains/breads component but not as both food components in the same lunch.

(B) *Nuts and seeds.* Nuts and seeds and their butters are allowed as meat alternates in accordance with FNS guidance. Acorns, chestnuts, and coconuts must not be used because of their low protein and iron content. Nut and seed meals or flours may be used only as allowed under appendix A to this part. Nuts or seeds may be used to meet no more than one-half of the meat/meat alternate component with another meat/meat alternate to meet the full requirement.

(C) *Yogurt.* Yogurt may be used to meet all or part of the meat/meat alternate requirement. Yogurt may be plain or flavored, and unsweetened or sweetened. Noncommercial and/or non-standardized yogurt products, such as frozen yogurt, homemade yogurt, yogurt flavored products, yogurt bars, yogurt covered fruit and/or nuts or similar products are not creditable. Four ounces (weight) or ½ cup (volume) of yogurt equals one ounce of the meat/meat alternate requirement.

(iii) *Vegetable/fruit component.* Full strength vegetable or fruit juice may be used to meet no more than one-half of the vegetable/fruit requirement. Cooked dry beans or peas may be counted as

either a vegetable or as a meat alternate but not as both in the same meal.

(iv) *Grains/breads component.* (A) *Enriched or whole grains.* All grains/breads must be enriched or whole grain or made with enriched or whole grain meal or flour.

(B) *Daily and weekly servings.* The requirement for the grain/bread component is based on minimum daily servings plus total servings over a five day period. Schools serving lunch 6 or 7 days per week should increase the weekly quantity by approximately 20 percent (1/5th) for each additional day. When schools operate less than 5 days per week, they may decrease the weekly quantity by approximately 20 percent (1/5th) for each day less than five. The servings for biscuits, rolls, muffins, and other grain/bread varieties are specified in FNS guidance.

(C) *Minimums under the traditional food-based menu planning approach.* Schools must offer daily at least one-half serving of the grain/bread component to children in Group I and at least one serving to children in Group II. Schools which serve lunch at least 5 days a week shall serve a total of at least five servings of grains/breads to children in Group I and eight servings per week to children in Group II.

(D) *Offer versus serve.* Schools must offer all five required food items. At the school food authority's option, students in preschool may decline one or two of the five food items. The price of a reimbursable lunch does not change if the student does not take a food item or requests smaller portions.

(E) *Meal pattern exceptions for outlying areas.* Schools in American Samoa, Puerto Rico and the Virgin Islands may serve vegetables such as yams, plantains, or sweet potatoes to meet the grain/bread requirement.

(5) *Fluid milk requirement.* Schools must offer students in age group 1–2 fluid milk in a variety of fat contents, flavored or unflavored. Schools may also offer this age group lactose-free or reduced-lactose fluid milk. For students in age group 3–4, schools must offer fat-free milk (unflavored or flavored) and low-fat milk (unflavored only). Schools may also offer this age group lactose-free and reduced-lactose milk that is fat-free or low-fat. Students in age group 3–4 must be offered a variety (at least two different options) of fluid milk. All fluid milk served must be pasteurized fluid milk which meets State and local standards for such milk. All fluid milk must have vitamins A and D at levels specified by the Food and Drug Administration and must be consistent with State and local standards for such milk. Schools must also comply with other applicable milk requirements in § 210.10(d)(2) through (4) of this part.

(6) *Menu choices.* FNS encourages schools to offer children a selection of foods at lunch. Choices provide variety and encourage consumption. Schools may offer choices of reimbursable lunches or foods within a reimbursable lunch. Children who are eligible for free or reduced price lunches must be allowed to take any reimbursable lunch or any choices offered as part of a reimbursable lunch. Schools may establish different unit prices for each lunch offered provided that the benefits made available to children eligible for free or reduced price lunches are not affected.

(7) *Requirements for lunch periods.* (i) *Timing.* Schools must offer lunches meeting the requirements of this section during the period the school has designated as the lunch period. Schools must offer lunches between 10 a.m. and 2 p.m. Schools may request an exemption from these times only from FNS.

(ii) *Lunch periods for young children.* With State agency approval, schools are encouraged to serve children ages 1 through 4 over two service periods. Schools may divide the quantities and/or the menu items, foods, or food items offered each time any way they wish.

(iii) *Adequate lunch periods.* FNS encourages schools to provide sufficient lunch periods that are long enough to give all students enough time to be served and to eat their lunches.

(8) *Exceptions and variations allowed in reimbursable meals.* Schools must comply with the requirements in § 210.10(m) of this part.

(9) *Nutrition disclosure.* If applicable, schools must follow the provisions on disclosure of Alternate Protein Products in § 210.10(n) of this part.

(10) *State agency's responsibilities for monitoring lunches.* As part of the administrative review authorized under § 210.18(g)(2) of this part, State agencies must evaluate compliance with the meal pattern requirements (food components and quantities) in paragraph (d) of this section. If the meals for preschoolers do not meet the requirements of this section, the State agency or school food authority must provide technical assistance and require the reviewed school to take corrective action. In addition, the State agency may take fiscal action as authorized in §§ 210.18(m) and 210.19(c) of this part.

(11) *Requirements for the infant lunch pattern.* (i) *Definitions.* (A) *Infant cereal* means any iron-fortified dry cereal, specially formulated and generally recognized as cereal for infants, that is routinely mixed with breastmilk or iron-fortified infant formula prior to consumption.

(B) *Infant formula* means any iron-fortified formula intended for dietary use solely as a food for normal, healthy infants. Formulas specifically formulated for infants with inborn errors of metabolism or digestive or absorptive problems are not included in this definition. Infant formula, when served, must be in liquid state at recommended dilution.

(ii) *Feeding lunches to infants.* Lunches served to infants ages birth through 11 months must meet the requirements in paragraph (k)(5) of this section. Foods included in the lunch must be of a texture and a consistency that are appropriate for the age of the infant being served. The foods must be served during a span of time consistent with the infant's eating habits. For those infants whose dietary needs are more individualized, exceptions to the meal pattern must be made in accordance with the requirements found in § 210.10(m) of this part.

(iii) *Breastmilk and iron-fortified formula.* Either breastmilk or iron-fortified infant formula, or portions of both, must be served for the entire first year. Meals containing breastmilk and meals containing iron-fortified infant formula served by the school are eligible for reimbursement. However, infant formula provided by a parent (or guardian) and breastmilk fed directly by the infant's mother, during a visit to the school, contribute to a reimbursable lunch only when the school supplies at least one component of the infant's meal.

(iv) *Solid foods.* For infants ages 4 through 7 months, solid foods of an appropriate texture and consistency are required only when the infant is developmentally ready to accept them. The school should consult with the infant's parent (or guardian) in making the decision to introduce solid foods. Solid foods should be introduced one at a time, on a gradual basis, with the intent of ensuring the infant's health and nutritional well-being.

(v) *Infant meal pattern.* Infant lunches must include, at a minimum, each of the food components indicated in Lunch Pattern for Infants table in the amount that is appropriate for the infant's age. For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered. In these situations, additional breastmilk must be offered if the infant is still hungry. Lunches may include portions of breastmilk and iron-fortified infant formula as long as the total

number of ounces meets, or exceeds, the minimum amount required of this food component. Similarly, to meet the component requirements for vegetables and fruits, portions of both may be served. Infant lunches are reimbursable when schools provide all of the components in the Lunch Pattern for Infants table that the infant is developmentally ready to accept.

LUNCH PATTERN FOR INFANTS

Birth through 3 months	4 through 7 months	8 through 11 months
4–6 fluid ounces of formula [1] or breastmilk [2 3]	4–8 fluid ounces of formula [1] or breastmilk [2 3]; and 0–3 tablespoons of infant cereal [1 4]; and 0–3 tablespoons of fruits or vegetables or both [4].	6–8 fluid ounces of formula [1] or breastmilk [2 3]; and 2–4 tablespoons of infant cereal [1]; and/or 1–4 tablespoons of meat, fish, poultry, egg yolk, cooked dry beans or peas; or ½–2 ounces of cheese, or 1–4 ounces (volume) of cottage cheese; or 1–4 ounces (weight) of cheese food or cheese spread; and 1–4 tablespoons of fruits or vegetables or both.

[1] Infant formula and dry infant cereal must be iron-fortified.
[2] Breastmilk or formula, or portions of both, may be served; however, it is recommended that breastmilk be served from birth through 11 months.
[3] For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered, with additional breastmilk offered if the infant is still hungry.
[4] A serving of this component is required only when the infant is developmentally ready to accept it.

■ 4. In § 210.18:
■ a. Revise paragraphs (a), (b)(2)(ii), (c), (g)(2), (i)(3)(ii), and (m); and
■ b. Remove paragraph (h)(2) and redesignate paragraph (h)(3) through (6) as paragraphs (h)(2) through (5), respectively.
■ c. Amend paragraph (i)(4)(iv) by removing the words ''the School Breakfast Program (7 CFR part 220) and/or''.

The revisions read as follows:

§ 210.18 Administrative reviews.

(a) *General.* Each State agency must follow the requirements of this section to conduct administrative reviews of school food authorities serving meals under parts 210 and 220 of this chapter.

(b) * * *

(2) * * *

(ii) *Performance Standard 2—Meal Requirements.* Reimbursable lunches meet the meal requirements in § 210.10 of this chapter, as applicable to the age/grade group reviewed. Reimbursable breakfasts meet the meal requirements in §§ 220.8 and 220.23 of this chapter, as applicable to the age/grade group reviewed.

* * * * *

(c) *Timing of reviews.* State agencies must conduct administrative reviews of all school food authorities participating in the National School Lunch Program and/or School Breakfast Program at least once during a 3-year review cycle. For each State agency, the first 3-year review cycle will start the school year that begins on July 1, 2013 and ends on June 30, 2014. Administrative reviews and follow-up reviews must be conducted as follows:

(1) *Administrative reviews.* At a minimum, State agencies must conduct administrative reviews of all school food authorities at least once during each 3-year review cycle, provided that each school food authority is reviewed at least once every 4 years. The on-site portion of the administrative review must be completed during the school year in which the review was begun.

(2) *Exceptions.* FNS may, on an individual school food authority basis, approve written requests for 1-year extensions to the 3-year review cycle specified in paragraph (c)(1) of this section if FNS determines this 3-year cycle requirement conflicts with efficient State agency management of the Programs.

(3) *Follow-up reviews.* The State agency is encouraged to conduct first follow-up reviews in the same school year as the administrative review. The first follow-up review must be conducted no later than December 31 of the school year following the administrative review. Subsequent follow-up reviews must be scheduled in accordance with paragraph (i)(5) of this section.

* * * * *

(g) * * *

(2) *Performance Standard 2 (Reimbursable lunches meet the meal requirements in § 210.10 of this chapter, as applicable to the age/grade group reviewed. Reimbursable breakfasts meet the meal requirements in § 220.8 and § 220.23 of this chapter, as applicable to the age/grade group reviewed.* When reviewing meals, the State agency must:

(i) For the day of the review, observe the serving line(s) to determine whether all food components and food quantities required under § 210.10, as applicable, and § 220.8 and § 220.23, as applicable, are offered.

(ii) For the day of the review, observe a significant number of the Program meals counted at the point of service for each type of serving line to determine whether the meals selected by the students contain the food components and food quantities required for a reimbursable meal under § 210.10, as applicable, and § § 220.8 and 220.23, as applicable. If visual observation suggests that quantities offered are insufficient or excessive, the State agency must require the reviewed school(s) to provide documentation demonstrating that the required amounts of each food component were available for service for each day of the review period.

(iii) Review menu and production records for a minimum of five operating days (specified by the State agency); such review must determine whether all food components and food quantities required under § 210.10, as applicable, and §§ 220.8 and 220.23, as applicable, of this chapter have been offered.

(iv) Conduct a weighted nutrient analysis of the meals for students in age/grade groups K and above to determine whether the meals offered meet the calorie, sodium, and saturated fat requirements in § 210.10 and §§ 220.8 and 220.23 of this chapter, as applicable. The State agency must conduct the nutrient analysis in accordance with the procedures established in § 210.10(i) of this part. Until instructed by the Secretary, a nutrient analysis for the meals offered to

preschoolers is not required. The State agency must also review nutrition labeling or manufacturer specifications for products or ingredients used to prepare school meals to verify they contain zero grams (less than 0.5 grams) of *trans* fat per serving.

* * * * *

(i) * * *

(3) * * *

(ii) For Performance Standard 2—10 percent or more of the total number of Program lunches or Program breakfasts observed in a school food authority are missing one or more of the food components required under parts 210 and 220.

* * * * *

(m) *Fiscal action.* Fiscal action for violations identified during an administrative review or any follow-up reviews must be taken in accordance with the provisions in § 210.19(c) of this part.

(1) *Performance Standard 1 violations.* A State agency is required to take fiscal action for all violations of Performance Standard 1. The State agency may limit fiscal action from the point corrective action occurs back through the beginning of the review period for errors identified under paragraphs (g)(1)(i)(A) through (C) of this section, provided corrective action occurs.

(2) *Performance Standard 2 violations.* A State agency is required to take fiscal action for violations of Performance Standard 2 as follows:

(i) For food component violations cited under paragraph (g)(2) of this section, the State agency must take fiscal action and require the school food authority and/or school reviewed to take corrective action for the missing component. If a corrective action plan is in place, the State agency may limit fiscal action from the point corrective action occurs back through the beginning of the review period for errors identified under paragraph (g)(2) of this section.

(ii) For repeated violations involving vegetable subgroups and milk type cited under paragraph (g)(2) of this section, the State agency must take fiscal action provided that:

(A) Technical assistance has been given by the State agency;

(B) Corrective action has been previously required and monitored by the State agency; and

(C) The school food authority remains in noncompliance with the meal requirements established in parts 210 and 220 of this chapter.

(iii) For violations involving food quantities and whole grain-rich foods cited under paragraph (g)(2) of this section and for violations of calorie, saturated fat, sodium, and *trans* fat requirements cited under paragraph (g)(2)(iv) of this section, the State agency has discretion to apply fiscal action provided that:

(A) Technical assistance has been given by the State agency;

(B) Corrective action has been previously required and monitored by the State agency; and

(C) The school food authority remains in noncompliance with the meal requirements established in parts 210 and 220 of this chapter.

* * * * *

■ 5. In § 210.19:

■ a. Remove paragraph (a)(1) and redesignate paragraphs (a)(2) through (6) as paragraph (a)(1) through (5); and

■ b. Revise paragraphs (c) introductory text, (c)(1), and (c)(6) to read as follows:

§ 210.19 Additional responsibilities.

* * * * *

(c) *Fiscal action.* State agencies are responsible for ensuring Program integrity at the school food authority level. State agencies must take fiscal action against school food authorities for Claims for Reimbursement that are not properly payable, including, if warranted, the disallowance of funds for failure to take corrective action to comply with the meal requirements in Parts 210 and 220 of this chapter. In taking fiscal action, State agencies must use their own procedures within the constraints of this Part and must maintain all records pertaining to action taken under this section. The State agency may refer to FNS for assistance in making a claim determination under this part.

(1) *Definition.* Fiscal action includes, but is not limited to, the recovery of overpayment through direct assessment or offset of future claims, disallowance of overclaims as reflected in unpaid Claims for Reimbursement, submission of a revised Claim for Reimbursement, and correction of records to ensure that unfiled Claims for Reimbursement are corrected when filed. Fiscal action also includes disallowance of funds for failure to take corrective action to meet the meal requirements in Parts 210 and 220 of this chapter.

* * * * *

(6) *Exceptions.* The State agency need not disallow payment or collect an overpayment when any review or audit reveals that a school food authority is approving applications which indicate that the households' incomes are within the Income Eligibility Guidelines issued by the Department or the applications contain Supplemental Nutrition Assistance Program or TANF case numbers or FDPIR case numbers or other FDPIR identifiers but the applications are missing the information specified in paragraph (1)(ii) of the definition of *Documentation* in § 245.2 of this chapter.

* * * * *

§ 210.21 [Amended]

■ 6. In § 210.21, amend paragraph (e) by removing the phrase ''paragraph (m)(1)(ii) of this section'' and adding in its place the phrase ''§ 210.10(d)(4) of this chapter.''

■ 7. Revise § 210.30 to read as follows:

§ 210.30 State agency and Regional office addresses.

School food authorities and schools desiring information about the Program should contact their State educational agency or the appropriate FNS Regional Office at the address or telephone number listed on the FNS Web site (*www.fns.usda.gov/cnd*).

■ 8. In Appendix B to part 210:

■ a. Amend paragraph (b)(1) by removing from the fourth sentence the words

'', and the public by notice in the **Federal Register** as indicated below under paragraph (b)(3) of this section;''

■ b. Amend paragraph (b)(2) by removing the words ''as indicated under paragraph (b)(3) of this section'' from the last sentence.

■ c. Remove paragraph (b)(3) and redesignate paragraph (b)(4) as paragraph (b)(3); and

■ d. Revise the first sentence of newly redesignated paragraph (b)(3) to read as follows:

* * * * *

Appendix B to Part 210—Categories of Foods of Minimal Nutritional Value

* * * * *

(b) * * *

(3) Written petitions should be sent to the Chief, Nutrition Promotion and Technical Assistance Branch, Child Nutrition Division, FNS, USDA, 3101 Park Center Drive, Room 632, Alexandria, Virginia 22302. * * *

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PART 220—SCHOOL BREAKFAST PROGRAM

■ 9. The authority citation for 7 CFR part 220 continues to read as follows:

Authority: 42 U.S.C. 1773, 1779.

■ 10. In § 220.2:

■ a. Amend the definition of *Breakfast* by removing the phrase ''nutritional requirements set out in § 220.8'' and adding in its place the phrase ''meal

requirements set out in §§ 220.8 and 220.23'',

■ b. Amend the definition of *Menu item* by removing the citation ''§ 220.8'' and adding in its place the citation ''§ 220.23'',

■ c. Remove the definition of *Milk;*

■ d. Amend the definition of *Nutrient Standard Menu Planning/Assisted Nutrient Standard Menu Planning* by removing the citations ''§ 220.8(e)(5)'' and ''§ 220.8(f)'' and adding in their place the citations ''§ 220.23(e)(5)'' and ''§ 220.23(f)'', respectively;

■ e. Revise the definition of *School week;* and

■ f. Add definitions for *Tofu* and *Whole grains.*

The revisions and additions read as follows:

§ 220.2 Definitions.

* * * * *

School week means the period of time used to determine compliance with the meal requirements in § 220.8 and § 220.23. The period must be a normal school week of five consecutive days; however, to accommodate shortened weeks resulting from holidays and other scheduling needs, the period must be a minimum of three consecutive days and a maximum of seven consecutive days. Weeks in which school breakfasts are offered less than three times must be combined with either the previous or the coming week.

* * * * *

Tofu means a soybean-derived food, made by a process in which soybeans are soaked, ground, mixed with water, heated, filtered, coagulated, and formed into cakes. Basic ingredients are whole soybeans, one or more food-grade coagulants (typically a salt or an acid), and water. Tofu products must conform to FNS guidance to count toward the meats/meat alternates component.

Whole grains means grains that consist of the intact, ground, cracked, or flaked grain seed whose principal anatomical components—the starchy endosperm, germ and bran—are present in the same relative proportions as they exist in the intact grain seed. Whole grain-rich products must conform to FNS guidance to count toward the grains component.

* * * * *

■ 11. Revise § 220.8 to read as follows:

§ 220.8 Meal requirements for breakfasts.

(a) *General requirements.* This section contains the meal requirements applicable to school breakfasts for students in grades K to 12. With the exception of the milk component, the meal requirements must be implemented beginning July 1, 2013 or as otherwise specified. School food authorities wishing to adopt the provisions of this section prior to the required date of compliance may do so with the approval of the State agency. In general, school food authorities must ensure that participating schools provide nutritious, well-balanced, and age-appropriate breakfasts to all the children they serve to improve their diet and safeguard their health.

(1) *General nutrition requirements.* School breakfasts offered to children age 5 and older must meet, at a minimum, the meal requirements in paragraph (b) of this section. Schools must follow a food-based menu planning approach and produce enough food to offer each child the quantities specified in the meal pattern established in paragraph (c) of this section for each age/grade group served in the school. In addition, school breakfasts must meet the dietary specifications in paragraph (f) of this section. Schools offering breakfasts to children ages 1 to 4 and infants must meet the meal pattern requirements in paragraph (o) of this section.

(2) *Unit pricing.* Schools must price each meal as a unit. The price of a reimbursable lunch does not change if the student does not take a food item or requests smaller portions. Schools must identify, near or at the beginning of the serving line(s), the food items that constitute the unit-priced reimbursable school meal(s).

(3) *Production and menu records.* Schools or school food authorities, as applicable, must keep production and menu records for the meals they produce. These records must show how the meals offered contribute to the required food components and food quantities for each age/grade group every day. Labels or manufacturer specifications for food products and ingredients used to prepare school meals must indicate zero grams of *trans* fat per serving (less than 0.5 grams). Schools or school food authorities must maintain records of the latest nutritional analysis of the school menus conducted by the State agency. Production and menu records must be maintained in accordance with FNS guidance.

(b) *Meal requirements for school breakfasts.* School breakfasts for children ages 5 and older must reflect food and nutrition requirements specified by the Secretary. Compliance with these requirements, once fully implemented as specified in paragraphs (c), (d), (e), (f), (h), (i), and (j) of this section, is measured as follows:

(1) On a daily basis:

(i) Meals offered to each age/grade group must include the food components and food quantities specified in the meal pattern in paragraph (c) of this section;

(ii) Food products or ingredients used to prepare meals must contain zero grams of *trans* fat per serving or a minimal amount of naturally occurring *trans* fat as specified in paragraph (f) of this section; and

(iii) Meal selected by each student must have the number of food components required for a reimbursable meal and include at least one fruit or vegetable.

(2) Over a 5-day school week:

(i) Average calorie content of the meals offered to each age/grade group must be within the minimum and maximum calorie levels specified in paragraph (f) of this section;

(ii) Average saturated fat content of the meals offered to each age/grade group must be less than 10 percent of total calories as specified in paragraph (f) of this section;

(iii) Average sodium content of the meals offered to each age/grade group must not exceed the maximum level specified in paragraph (f) of this section;

(c) *Meal pattern for school breakfasts.* A school must offer the food components and quantities required in the breakfast meal pattern established in the following table:

	Breakfast meal pattern		
	Grades K–5	Grades 6–8	Grades 9–12
Meal pattern	Amount of food [a] per week (Minimum per day)		
Fruits (cups) [b c]	5 (1)	5 (1)	5 (1)
Vegetables (cups) [b c]	0	0	0
Dark green	0	0	0
Red/Orange	0	0	0

	Breakfast meal pattern		
	Grades K–5	Grades 6–8	Grades 9–12
Beans and peas (legumes)	0	0	0
Starchy	0	0	0
Other	0	0	0
Grains (oz eq) [d]	7–10 (1)	8–10 (1)	9–10 (1)
Meats/Meat Alternates (oz eq) [e]	0	0	0
Fluid milk [f] (cups)	5 (1)	5 (1)	5 (1)
Other Specifications: Daily Amount Based on the Average for a 5-Day Week			
Min-max calories (kcal) [g h]	350–500	400–550	450–600
Saturated fat (% of total calories) [h]	< 10	< 10	< 10
Sodium (mg) [h i]	≤ 430	≤ 470	≤ 500
Trans fat [h j]	Nutrition label or manufacturer specifications must indicate zero grams of *trans* fat per serving.		

[a] Food items included in each group and subgroup and amount equivalents. Minimum creditable serving is ⅛ cup.

[b] One quarter cup of dried fruit counts as ½ cup of fruit; 1 cup of leafy greens counts as ½ cup of vegetables. No more than half of the fruit or vegetable offerings may be in the form of juice. All juice must be 100% full-strength.

[c] Beginning July 1, 2014 (SY 2014–2015) schools must offer 1 cup of fruit daily and 5 cups of fruit weekly. Vegetables may be substituted for fruits, but the first two cups per week of any such substitution must be from the dark green, red/orange, beans and peas (legumes) or ''Other vegetables'' subgroups, as defined in 210.10(c)(2)(iii).

[d] Beginning July 1, 2013 (SY 2013–2014), at least half of grains offered must be whole-grain-rich and schools must meet the grain ranges. Schools may substitute 1 oz. eq. of meat/meat alternate for 1 oz. eq. of grains after the minimum daily grains requirement is met. By July 1, 2014 (SY 2014–15) all grains must be whole-grain-rich.

[e] There is no meat/meat alternate requirement.

[f] Beginning July 1, 2012 (SY 2012–2013) all fluid milk must be low-fat (1 percent milk fat or less, unflavored) or fat-free (unflavored or flavored).

[g] Beginning July 1, 2013 (SY 2013–2014), the average daily calories for a 5-day school week must be within the range (at least the minimum and no more than the maximum values).

[h] Discretionary sources of calories (solid fats and added sugars) may be added to the meal pattern if within the specifications for calories, saturated fat, *trans* fat, and sodium. Foods of minimal nutritional value and fluid milk with fat content greater than 1 percent milk fat are not allowed.

[i] Final sodium targets must be met no later than July 1, 2022 (SY 2022–2023). The first intermediate targets must be met no later than July 1, 2014 (SY 2014–2015) and the second intermediate targets must be met no later than July 1, 2017 (SY 2017–2018).

[j] *Trans* fat restrictions must be implemented on July 1, 2013 (SY 2013–14).

(1) *Age/grade groups.* Effective July 1, 2013 (SY 2013–2014), schools must plan menus for students using the following age/grade groups: Grades K–5 (ages 5–10), grades 6–8 (ages 11–13), and grades 9–12 (ages 14–18). If an unusual grade configuration in a school prevents the use of the established age/grade groups, students in grades K–5 and grades 6–8 may be offered the same food quantities at breakfast provided that the calorie and sodium standards for each age/grade group are met. No customization of the established age/grade groups is allowed.

(2) *Food components.* Schools must offer students in each age/grade group the food components specified in meal pattern in paragraph (c). Food component descriptions in § 210.10 of this chapter apply to this Program.

(i) *Meats/meat alternates component.* Schools are not required to offer meats/meat alternates as part of the breakfast menu. Effective July 1, 2013 (SY 2013–2014), schools may substitute meats/meat alternates for grains, after the daily grains requirement is met, to meet the weekly grains requirement. One ounce equivalent of meat/meat alternate is equivalent to one ounce equivalent of grains.

(A) *Enriched macaroni.* Enriched macaroni with fortified protein as defined in Appendix A to Part 210 may be used to meet part of the meats/meat alternates requirement when used as specified in Appendix A to Part 210. An enriched macaroni product with fortified protein as defined in Appendix A to Part 210 may be used to meet part of the meats/meat alternates component or the grains component but may not meet both food components in the same lunch.

(B) *Nuts and seeds.* Nuts and seeds and their butters are allowed as meat alternates in accordance with program guidance. Acorns, chestnuts, and coconuts may not be used because of their low protein and iron content. Nut and seed meals or flours may be used only if they meet the requirements for Alternate Protein Products established in Appendix A to Part 220. Nuts or seeds may be used to meet no more than one-half (50 percent) of the meats/meat alternates component with another meats/meat alternates to meet the full requirement.

(C) *Yogurt.* Yogurt may be used to meet all or part of the meats/meat alternates component. Yogurt may be plain or flavored, unsweetened or sweetened. Noncommercial and/or non-standardized yogurt products, such as frozen yogurt, drinkable yogurt products, homemade yogurt, yogurt flavored products, yogurt bars, yogurt covered fruits and/or nuts or similar products are not creditable. Four ounces (weight) or ½ cup (volume) of yogurt equals one ounce of the meats/meat alternates requirement.

(D) *Tofu and soy products.* Commercial tofu and soy products may be used to meet all or part of the meats/meat alternates component in accordance with FNS guidance. Noncommercial and/or non-standardized tofu and products are not creditable.

(E) *Beans and peas (legumes).* Cooked dry beans and peas (legumes) may be used to meet all or part of the meats/meat alternates component. Beans and peas (legumes) are identified in this section and include foods such as black beans, garbanzo beans, lentils, kidney beans, mature lima beans, navy beans, pinto beans, and split peas.

(F) *Other meat alternates.* Other meat alternates, such as cheese and eggs, may be used to meet all or part of the meats/meat alternates component in accordance with FNS guidance.

(ii) *Fruits component.* Effective July 1, 2014 (SY 2014–2015), schools must

offer daily the fruit quantities specified in the breakfast meal pattern in paragraph (c) of this section. Fruits that are fresh; frozen without added sugar; canned in light syrup, water or fruit juice; or dried may be offered to meet the fruits component requirements. Vegetables may be offered in place of all or part of the required fruits at breakfast, but the first two cups per week of any such substitution must be from the dark green, red/orange, beans and peas (legumes) or other vegetable subgroups, as defined in this section. All fruits are credited based on their volume as served, except that ¼ cup of dried fruit counts as ½ cup of fruit. Only pasteurized, full-strength fruit juice may be used, and may be credited to meet no more than one-half of the fruit component.

(iii) *Vegetables component.* Schools are not required to offer vegetables as part of the breakfast menu but may, effective July 1, 2014 (SY 2014–2015), offer vegetables to meet part or all of the fruit requirement. Fresh, frozen, or canned vegetables and dry beans and peas (legumes) may be offered to meet the fruit requirement. All vegetables are credited based on their volume as served, except that 1 cup of leafy greens counts as ½ cup of vegetables and tomato paste and tomato puree are credited based on calculated volume of the whole food equivalency. Pasteurized, full-strength vegetable juice may be used to meet no more than one-half of the vegetable component. Cooked dry beans or peas (legumes) may be counted as either a vegetable or as a meat alternate but not as both in the same meal.

(iv) *Grains component.* (A) *Enriched and whole grains.* All grains must be made with enriched and whole grain meal or flour, in accordance with the most recent FNS guidance on grains. Whole grain-rich products must contain at least 50 percent whole grains and the remaining grains in the product must be enriched. Effective July 1, 2013 (SY 2013–2014), schools may substitute meats/meat alternates for grains, after the daily grains requirement is met, to meet the weekly grains requirement. One ounce equivalent of meat/meat alternate is equivalent to one ounce equivalent of grains.

(B) *Daily and weekly servings.* Effective July 1, 2013 (SY 2013–2014), the grains component is based on minimum daily servings plus total servings over a five-day school week. Beginning July 1, 2013 (SY 2013–2014), half of the grains offered during the school week must meet the whole grain-rich criteria specified in FNS guidance. Beginning July 1, 2014 (SY 2014–2015), all grains must meet the whole grain-rich criteria specified in FNS guidance. The whole grain-rich criteria provided in FNS guidance may be updated to reflect additional information provided voluntarily by industry on the food label or a whole grains definition by the Food and Drug Administration. Schools serving breakfast 6 or 7 days per week must increase the weekly grains quantity by approximately 20 percent (⅕) for each additional day. When schools operate less than 5 days per week, they may decrease the weekly quantity by approximately 20 percent (⅕) for each day less than five. The servings for biscuits, rolls, muffins, and other grain/bread varieties are specified in FNS guidance.

(3) *Food components in outlying areas.* Schools in American Samoa, Puerto Rico and the Virgin Islands may serve a vegetable such as yams, plantains, or sweet potatoes to meet the grains component.

(d) *Fluid milk requirement.* A serving of fluid milk as a beverage or on cereal or used in part for each purpose must be offered for breakfasts. Schools must offer students a variety (at least two different options) of fluid milk. Effective July 1, 2012 (SY 2012–2013), all milk must be fat-free or low-fat. Milk with higher fat content is not allowed. Fat-free fluid milk may be flavored or unflavored, and low-fat fluid milk must be unflavored. Low fat or fat-free lactose-free and reduced-lactose fluid milk may also be offered. Schools must also comply with other applicable fluid milk requirements in § 210.10(d)(1) through (4) of this chapter.

(e) *Offer versus serve.* School breakfast must offer daily at least the three food components required in the meal pattern in paragraph (c) of this section. To exercise the offer versus serve option at breakfast, a school food authority or school must offer a minimum of four food items daily as part of the required components. Under offer versus serve, students are allowed to decline one of the four food items, provided that students select at least ½ cup of the fruit component for a reimbursable meal beginning July 1, 2014 (SY 2014–2015). If only three food items are offered at breakfast, school food authorities or schools may not exercise the offer versus serve option.

(f) *Dietary specifications.* (1) *Calories.* Effective July 1, 2013 (SY 2013–2014), school breakfasts offered to each age/grade group must meet, on average over the school week, the minimum and maximum calorie levels specified in the following table:

CALORIE RANGES FOR BREAKFAST—EFFECTIVE SY 2013–2014

	Grades K–5	Grades 6–8	Grades 9–12
Minimum-maximum calories (kcal) [a] [b]	350–500	400–550	450–600

[a] The average daily amount for a 5-day school must fall within the minimum and maximum levels.
[b] Discretionary sources of calories (solid fats and added sugars) may be added to the meal pattern if within the specifications for calories, saturated fat, *trans* fat, and sodium.

(2) *Saturated fat.* Effective July 1, 2012 (SY 2012–2013), school breakfasts offered to all age/grade groups must, on average over the school week, provide less than 10 percent of total calories from saturated fat.

(3) *Sodium.* School breakfasts offered to each age/grade group must meet, on average over the school week, the levels of sodium specified in the following table within the specified deadlines:

SODIUM REDUCTION: TIMELINE & AMOUNT

Age/grade group	Baseline: average current sodium levels as offered [1] (mg)	Target 1: July 1, 2014 SY 2014–2015 (mg)	Target 2: July 1, 2017 SY 2017–2018 (mg)	Final Target: July 1, 2022 SY 2022–2023 (mg)
School Breakfast Program				
K–5	573 (elementary)	≤540	≤485	≤430
6–8	629 (middle)	≤600	≤535	≤470
9–12	686 (high)	≤640	≤570	≤500

[1] SNDA–III.

(4) *Trans fat.* Effective July 1, 2013 (SY 2013–2014), food products and ingredients used to prepare school meals must contain zero grams of *trans* fat (less than 0.5 grams) per serving. Schools must add the *trans* fat specification and request the required documentation (nutrition label or manufacturer specifications) in their procurement contracts. Documentation for food products and food ingredients must indicate zero grams of *trans* fat per serving. Meats that contain a minimal amount of naturally-occurring *trans* fats are allowed in the school meal programs.

(g) *Compliance assistance.* The State agency and school food authority must provide technical assistance and training to assist schools in planning breakfasts that meet the meal pattern in paragraph (c) of this section and the dietary specifications for calorie, saturated fat, sodium, and *trans* fat established in paragraph (f) of this section. Compliance assistance may be offered during training, onsite visits, and/or administrative reviews.

(h) *State agency responsibilities for monitoring dietary specifications.* (1) *Calories, saturated fat, and sodium.* Effective July 1, 2013 (SY 2013–2014), as part of the administrative review authorized under § 210.18 of this chapter, State agencies must conduct a weighted nutrient analysis for the school(s) selected for review to evaluate the average levels of calories, saturated fat, and sodium of the breakfasts offered during one week within the review period. The nutrient analysis must be conducted in accordance with the procedures established in § 210.10(i) of this chapter. If the results of the review indicate that the school breakfasts are not meeting the standards for calories, saturated fat, or sodium specified in paragraph (f) of this section, the State agency or school food authority must provide technical assistance and require the reviewed school to take corrective action to meet the requirements.

(2) *Trans fat.* Effective SY 2013–2014, State agencies conducting an administrative review must review product labels of manufacturer specifications to verify that the food products or ingredients used by the reviewed school(s) contain zero grams of *trans* fat (less than 0.5 grams) per serving.

(i) *State agency responsibilities for nutrient analysis.* State agencies must conduct a weighted nutrient analysis of all foods offered in a reimbursable breakfast by a school selected for administrative review to determine the average levels of calories, saturated fat, and sodium in the meals offered over a school week within the review period. The analysis must be conducted in accordance with the procedures established in § 210.10(i) of this chapter.

(j) *State agency's responsibilities for compliance monitoring.* Effective SY 2013–2014, compliance with the applicable meal requirements in paragraph (b) will be monitored by the State agency through administrative reviews authorized in § 210.18 of this chapter.

(k) *Menu choices at breakfast.* The requirements in § 210.10(k) of this chapter also apply to this Program.

(l) *Requirements for breakfast period.* (1) *Timing.* Schools must offer breakfasts meeting the requirements of this section at or near the beginning of the school day.

(2) [Reserved].

(m) *Exceptions and variations allowed in reimbursable meals.* The requirements in § 210.10(m) of this chapter also apply to this Program.

(n) *Nutrition disclosure.* The requirements in § 210.10(n) of this chapter also apply to this Program.

(o) *Breakfasts for preschoolers and infants.* (1) *Nutrition standards for breakfasts for children age 1 to 4.* Until otherwise instructed by the Secretary, breakfasts for preschoolers, when averaged over a school week, must meet the nutrition standards and the appropriate nutrient and calorie levels in this section. The nutrition standards are:

(i) Provision of one-fourth of the Recommended Dietary Allowances (RDA) for protein, calcium, iron, vitamin A and vitamin C in the appropriate levels (see paragraph (o)(2) of this section);

(ii) Provision of the breakfast energy allowances (calories) for children in the appropriate levels (see paragraph (o)(2) of this section);

(iii) The following dietary recommendations:

(A) Eat a variety of foods;

(B) Limit total fat to 30 percent of total calories;

(C) Limit saturated fat to less than 10 percent of total calories;

(D) Choose a diet low in cholesterol;

(E) Choose a diet with plenty of grain products, vegetables, and fruits; and

(F) Choose a diet moderate in salt and sodium.

(iv) The following measures of compliance:

(A) Limit the percent of calories from total fat to 30 percent of the actual number of calories offered;

(B) Limit the percent of calories from saturated fat to less than 10 percent of the actual number of calories offered;

(C) Reduce sodium and cholesterol levels; and

(D) Increase the level of dietary fiber.

(v) School food authorities must follow the traditional food-based menu planning approach to plan breakfasts for preschoolers and provide daily the food components and quantities specified in paragraph (o)(3) of this section.

(vi) Schools must keep production and menu records for the breakfasts they produce. These records must show how the breakfasts contribute to the required food components and food quantities every school day. In addition, these records must show how the breakfasts contribute to the nutrition standards in paragraph (o)(1) of this section and the appropriate calorie and nutrient levels in paragraph (o)(2) of this section over the school week. Schools or school food authorities must maintain records of the latest nutritional analysis of the school menus conducted by the State agency.

(2) *Nutrient and calorie levels for breakfasts for preschoolers.* Under the traditional food-based menu planning approach, the required levels are:

MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL BREAKFASTS

[Traditional Food-Based Menu Planning Approach]

	Age 2 [1]	Ages 3–4
Nutrients and energy allowances	School week averages	
Energy allowances (calories)	325	388
Total fat (as a percentage of actual total food energy)	(2)	(2)
Saturated fat (as a percentage of actual total food energy)	(2)	(2)
RDA for protein (g)	4	5
RDA for calcium (mg)	200	200
RDA for iron (mg)	2.5	2.5
RDA for Vitamin A (RE)	100	113
RDA for Vitamin C (mg)	10	11

[1] Nutrient and calorie levels start at age 2 because the ''Dietary Guidelines for Americans'' apply to ages 2 and older.
[2] The 1995 ''Dietary Guidelines for Americans'' recommend that after 2 years of age ''children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat.''

(3) *Meal pattern for preschoolers.* (i) *Food items.* Schools must offer these food items in at least the portions required for each age group:

(A) A serving of fluid milk as a beverage or on cereal or used partly for both;

(B) A serving of fruit or vegetable or both, or full-strength fruit or vegetable juice; and

(C) Two servings from one of the following components or one serving from each component:

(*1*) Grains/breads; and/or

(*2*) Meat/meat alternate.

(ii) *Quantities for the traditional food-based menu planning approach.* At a minimum, schools must offer the food items in the quantities specified for the appropriate age/grade group in the following table:

TRADITIONAL FOOD-BASED MENU PLANNING APPROACH MEAL PLAN FOR BREAKFASTS

	Ages 1–2	Ages 3–4
Food components and food items	School week averages	
Fluid milk (as a beverage, on cereal, or both)	4 fluid ounces	6 fluid ounces[1].
Juice/Fruit/Vegetable: Fruit and/or vegetable; or full-strength fruit or vegetable juice.	¼ cup	½ cup.
Select one serving from each of the following components, two from one component, or an equivalent combination:		
Grains/Breads:		
Whole grain or enriched bread	½ slice	½ slice.
Whole grain or enriched bread product, such as biscuit, roll, muffin.	½ serving	½ serving.
Whole grain, enriched or fortified cereal	¼ cup or ⅓ ounce	⅓ cup or ½ ounce.
Meat or Meat Alternates:		
Meat/poultry or fish	½ ounce	½ ounce.
Alternate protein products [2]	½ ounce	½ ounce
Cheese	½ ounce	½ ounce.
Large egg	½	½
Peanut butter or other nut or seed butters	1 tablespoon	1 tablespoon.
Cooked dry beans and peas	2 tablespoons	2 tablespoons.
Nuts and/or seeds (as listed in program guidance) [3]	½ ounce	½ ounce.
Yogurt, plain or flavored, unsweetened or sweetened	2 ounces or ¼ cup	2 ounces or ¼ cup.

[1] Fluild milk for children ages 3–4 must be fat-free (unflavored or flavored) or low-fat (unflavored only)
[2] Must meet the requirements in appendix A of this part.
[3] No more than 1 ounce of nuts and/or seeds may be served in any one breakfast.

(iii) *Offer versus serve.* Schools must offer all four required food items. At the school food authority's option, students in preschool may decline one of the four food items. The price of a reimbursable breakfast does not change if the student does not take a menu item or requests smaller portions.

(iv) *Exceptions and variations allowed in reimbursable breakfasts.* Schools must follow the requirements in § 210.10(m) of this chapter.

(4) *Fluid milk requirement.* A serving of fluid milk as a beverage or on cereal or used in part for each purpose must be offered for breakfasts. Schools must offer students in age group 1–2 fluid milk in a variety of fat contents, flavored or unflavored. Schools may also offer this age group lactose-free or reduced-lactose fluid milk. For students in age group 3–4, schools must offer fat-free milk (unflavored or flavored) and low-fat milk (unflavored only). Schools may also offer this age group lactose-free and reduced-lactose milk that is fat-free or low-fat. Students in age group 3–4 must be offered a variety (at least two different options) of fluid milk. All milk served in the Program must be pasteurized fluid milk which meets State and local standards for such milk. All fluid milk must have vitamins A and D at levels specified by the Food and Drug Administration and must be consistent with State and local standards for such milk. Schools must also comply with other applicable milk

requirements in § 210.10(d)(2), § 210.10(d)(3), and § 210.10(d)(4) of this chapter.

(5) *Additional foods.* Schools may offer additional foods with breakfasts to children over one year of age.

(6) *Menu choices at breakfast.* Schools must follow the requirements in § 210.10(l) of this chapter.

(7) *Exceptions and variations allowed in reimbursable meals.* Schools must follow the requirements in § 210.10(m) of this chapter.

(8) *Nutrition disclosure.* Schools must follow the requirements in § 210.10(n) of this chapter.

(9) *State agency's responsibilities for monitoring breakfasts.* As part of the administrative review authorized under § 210.18(g)(2) of this chapter, State agencies must evaluate compliance with the meal pattern requirements (food components and quantities) in paragraph (o)(3) of this section. If the meals do not meet the requirements of this section, the State agency or school food authority must provide technical assistance and require the reviewed school to take corrective action. In addition, the State agency must take fiscal action as authorized in § 210.18(m) and 210.19(c) of this chapter.

(10) *Requirements for the infant breakfast pattern.* (i) *Feeding breakfasts to infants.* Breakfasts served to infants ages birth through 11 months must meet the requirements described in paragraph (o)(11)(iv) of this section. Foods included in the breakfast must be of a texture and a consistency that are appropriate for the age of the infant being served. The foods must be served during a span of time consistent with the infant's eating habits. For those infants whose dietary needs are more individualized, exceptions to the meal pattern must be made in accordance with the requirements found in § 210.10(m) of this chapter.

(ii) *Breastmilk and iron-fortified formula.* Either breastmilk or iron-fortified infant formula, or portions of both, must be served for the entire first year. Meals containing breastmilk and meals containing iron-fortified infant formula supplied by the school are eligible for reimbursement. However, infant formula provided by a parent (or guardian) and breastmilk fed directly by the infant's mother, during a visit to the school, contribute to a reimbursable breakfast only when the school supplies at least one component of the infant's meal.

(iii) *Solid foods.* For infants ages 4 through 7 months, solid foods of an appropriate texture and consistency are required only when the infant is developmentally ready to accept them. The school should consult with the infant's parent (or guardian) in making the decision to introduce solid foods. Solid foods should be introduced one at a time, on a gradual basis, with the intent of ensuring the infant's health and nutritional well-being.

(iv) *Infant meal pattern.* Infant breakfasts must have, at a minimum, each of the food components indicated, in the amount that is appropriate for the infant's age. For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered. In these situations, additional breastmilk must be offered if the infant is still hungry. Breakfasts may include portions of breastmilk and iron-fortified infant formula as long as the total number of ounces meets, or exceeds, the minimum amount required of this food component. Similarly, to meet the component requirement for vegetables and fruit, portions of both may be served.

(A) *Birth through 3 months.* 4 to 6 fluid ounces of breastmilk or iron-fortified infant formula—only breastmilk or iron-fortified formula is required to meet the infant's nutritional needs.

(B) *4 through 7 months.* Breastmilk or iron-fortified formula is required. Some infants may be developmentally ready for solid foods of an appropriate texture and consistency. Breakfasts are reimbursable when schools provide all of the components in the meal pattern that the infant is developmentally ready to accept.

(*1*) 4 to 8 fluid ounces of breastmilk or iron-fortified infant formula; and

(*2*) 0 to 3 tablespoons of iron-fortified dry infant cereal.

(C) *8 through 11 months.* Breastmilk or iron-fortified formula and solid foods of an appropriate texture and consistency are required.

(*1*) 6 to 8 fluid ounces of breastmilk or iron-fortified infant formula; and

(*2*) 2 to 4 tablespoons of iron-fortified dry infant cereal; and

(*3*) 1 to 4 tablespoons of fruit or vegetable.

(v) *Infant meal pattern table.* The minimum amounts of food components to serve to infants, as described in paragraph (o)(11)(iv) of this section, are:

BREAKFAST PATTERN FOR INFANTS

Birth through 3 months	4 through 7 months	8 through 11 months
4–6 fluid ounces of formula [1] or breastmilk [2 3]	4–8 fluid ounces of formula[1] or breastmilk;[2 3] and 0–3 tablespoons of infant cereal [1 4]	6–8 fluid ounces of formula [1] or breastmilk;[2 3] and 2–4 tablespoons of infant cereal;[1] and 1–4 tablespoons of fruit or vegetable or both.

[1] Infant formula and dry infant cereal must be iron-fortified.
[2] Breastmilk or formula, or portions of both, may be served; however, it is recommended that breastmilk be served from birth through 11 months.
[3] For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered, with additional breastmilk offered if the infant is still hungry.
[4] A serving of this component is required only when the infant is developmentally ready to accept it.

■ 12. Paragraph 220.13(f) is amended as follows:

■ a. Amend paragraph (f)(2) by removing the words ''§ 210.30(d)'' wherever it appears and adding in its place the words ''§ 210.29''; and

■ b. Revise paragraph (f)(3) to read as follows:

§ 220.13 Special responsibilities of State agencies.

(f) * * *

(3) For the purposes of compliance with the meal requirements in § 220.8 and § 220.23, the State agency must follow the provisions specified in § 210.18(g)(2) of this chapter, as applicable.

* * * * *

■ 13. Add § 220.23 to read as follows:

§ 220.23 Nutrition standards and menu planning approaches for breakfasts.

(a) *What are the nutrition standards for breakfasts for children age 2 and*

over? This section contains the requirements applicable to school breakfasts for children age 2 and over in school years 2012–2013 through 2013–14. All of the requirements of this section will be superseded by the requirements in § 220.8 beginning July 1, 2013 (school year 2013–14), with the exceptions noted in paragraph (n) of this section. School food authorities must ensure that participating schools provide nutritious and well-balanced breakfasts. For children age 2 and over, breakfasts, when averaged over a school week, must meet the nutrition standards and the appropriate nutrient and calorie levels in this section. The nutrition standards are:

(1) Provision of one-fourth of the Recommended Dietary Allowances (RDA) for protein, calcium, iron, vitamin A and vitamin C in the appropriate levels (see paragraphs (b), (c), (e)(1), or (h) of this section);

(2) Provision of the breakfast energy allowances (calories) for children in the appropriate levels (see paragraphs (b), (c), (e)(1), or (h) of this section);

(3) These applicable recommendations of the 1995 Dietary Guidelines for Americans:

(i) Eat a variety of foods;

(ii) Limit total fat to 30 percent of total calories;

(iii) Limit saturated fat to less than 10 percent of total calories;

(iv) Choose a diet low in cholesterol;

(v) Choose a diet with plenty of grain products, vegetables, and fruits; and

(vi) Choose a diet moderate in salt and sodium.

(4) These measures of compliance with the applicable recommendations of the 1995 Dietary Guidelines for Americans:

(i) Limit the percent of calories from total fat to 30 percent of the actual number of calories offered;

(ii) Limit the percent of calories from saturated fat to less than 10 percent of the actual number of calories offered;

(iii) Reduce sodium and cholesterol levels; and

(iv) Increase the level of dietary fiber.

(5) School food authorities have several ways to plan menus. The minimum levels of nutrients and calories that breakfasts must offer depends on the menu planning approach used and the age/grades served. The menu planning approaches are:

(i) Nutrient standard menu planning (see paragraphs (b) and (e) of this section);

(ii) Assisted nutrient standard menu planning (see paragraphs (b) and (f) of this section);

(iii) Traditional food-based menu planning (see paragraphs (c) and (g)(1) of this section);

(iv) Enhanced food-based menu planning (see paragraphs (c) and (g)(2) of this section); or

(v) Alternate menu planning as provided for in paragraph (h) of this section.

(6) Schools must keep production and menu records for the breakfasts they produce. These records must show how the breakfasts contribute to the required food components, food items or menu items every day. In addition, these records must show how the breakfasts contribute to the nutrition standards in paragraph (a) of this section and the appropriate calorie and nutrient levels (see paragraphs (c), (d), or (h) of this section, depending on the menu planning approach used) over the school week. If applicable, schools or school food authorities must maintain nutritional analysis records to demonstrate that breakfasts, when averaged over each school week, meet:

(i) The nutrition standards provided in paragraph (a) of this section; and

(ii) The nutrient and calorie levels for children for each age or grade group in accordance with paragraphs (b) and (e)(1) of this section or developed under paragraph (h) of this section.

(b) *What are the levels for nutrients and calories for breakfasts planned under the nutrient standard or assisted nutrient standard menu planning approaches?* (1) The required levels are:

MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL BREAKFASTS NUTRIENT STANDARD MEAL PLANNING APPROACHES (SCHOOL WEEK AVERAGES)

Nutrients and energy allowances	Minimum requirements		Optional
	Preschool	Grades K–12	Grades 7–12
Calories (kcal)	388	554	618
Total fat (as % of total kcals)	(1)	(1, 2)	(2)
Saturated fat (as % of total kcals)	(1)	(1, 3)	(3)
RDA for protein (g)	5	10	12
RDA for calcium (mg)	200	257	300
RDA for iron (mg)	2.5	3	3.4
RDA for Vitamin A (RE)	113	197	225
RDA for Vitamin C (mg)	11	13	14

[1] The Dietary Guidelines recommend that after 2 years of age "* * * children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."

[2] Not to exceed 30 percent over a school week.

[3] Less than 10 percent over a school week.

(2) Optional levels are:

OPTIONAL MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL BREAKFASTS NUTRIENT STANDARD MEAL PLANNING APPROACHES (SCHOOL WEEK AVERAGES)

Nutrients and energy allowances	Ages 3–6	Ages 7–10	Ages 11–13	Ages 14 and above
Calories (kcal)	419	500	588	625
Total fat (as % of total kcals)	(1, 2)	(2)	(2)	(2)
Saturated fat (as % of total kcals)	(1, 3)	(3)	(3)	(3)
RDA for protein (g)	5.5	7	11.25	12.5
RDA for calcium (mg)	200	200	300	300

OPTIONAL MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL BREAKFASTS NUTRIENT STANDARD MEAL PLANNING APPROACHES (SCHOOL WEEK AVERAGES)—Continued

Nutrients and energy allowances	Ages 3–6	Ages 7–10	Ages 11–13	Ages 14 and above
RDA for iron (mg)	2.5	2.5	3.4	3.4
RDA for Vitamin A (RE)	119	175	225	225
RDA for Vitamin C (mg)	11.00	11.25	12.5	14.4

[1] The Dietary Guidelines recommend that after 2 years of age "* * * children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."
[2] Not to exceed 30 percent over a school week.
[3] Less than 10 percent over a school week.

(3) Schools may also develop a set of nutrient and calorie levels for a school week. These levels are customized for the age groups of the children in the particular school.

(c) *What are the nutrient and calorie levels for breakfasts planned under the food-based menu planning approaches?*—(1) *Traditional approach.* For the traditional food-based menu planning approach, the required levels are:

MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL BREAKFASTS TRADITIONAL FOOD-BASED MENU PLANNING APPROACH (SCHOOL WEEK AVERAGES)

Nutrients and energy allowances	Age 2	Ages 3, 4, 5	Grades K–12
Calories (kcal)	325	388	554
Total fat (as % of total kcals)	(1)	(1)	(1, 2)
Saturated fat (as % of total kcals)	(1)	(1)	(1, 3)
RDA for protein (g)	4	5	10
RDA for calcium (mg)	200	200	257
RDA for iron (mg)	2.5	2.5	3
RDA for Vitamin A (RE)	100	113	197
RDA for Vitamin C (mg)	10	11	13

[1] The Dietary Guidelines recommend that after 2 years of age "* * * children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."
[2] Not to exceed 30 percent over a school week.
[3] Less than 10 percent over a school week.

(2) *Enhanced approach.* For the enhanced food-based menu planning approach, the required levels are:

MINIMUM NUTRIENT AND CALORIE LEVELS FOR SCHOOL BREAKFASTS ENHANCED FOOD-BASED MENU PLANNING APPROACH (SCHOOL WEEK AVERAGES)

Nutrients and energy allowances	Required for		Option for
	Preschool	Grades K–12	Grades 7–12
Calories (kcal)	388	554	618
Total fat (as % of total kcals)	(1)	(1, 2)	(2)
Saturated fat (as % of total kcals)	(1)	(1, 3)	(3)
RDA for protein (g)	5	10	12
RDA for calcium (mg)	200	257	300
RDA for iron (mg)	2.5	3	3.4
RDA for Vitamin A (RE)	113	197	225
RDA for Vitamin C (mg)	11	13	14

[1] The Dietary Guidelines recommend that after 2 years of age "* * * children should gradually adopt a diet that, by about 5 years of age, contains no more than 30 percent of calories from fat."
[2] Not to exceed 30 percent over a school week.
[3] Less than 10 percent over a school week.

(d) *Exceptions and variations allowed in reimbursable breakfasts.* (1) *Exceptions for disability reasons.* Schools must make substitutions in breakfasts for students who are considered to have a disability under 7 CFR part 15b.3 and whose disability restricts their diet. Substitutions must be made on a case by case basis only when supported by a written statement of the need for substitutions that includes recommended alternate foods, unless otherwise exempted by FNS. Such statement must be signed by a licensed physician.

(2) *Exceptions for non-disability reasons.* Schools may make substitutions for students without disabilities who cannot consume the breakfast because of medical or other

special dietary needs. Substitutions must be made on a case by case basis only when supported by a written statement of the need for substitutions that includes recommended alternate foods, unless otherwise exempted by FNS. Except with respect to substitutions for fluid milk, such statement must be signed by a recognized medical authority.

(i) *Milk substitutions for non-disability reasons.* Schools may make substitutions for fluid milk for non-disabled students who cannot consume fluid milk due to medical or special dietary needs. A school that selects this option may offer the nondairy beverage(s) of its choice, provided the beverage(s) meet the nutritional standards established in paragraph (i)(3) of this section. Expenses incurred in providing substitutions for fluid milk that exceed program reimbursements must be paid by the school food authority.

(ii) *Requisites for milk substitutions.* (A) A school food authority must inform the State agency if any of its schools choose to offer fluid milk substitutes other than for students with disabilities; and

(B) A medical authority or the student's parent or legal guardian must submit a written request for a fluid milk substitute, identifying the medical or other special dietary need that restricts the student's diet.

(iii) *Substitution approval.* The approval for fluid milk substitution must remain in effect until the medical authority or the student's parent or legal guardian revokes such request in writing, or until such time as the school changes its substitution policy for non-disabled students.

(3) *Variations for ethnic, religious, or economic reasons.* Schools should consider ethnic and religious preferences when planning and preparing breakfasts. Variations on an experimental or continuing basis in the food components for the food-based menu planning approaches in paragraph (g) of this section may be allowed by FNS. Any variations must be nutritionally sound and needed to meet ethnic, religious, or economic needs.

(4) *Exceptions for natural disasters.* If there is a natural disaster or other catastrophe, FNS may temporarily allow schools to serve breakfasts for reimbursement that do not meet the requirements in this section.

(e) *What are the requirements for the nutrient standard menu planning approach?* (1) *Nutrient levels*—(i) *Adjusting nutrient levels for young children.* Schools with children who are age 2 must at least meet the nutrition standards in paragraph (a) of this section and the preschool nutrient and calorie levels in paragraph (b)(1) of this section over a school week. Schools may also use the preschool nutrient and calorie levels in paragraph (b)(2) of this section or may calculate nutrient and calorie levels for two year olds. FNS has a method for calculating these levels in menu planning guidance materials.

(ii) *Minimum levels for nutrients.* Breakfasts must at least offer the nutrient and calorie levels for the required grade groups in the table in paragraph (b)(1) of this section. Schools may also offer breakfasts meeting the nutrient and calorie levels for the age groups in paragraph (b)(2) of this section. If only one grade or age group is outside the established levels, schools may follow the levels for the majority of the children. Schools may also customize the nutrient and calorie levels for the children they serve. FNS has a method for calculating these levels in guidance materials for menu planning.

(2) *Reimbursable breakfasts*—(i) *Contents of a reimbursable breakfast.* A reimbursable breakfast must include at least three menu items. All menu items or foods offered in a reimbursable breakfast contribute to the nutrition standards in paragraph (a) of this section and to the levels of nutrients and calories that must be met in paragraphs (c) or (e)(1) of this section. Unless offered as part of a menu item in a reimbursable breakfast, foods of minimal nutritional value (see appendix B to part 220) are not included in the nutrient analysis. Reimbursable breakfasts planned under the nutrient standard menu planning approach must meet the nutrition standards in paragraph (a) of this section and the appropriate nutrient and calorie levels in paragraph (b) or (e)(1) of this section.

(ii) *Offer versus serve.* Schools must offer at least three menu items. At their option, school food authorities may allow students to select only two menu items and to decline a maximum of one menu item. The price of a reimbursable breakfast does not change if the student does not take a menu item or requests smaller portions.

(3) *Doing the analysis.* Schools using nutrient standard menu planning must conduct the analysis on all menu items and foods offered in a reimbursable breakfast. The analysis is conducted over a school week within the review period. Unless offered as part of a menu item in a reimbursable breakfast, foods of minimal nutritional value (see appendix B to part 220) are not included in the nutrient analysis.

(4) *Software elements*—(i) *The Child Nutrition Database.* The nutrient analysis is based on the Child Nutrition Database. This database is part of the software used to do a nutrient analysis. Software companies or others developing systems for schools may contact FNS for more information about the database.

(ii) *Software evaluation.* FNS or an FNS designee evaluates any nutrient analysis software before it may be used in schools. FNS or its designee determines if the software, as submitted, meets the minimum requirements. The approval of software does not mean that FNS or USDA endorses it. The software must be able to do all functions after the basic data is entered. The required functions include weighted averages and the optional combined analysis of the lunch and breakfast programs.

(5) *Nutrient analysis procedures*—(i) *Weighted averages.* Schools must include all menu items and foods offered in reimbursable breakfasts in the nutrient analysis. Menu items and foods are included based on the portion sizes and projected serving amounts. They are also weighted based on their proportionate contribution to the breakfasts offered. This means that menu items or foods more frequently offered are weighted more heavily than those not offered as frequently. Schools calculate weighting as indicated by FNS guidance and by the guidance provided by the software.

(ii) *Analyzed nutrients.* The analysis includes all menu items and foods offered over a school week. The analysis must determine the levels of: Calories, protein, vitamin A, vitamin C, iron, calcium, total fat, saturated fat, sodium, cholesterol and dietary fiber.

(6) *Comparing the results of the nutrient analysis.* Once the procedures in paragraph (i)(5) of this section are completed, schools must compare the results of the analysis to the appropriate nutrient and calorie levels, by age/grade groups, in paragraph (b) of this section or those developed under paragraph (e)(1) of this section. This comparison determines the school week's average. Schools must also make comparisons to the nutrition standards in paragraph (a) of this section to determine how well they are meeting the nutrition standards over a school week.

(7) *Adjustments to the menus.* Once schools know the results of the nutrient analysis based on the procedures in paragraphs (e)(5) and (6) of this section, they must adjust future menu cycles to reflect production and how often the menu items and foods are offered. Schools may need to reanalyze menus when the students' selections and,

consequently, production levels change. Schools may need to change the menu items and foods offered given the students' selections and may need to modify the recipes and other specifications to make sure that the nutrition standards in paragraph (a) and either paragraph (b) or (e)(1) of this section are met.

(8) *Standardized recipes.* If a school follows the nutrient standard menu planning approach, it must develop and follow standardized recipes. A standardized recipe is a recipe that was tested to provide an established yield and quantity using the same ingredients for both measurement and preparation methods. Any standardized recipes developed by USDA/FNS are in the Child Nutrition Database. If a school has its own recipes, they must be standardized and analyzed to determine the levels of calories, nutrients, and dietary components listed in paragraph (e)(5)(ii) of this section. Schools must add any local recipes to their local database as outlined in FNS guidance.

(9) *Processed foods.* The Child Nutrition Database includes a number of processed foods. Schools may use purchased processed foods and menu items that are not in the Child Nutrition Database. Schools or the State agency must add any locally purchased processed foods and menu items to their local database as outlined in FNS guidance. Schools or State agencies must obtain the levels of calories, nutrients, and dietary components listed in paragraph (e)(5)(ii) of this section.

(10) *Menu substitutions.* Schools may need to substitute foods or menu items in a menu that was already analyzed. If the substitution(s) occurs more than two weeks before the planned menu is served, the school must reanalyze the revised menu. If the substitution(s) occurs two weeks or less before the planned menu is served, the school does not need to do a reanalysis. However, schools should always try to substitute similar foods.

(11) *Meeting the nutrition standards.* The school's analysis shows whether their menus are meeting the nutrition standards in paragraph (a) of this section and the appropriate levels of nutrients and calories in paragraph (b) of this section or customized levels developed under paragraph (e)(1) of this section. If the analysis shows that the menu(s) are not meeting these standards, the school needs to take action to make sure that the breakfasts meet the nutrition standards and the calorie, nutrient, and dietary component levels. Actions may include technical assistance and training and may be taken by the State agency, the school food authority or by the school as needed.

(12) *Other Child Nutrition Programs and nutrient standard analysis menu planning.* School food authorities that operate the Summer Food Service Program (part 225 of this chapter) and/or the Child and Adult Care Food Program (part 226 of this chapter) may, with State agency approval, prepare breakfasts for these programs using the nutrient standard menu planning approach for children age two and over. FNS has program guidance on the levels of nutrient and calories for adult breakfasts offered under the Child and Adult Care Food Program.

(f) *What are the requirements for the assisted nutrient standard menu planning approach?*—(1) *Definition of assisted nutrient standard menu planning.* Some school food authorities may not be able to do all of the procedures necessary for nutrient standard menu planning. The assisted nutrient standard menu planning approach provides schools with menu cycles developed and analyzed by other sources. These sources include the State agency, other schools, consultants, or food service management companies.

(2) *Elements of assisted nutrient standard menu planning.* School food authorities using menu cycles developed under assisted nutrient standard menu planning must follow the procedures in paragraphs (e)(1) through (10) of this section. The menu cycles must also incorporate local food preferences and accommodate local food service operations. The menu cycles must meet the nutrition standards in paragraph (a) of this section and meet the applicable nutrient and calorie levels for nutrient standard menu planning in paragraphs (b) or (e)(1) of this section. The supplier of the assisted nutrient standard menu planning approach must also develop and provide recipes, food product specifications, and preparation techniques. All of these components support the nutrient analysis results of the menu cycles used by the receiving school food authorities.

(3) *State agency approval.* Prior to its use, the State agency must approve the initial menu cycle, recipes and other specifications of the assisted nutrient standard menu planning approach. The State agency needs to make sure all the steps required for nutrient analysis were followed. School food authorities may also ask the State agency for assistance with implementation of their assisted nutrient standard menu planning approach.

(4) *Required adjustments.* After the initial service of the menu cycle developed under the assisted nutrient standard menu planning approach, the nutrient analysis must be reassessed and appropriate adjustments made as discussed in paragraph (e)(7) of this section.

(5) *Final responsibility for meeting the nutrition standards.* The school food authority using the assisted nutrient standard menu planning approach retains final responsibility for meeting the nutrition standards in paragraph (a) of this section and the applicable calorie and nutrient levels in paragraphs (b) or (e)(1) of this section.

(6) *Adjustments to the menus.* If the nutrient analysis shows that the breakfasts offered are not meeting the nutrition standards in paragraph (a) of this section and the applicable calorie and nutrient levels in paragraphs (b) or (e)(1) of this section, the State agency, school food authority or school must take action to make sure the breakfasts offered meet these requirements. Actions needed include technical assistance and training.

(7) *Other Child Nutrition Programs and assisted nutrient analysis menu planning.* School food authorities that operate the Summer Food Service Program (part 225 of this chapter) and/or the Child and Adult Care Food Program (part 226 of this chapter) may, with State agency approval, prepare breakfasts for these programs using the assisted nutrient standard menu planning approach for children age two and over. FNS has guidance on the levels of nutrients and calories for adult breakfasts offered under the Child and Adult Care Food Program.

(g) *What are the requirements for the food-based menu planning approaches?*—(1) *Food items.* There are two menu planning approaches based on meal patterns, not nutrient analysis. These approaches are the traditional food-based menu planning approach and the enhanced food-based menu planning approach. Schools using one of these approaches must offer these food items in at least the portions required for various age/grade groups:

(i) A serving of fluid milk as a beverage or on cereal or used partly for both;

(ii) A serving of fruit or vegetable or both, or full-strength fruit or vegetable juice; and

(iii) Two servings from one of the following components or one serving from each component:

(A) Grains/breads; and/or

(B) Meat/meat alternate.

(2) *Quantities for the traditional food-based menu planning approach.* At a minimum, schools must offer the food items in the quantities specified for the

appropriate age/grade group in the following table:

TRADITIONAL FOOD-BASED MENU PLANNING APPROACH—MEAL PATTERN FOR BREAKFASTS

Food components and food items	1–2	Ages 3, 4 and 5	Grades K–12
MILK (fluid) (as a beverage, on cereal, or both)	4 fluid ounces	6 fluid ounces	8 fluid ounces.
JUICE/FRUIT/VEGETABLE: Fruit and/or vegetable; or full-strength fruit juice or vegetable juice.	¼ cup	½ cup	½ cup.
SELECT ONE SERVING FROM EACH OF THE FOLLOWING COMPONENTS, TWO FROM ONE COMPONENT, OR AN EQUIVALENT COMBINATION:			
GRAINS/BREADS:			
Whole-grain or enriched bread	½ slice	½ slice	1 slice.
Whole-grain or enriched biscuit, roll, muffin, etc	½ serving	½ serving	1 serving.
Whole-grain, enriched or fortified cereal	¼ cup or ⅓ ounce.	⅓ cup or½ ounce.	¾ cup or 1 ounce.
MEAT OR MEAT ALTERNATIVES:			
Meat/poultry or fish	½ ounce	½	1 ounce.
Alternate protein products[1]	½ ounce	½ ounce	1 ounce.
Cheese	½ ounce	½ ounce	1 ounce.
Large egg	½	½	½.
Peanut butter or other nut or seed butters	1 tablespoon	1 tablespoon	2 tablespoons.
Cooked dry beans and peas	2 tablespoons	2 tablespoons	4 tablespoons.
Nuts and/or seeds (as listed in program guidance)[2]	½ ounce	½ ounce	1 ounce.
Yogurt, plain or flavored, unsweetened or sweetened	2 ounces or ¼ cup.	2 ounces or ¼ cup.	4 ounces or ½ cup.

[1] Must meet the requirements in appendix A of this part.
[2] No more than 1 ounce of nuts and/or seeds may be served in any one breakfast.

(3) *Quantities for the enhanced food-based menu planning approach.* At a minimum, schools must offer the food items in the quantities specified for the appropriate age/grade group in the following table:

ENHANCED FOOD-BASED MENU PLANNING APPROACH-MEAL PATTERN FOR BREAKFASTS

Food components and food items	Required for		Option for	
	Ages 1–2	Preschool	Grades K–12	Grades 7–12
MILK (fluid) (as a beverage, on cereal, or both).	4 fluid ounces	6 fluid ounces	8 fluid ounces	8 fluid ounces.
JUICE/FRUIT/VEGETABLE: Fruit and/or vegetable; or full-strength fruit juice or vegetable juice.	¼ cup	½ cup	½ cup	½ cup.
SELECT ONE SERVING FROM EACH OF THE FOLLOWING COMPONENTS, TWO FROM ONE COMPONENT, OR AN EQUIVALENT COMBINATION:				
GRAINS/BREADS:				
Whole-grain or enriched bread	½ slice	½ slice	1 slice	1 slice.
Whole-grain or enriched biscuit, roll, muffin, etc..	½ serving	½ serving	1 serving	1 serving.
Whole-grain, enriched or fortified cereal.	¼ cup or 1/3 ounce	⅓ cup or ½ ounce	¾ cup or 1 ounce	¾ cup or 1 ounce plus an additional serving of one of the Grains/Breads above.
MEAT OR MEAT ALTERNATIVES:				
Meat/poultry or fish	½ ounce	½ ounce	1 ounce	1 ounce.
Alternate protein products[1]	½ ounce	½ ounce	1 ounce	1 ounce.
Cheese	½ ounce	½ ounce	1 ounce	1 ounce.
Large egg	½	½	½	½.
Peanut butter or other nut or seed butters.	1 tablespoon	1 tablespoon	2 tablespoons	2 tablespoons.
Cooked dry beans and peas	2 tablespoons	2 tablespoons	4 tablespoons	4 tablespoons.
Nuts and/or seeds (as listed in program guidance)[2].	½ ounce	½ ounce	1 ounce	1 ounce.
Yogurt, plain or flavored, unsweetened or sweetened.	2 ounces or ¼ cup	2 ounces or ¼ cup	4 ounces or ½ cup	4 ounces or ½ cup.

[1] Must meet the requirements in appendix A of this part.
[2] No more than 1 ounce of nuts and/or seeds may be served in any one breakfast.

(4) *Offer versus serve.* Each school must offer all four required food items listed in paragraph (g)(1) of this section. At the option of the school food authority, each school may allow students to refuse one food item from any component. The refused food item may be any of the four items offered to the student. A student's decision to accept all four food items or to decline one of the four food items must not affect the charge for a reimbursable breakfast.

(5) *Meal pattern exceptions for outlying areas.* Schools in American Samoa, Puerto Rico and the Virgin Islands may serve a starchy vegetable such as yams, plantains, or sweet potatoes to meet the grain/bread requirement.

(h) *What are the requirements for alternate menu planning approaches?*—(1) *Definition.* Alternate menu planning approaches are those adopted or developed by school food authorities or State agencies that differ from the standard approaches established in paragraphs (e) through (g) of this section.

(2) *Use and approval of major changes or new alternate approaches.* Within the guidelines established for developing alternate menu planning approaches, school food authorities or State agencies may modify one of the established menu planning approaches in paragraphs (e) through (g) of this section or may develop their own menu planning approach. The alternate menu planning approach must be available in writing for review and monitoring purposes. No formal plan is required; guidance material, a handbook or protocol is sufficient. As appropriate, the material must address how the guidelines in paragraph (h)(3) of this section are met. A State agency that develops an alternate approach that is exempt from FNS approval under paragraph (h)(2)(iii) of this section must notify FNS in writing when implementing the alternate approach.

(i) *Approval of local level plans.* Any school food authority-developed menu planning approach must have prior State agency review and approval.

(ii) *Approval of State agency plans.* Unless exempt under paragraph (h)(2)(iii) of this section, any State agency-developed menu planning approach must have prior FNS approval.

(iii) *State agency plans not subject to approval.* A State agency-developed menu planning approach does not need FNS approval if:

(A) Five or more school food authorities in the State use it; and

(B) The State agency maintains ongoing oversight of the operation and evaluation of the approach and makes any needed adjustments to its policies and procedures to ensure that the appropriate guidelines in paragraph (h)(3) of this section are met.

(3) *Elements for major changes or new approaches.* Any alternate menu planning approach must:

(i) Offer fluid milk, as provided in paragraph (i) of this section;

(ii) Include the procedures for offer versus serve if the school food authority chooses to implement the offer versus serve option. Alternate approaches should follow the offer versus serve procedures in paragraphs (e)(2)(ii) and (g)(4) of this section, as appropriate. If these requirements are not followed, the approach must indicate:

(A) The affected age/grade groups;

(B) The number and type of items (and, if applicable, the quantities for the items) that constitute a reimbursable breakfast under offer versus serve;

(C) How such procedures will reduce plate waste; and

(D) How a reasonable level of calories and nutrients for the breakfast as taken is provided.

(iii) Meet the Recommended Dietary Allowances and breakfast energy allowances (nutrient levels) and indicate the age/grade groups served and how the nutrient levels are met for those age/grade groups;

(iv) Follow the requirements for competitive foods in the definition of *Foods of minimal nutritional value* in § 220.2, in § 220.12, and in appendix B of this part;

(v) Follow the requirements for counting food items and products towards meeting the meal patterns. These requirements are found in paragraphs (g) and (i) of this section, in appendices A through C to this part, and in instructions and guidance issued by FNS. This only applies if the alternate approach is a food-based menu planning approach.

(vi) Identify a reimbursable breakfast at the point of service.

(A) To the extent possible, the procedures provided in paragraph (e)(2)(i) of this section for nutrient standard or assisted nutrient standard menu planning approaches or for food-based menu planning approaches provided in paragraph (g) of this section must be followed. Any instructions or guidance issued by FNS that further defines the elements of a reimbursable breakfast must be followed when using the existing regulatory provisions.

(B) Any alternate approach that deviates from the provisions in paragraph (e)(2)(i) or paragraph (g) of this section must indicate what constitutes a reimbursable breakfast, including the number and type of items (and, if applicable, the quantities for the items) which comprise the breakfast, and how a reimbursable breakfast is to be identified at the point of service.

(vii) Explain how the alternate menu planning approach can be monitored under the applicable provisions of § 210.18 of this chapter, including a description of the records that will be maintained to document compliance with the program's administrative and nutritional requirements. However, if the procedures under § 210.18 of this chapter cannot be used to monitor the alternate approach, a description of review procedures which will enable the State agency to assess compliance with the nutrition standards in paragraphs (a)(1) through (4) of this section must be included; and

(viii) Follow the requirements for weighted analysis and for approved software for nutrient standard menu planning as required by paragraphs (e)(4) and (5) of this section unless a State agency-developed approach meets the criteria in paragraph (h)(2)(iii) of this section.

(i) *What are the requirements for offering milk?*—(1) *Serving milk.* A serving of fluid milk as a beverage or on cereal or used in part for each purpose must be offered for breakfasts. Schools must offer students a variety (at least two different options) of fluid milk daily. All milk must be fat-free or low-fat. Milk with higher fat content is not allowed. Fat-free fluid milk may be flavored or unflavored, and low-fat fluid milk must be unflavored. Low fat or fat-free lactose-free and reduced-lactose fluid milk may also be offered. Schools must also comply with other applicable fluid milk requirements in § 210.10(d)(1) through (4) of this chapter.

(2) *Inadequate milk supply.* If a school cannot get a supply of milk, it can still participate in the Program under the following conditions:

(i) If emergency conditions temporarily prevent a school that normally has a supply of fluid milk from obtaining delivery of such milk, the State agency may allow the school to serve breakfasts during the emergency period with an alternate form of milk or without milk.

(ii) If a school is unable to obtain a supply of any type of fluid milk on a continuing basis, the State agency may allow schools to substitute canned or dry milk in the required quantities in the preparation of breakfasts. In Alaska, Hawaii, American Samoa, Guam, Puerto Rico, and the Virgin Islands, if a

sufficient supply of fluid milk cannot be obtained, ''milk'' includes reconstituted or recombined milk, or otherwise as allowed by FNS through a written exception.

(3) *Milk substitutes.* If a school chooses to offer one or more substitutes for fluid milk for non-disabled students with medical or special dietary needs, the nondairy beverage(s) must provide the nutrients listed in the following table. Milk substitutes must be fortified in accordance with fortification guidelines issued by the Food and Drug Administration. A school need only offer the nondairy beverage(s) that it has identified as allowable fluid milk substitutes according to this paragraph (i)(3).

Nutrient	Per cup
Calcium	276 mg.
Protein	8 g.
Vitamin A	500 IU.
Vitamin D	100 IU.
Magnesium	24 mg.
Phosphorus	222 mg.
Potassium	349 mg.
Riboflavin	0.44 mg.
Vitamin B–12	1.1 mcg.

(j) *What are the requirements for the infant breakfast pattern?* (1) *Feeding breakfasts to infants.* Breakfasts served to infants ages birth through 11 months must meet the requirements described in paragraph (j)(4) of this section. Foods included in the breakfast must be of a texture and a consistency that are appropriate for the age of the infant being served. The foods must be served during a span of time consistent with the infant's eating habits. For those infants whose dietary needs are more individualized, exceptions to the meal pattern must be made in accordance with the requirements found in paragraph (d)(1) of this section.

(2) *Breastmilk and iron-fortified formula.* Either breastmilk or iron-fortified infant formula, or portions of both, must be served for the entire first year. Meals containing breastmilk and meals containing iron-fortified infant formula supplied by the school are eligible for reimbursement. However, infant formula provided by a parent (or guardian) and breastmilk fed directly by the infant's mother, during a visit to the school, contribute to a reimbursable breakfast only when the school supplies at least one component of the infant's meal.

(3) *Solid foods.* For infants ages 4 through 7 months, solid foods of an appropriate texture and consistency are required only when the infant is developmentally ready to accept them. The school should consult with the infant's parent (or guardian) in making the decision to introduce solid foods. Solid foods should be introduced one at a time, on a gradual basis, with the intent of ensuring the infant's health and nutritional well-being.

(4) *Infant meal pattern.* Infant breakfasts must have, at a minimum, each of the food components indicated, in the amount that is appropriate for the infant's age. For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered. In these situations, additional breastmilk must be offered if the infant is still hungry. Breakfasts may include portions of breastmilk and iron-fortified infant formula as long as the total number of ounces meets, or exceeds, the minimum amount required of this food component. Similarly, to meet the component requirement for vegetables and fruit, portions of both may be served.

(i) *Birth through 3 months.* 4 to 6 fluid ounces of breastmilk or iron-fortified infant formula—only breastmilk or iron-fortified formula is required to meet the infant's nutritional needs.

(ii) *Four through 7 months.* Breastmilk or iron-fortified formula is required. Some infants may be developmentally ready for solid foods of an appropriate texture and consistency. Breakfasts are reimbursable when schools provide all of the components in the meal pattern that the infant is developmentally ready to accept.

(A) Four to 8 fluid ounces of breastmilk or iron-fortified infant formula; and

(B) 0 to 3 tablespoons of iron-fortified dry infant cereal.

(iii) *Eight through 11 months.* Breastmilk or iron-fortified formula and solid foods of an appropriate texture and consistency are required.

(A) Six to 8 fluid ounces of breastmilk or iron-fortified infant formula; and

(B) Two to 4 tablespoons of iron-fortified dry infant cereal; and

(C) One to 4 tablespoons of fruit or vegetable.

(5) *Infant meal pattern table.* The minimum amounts of food components to serve to infants, as described in paragraph (j)(4) of this section, are:

BREAKFAST PATTERN FOR INFANTS

Birth through 3 months	4 through 7 months	8 through 11 months
4–6 fluid ounces of formula[1] or breastmilk[2 3]	4–8 fluid ounces of formula[1] or breastmilk[2 3]; and 0–3 tablespoons of infant cereal[1 4]	6–8 fluid ounces of formula[1] or breastmilk[2 3]; and 2–4 tablespoons of infant cereal[1]; and 1–4 tablespoons of fruit or vegetable or both

[1] Infant formula and dry infant cereal must be iron-fortified.
[2] Breastmilk or formula, or portions of both, may be served; however, it is recommended that breastmilk be served in place of formula from birth through 11 months.
[3] For some breastfed infants who regularly consume less than the minimum amount of breastmilk per feeding, a serving of less than the minimum amount of breastmilk may be offered, with additional breastmilk offered if the infant is still hungry.
[4] A serving of this component is required only when the infant is developmentally ready to accept it.

(k) *What about serving additional foods?* Schools may offer additional foods with breakfasts to children over one year of age.

(l) *Must schools offer choices at breakfast?* FNS encourages schools to offer children a selection of foods and menu items at breakfast. Choices provide variety and encourage consumption. Schools may offer choices of reimbursable breakfasts or foods within a reimbursable breakfast. When a school offers a selection of more than one type of breakfast or when it offers a variety of food components, menu items or foods and milk for choice as a reimbursable breakfast, the school must offer all children the same selection(s) regardless of whether the child is eligible for free or reduced price breakfasts or must pay the designated full price. The school may establish different unit prices for each type of breakfast offered provided that the benefits made available to children eligible for free or reduced price breakfasts are not affected.

(m) *What must schools do about nutrition disclosure?* To the extent that school food authorities identify foods in

a menu, or on the serving line or through other available means of communicating with program participants, school food authorities must identify products or dishes containing more than 30 parts fully hydrated alternate protein products (as specified in appendix A of this part) to less than 70 parts beef, pork, poultry or seafood on an uncooked basis, in a manner which does not characterize the product or dish solely as beef, pork, poultry or seafood. Additionally, FNS encourages schools to inform the students, parents, and the public about efforts they are making to meet the nutrition standards (see paragraph (a) of this section) for school breakfasts.

(n) *Implementation timeframes.* All the requirements in this section will be superseded by the requirements in § 220.8 beginning July 1, 2013 (SY 2013–2014) with the following exceptions:

(1) Fruits and vegetables component. The fruits and vegetables requirements in paragraphs (g)(1) through (3) will be superseded July 1, 2014; and

(2) Sodium specification. The sodium requirements in (a)(3)(vi) will be superseded July 1, 2014.

Appendix A to Part 220 [Amended]

■ 14. Amend Appendix A to part 220 by removing section I. Formulated Grain-Fruit Products in its entirety, and by removing the Roman numeral ''II.'' from the words ''II. Alternate Protein Products''.

Kevin Concannon,

Under Secretary, Food, Nutrition, and Consumer Services.

[FR Doc. 2012–1010 Filed 1–25–12; 8:45 am]

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Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 226

Endangered and Threatened Species: Final Rule To Revise the Critical Habitat Designation for the Endangered Leatherback Sea Turtle; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 0808061067–1664–03]

RIN 0648–AX06

Endangered and Threatened Species: Final Rule To Revise the Critical Habitat Designation for the Endangered Leatherback Sea Turtle

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

ACTION: Final rule.

SUMMARY: We, the National Marine Fisheries Service (NMFS), issue a final rule to revise the current critical habitat for the leatherback sea turtle (*Dermochelys coriacea*) by designating additional areas within the Pacific Ocean. This designation includes approximately 16,910 square miles (43,798 square km) stretching along the California coast from Point Arena to Point Arguello east of the 3,000 meter depth contour; and 25,004 square miles (64,760 square km) stretching from Cape Flattery, Washington to Cape Blanco, Oregon east of the 2,000 meter depth contour. The designated areas comprise approximately 41,914 square miles (108,558 square km) of marine habitat and include waters from the ocean surface down to a maximum depth of 262 feet (80 m). Other Pacific waters within the U.S. Exclusive Economic Zone (EEZ) were evaluated based on the geographical area occupied by the species, but we determined that they were not eligible for designation, as they do not contain the feature identified as essential to the conservation of the species. The total estimated annualized economic impact associated with this designation is estimated to range between $188,000 and $9.1 million U.S. dollars.

DATES: This rule becomes effective February 27, 2012.

ADDRESSES: This final rule and supporting documents (Economic Report, Endangered Species Act (ESA) Section 4(b)(2) Report and Biological Report) are available electronically on the NMFS Web site at *http://www.nmfs.noaa.gov/pr/species/turtles/leatherback.htm#documents*, or at the Federal eRulemaking Portal *http://www.regulations.gov*. Hard copies are available by contacting: Chief, Marine Mammal and Sea Turtle Conservation Division, NMFS, Office of Protected Resources, 1315 East West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Sara McNulty, NMFS, Office of Protected Resources, (301) 427–8402; Elizabeth Petras, NMFS Southwest Region, (562) 980–3238; Steve Stone, NMFS Northwest Region, (503) 231–2317.

SUPPLEMENTARY INFORMATION:

Background

Under the ESA, we are responsible for determining whether certain species, subspecies, or distinct population segments (DPS) are threatened or endangered and for designating critical habitat for those species (16 U.S.C. 1533). The leatherback sea turtle was listed as endangered throughout its range on June 2, 1970 (35 FR 8491). Pursuant to a joint agreement, the U.S. Fish and Wildlife Service (USFWS) has jurisdiction over sea turtles on the land and NMFS has jurisdiction over sea turtles in the marine environment. The USFWS initially designated critical habitat for leatherbacks on September 26, 1978 (43 FR 43688). This critical habitat area consists of a strip of land 0.2 miles (0.32 kilometers) wide (from mean high tide inland) at Sandy Point Beach on the western end of the island of St. Croix in the U.S. Virgin Islands. On March 23, 1979, NMFS designated the marine waters adjacent to Sandy Point Beach as critical habitat from the hundred fathom (182.9 meters) curve shoreward to the level of mean high tide (44 FR 17710).

On October 2, 2007, we received a petition from the Center for Biological Diversity (CBD), Oceana, and Turtle Island Restoration Network to revise the leatherback critical habitat designation by adding areas in the Pacific Ocean. On December 28, 2007, we announced a 90-day finding that the petition provided substantial scientific information indicating that the petitioned action may be warranted (72 FR 73745). On January 5, 2010 we published a combined 12-month finding and proposed rule to revise the critical habitat designation for this species (75 FR 319), followed by a notification of public hearings (75 FR 5015, February 1, 2010), and a notification of the extension of the public comment period for an additional 45 days, (75 FR 7434, February 19, 2010). As proposed, this rule identified eight specific geographic areas in the U.S. EEZ off the U.S. West Coast as critical habitat for the leatherback turtle, based on the presence in these areas of certain biological or physical features essential to conservation of the species for which special management consideration or protection might be required. In determining the areas that may be eligible for designation as critical habitat, regulations published at 50 CFR 424.12(a)–(b) direct the Secretary to consider those physical or biological features that are essential to conservation of the species and that may require special management considerations or protection; and to focus on the principal biological or physical constituent elements within the area that are essential to the conservation of the species. Primary constituent elements (PCE's) in the proposed rule included migratory pathway conditions (i.e., the state of the areas through which leatherbacks traverse for feeding and reproduction), and the separate PCE of quality and quantity of prey.

This final rule describes the final critical habitat designation, including responses to comments, a summary of changes from the proposed rule, and supporting information on leatherback sea turtle biology, distribution, and habitat use, and the methods used to develop the final designation. Based on review and evaluation of the comments received this final designation differs from our proposed designation in the following ways. We: (1) Eliminated ''migratory pathway conditions'' as a primary constituent element (PCE); (2) clarified the prey PCE to explicitly identify density of prey as a characteristic of the PCE; and (3) revised the boundaries of the specific areas in which the PCE is found. As a result of these changes, several occupied areas no longer meet the definition of critical habitat, and we have eliminated those areas from consideration in this final rule. These changes are reflected throughout the rule, and are described in detail below in the section ''Summary of Changes from the Proposed Rule.''

Under section 4(b)(2) of the ESA we must consider the economic impacts, impacts to national security, and other relevant impacts of designating any particular area as critical habitat before making a final designation. The Secretary has discretion to exclude an area otherwise meeting the definition of critical habitat from the designation if the benefits of the exclusion (i.e., the impacts that would be avoided if an area was excluded from the designation) outweigh the benefits of the designation (i.e., the conservation benefits to leatherbacks if an area was designated), so long as exclusion of the area will not result in extinction of the species.

This evaluation process introduced various alternatives for the revision of designated critical habitat for the leatherback sea turtle, all of which we

considered. The first alternative, not designating critical habitat for leatherbacks, would impose no economic, national security, or other relevant impacts, but would not provide any conservation benefit to the species. This alternative was considered and rejected because such an approach does not meet the legal requirements of the ESA and would not provide for the conservation of the species to the extent such benefits could be gained through designation.

The second alternative, designating a subset of the areas that meet the definition of critical habitat and are therefore eligible for designation, our preferred alternative in the proposed rule, was also rejected. In our proposed rule we identified 8 particular areas meeting the definition of critical habitat and concluded that 5 out of these 8 areas were eligible for exclusion based on the ESA section 4(b)(2) analyses. We then proposed to exclude all 5 areas from the critical habitat designation. However, as detailed in subsequent sections of this final rule, after reviewing the public comments and subsequently eliminating the migratory conditions PCE, and making boundary adjustments that resulted in the addition of area 9, we concluded that 6 areas, including the 5 areas identified for exclusion in the proposed rule, did not contain the prey PCE and thus did not meet the definition of critical habitat. We confirmed that the three areas initially identified as critical habitat and proposed for designation continue to meet the definition of critical habitat. Our final 4(b)(2) analysis was revised to address only the three areas that meet the definition of critical habitat.

The third alternative, designating the three areas as meeting the definition of critical habitat (i.e., no areas excluded), was considered and selected. We selected this alternative after conducting an ESA section 4(b)(2) analysis, and determining that the benefits of exclusion, including the avoidance or reduction of economic impacts, did not outweigh the conservation benefits to the species. The total estimated annualized economic impact associated with this designation is estimated to range between $188,000 and $9.1 million U.S. dollars. However, as explained below and detailed in the ESA Section 4(b)(2) Report (see **ADDRESSES**), the conservation benefit to the species outweighs these costs. We selected this third alternative because it would result in a critical habitat designation that provides for the conservation of the species and meets joint NMFS and USFWS regulations concerning critical habitat designation under the ESA (50 CFR part 424).

Leatherback Natural History

The leatherback is the sole remaining member of the taxonomic family Dermochelyidae. All other extant sea turtles belong to the family Cheloniidae. Leatherbacks are the largest marine turtle, with a curved carapace length (CCL) often exceeding 150 cm and front flippers that can span 270 cm (NMFS and USFWS, 1998). The leatherback's slightly flexible, rubber-like carapace is distinguishable from other sea turtles that have carapaces with bony plates covered with horny scutes. In adults, the carapace consists mainly of tough, oil-saturated connective tissue raised into seven prominent ridges and tapered to a blunt point posteriorly. The carapace and plastron are barrel-shaped and streamlined. Leatherbacks display several unique physiological and behavioral traits that enable this species to inhabit cold water, unlike other sea turtle species. These include a countercurrent circulatory system (Greer *et al.,* 1973), a thick layer of insulating fat (Goff and Lien, 1988; Davenport *et al.,* 1990), gigantothermy that limits heat loss (Paladino *et al.,* 1990), and the ability to elevate body temperature through increased metabolic activity (Southwood *et al.,* 2005; Bostrom and Jones, 2007). These adaptations also enable leatherbacks to have a larger geographic range than other species of sea turtle.

Leatherbacks have the most extensive range of any living reptile and have been reported circumglobally throughout the oceans of the world (Marquez, 1990; NMFS and USFWS, 1998). Leatherbacks can forage in the cold temperate regions of the oceans, occurring at latitudes as high as 71° N. and 47° S.; however, nesting is confined to tropical and subtropical latitudes. In the Pacific Ocean, significant nesting aggregations occur primarily in Mexico, Costa Rica, Indonesia, the Solomon Islands, and Papua New Guinea. In the Atlantic Ocean, significant leatherback nesting aggregations have been documented on the west coast of Africa, from Guinea-Bissau south to Angola, with dense aggregations in Gabon. In the wider Caribbean Sea, leatherback nesting is broadly distributed across 36 countries or territories with major nesting colonies (>1000 females nesting annually) in Trinidad, French Guiana, and Suriname (Dow *et al.,* 2007). In the Indian Ocean, nesting aggregations are reported in South Africa, India and Sri Lanka. Leatherbacks have not been reported to nest in the Mediterranean Sea.

Migratory routes of leatherbacks are not entirely known. However, recent satellite telemetry studies have documented transoceanic migrations between nesting beaches and foraging areas in the Atlantic and Pacific Ocean basins (Ferraroli *et al.,* 2004; Hays *et al.,* 2004; James *et al.,* 2005; Eckert, 2006; Eckert *et al.,* 2006; Benson *et al.,* 2007a; Benson *et al.,* 2011). In a single year, a leatherback may swim more than 10,000 kilometers (Eckert, 2006; Eckert *et al.,* 2006; Benson *et al.,* 2007a; Benson *et al.,* 2011). Leatherbacks nesting in Central America and Mexico migrate thousands of miles into tropical and temperate waters of the South Pacific (Eckert and Sarti, 1997; Shillinger *et al.,* 2008). After nesting, females from Jamursba-Medi, Indonesia, make long-distance migrations into the central and eastern North Pacific, westward to the Sulawasi and Sulu and South China Seas, or northward to the Sea of Japan (Benson *et al.,* 2007a; Benson *et al.,* 2011). Turtles tagged after nesting in July at Jamursba-Medi arrived in waters off California and Oregon during July-August (Benson *et al.,* 2007a; 2011) coincident with the development of seasonal aggregations of jellyfish (Shenker, 1984; Suchman and Brodeur, 2005; Graham, 2009). Other studies similarly have documented leatherback sightings along the Pacific coast of North America during the summer and fall months, when large aggregations of jellyfish form (Bowlby, 1994; Starbird *et al.,* 1993; Benson *et al.,* 2007b; Graham, 2009). Leatherbacks primarily forage on cnidarians (jellyfish and siphonophores) and, to a lesser extent, tunicates (pyrosomas and salps) (NMFS and USFWS, 1998). Leatherbacks forage widely in temperate and tropical waters and exploit diverse open-ocean and coastal habitats characterized by oceanic processes that aggregate prey, such as convergence zones, coastal retention areas, or mesoscale eddies (Morreale *et al.,* 1994; Eckert, 1998; 1999; Benson *et al.,* 2011).

Summary of Comments and Responses

We requested comments on the proposed rule and associated supporting reports to revise the critical habitat designation for leatherback sea turtles on January 5, 2010 (75 FR 319), and on February 19, 2010 (75 FR 7434), we extended the comment period through April 23, 2010. We held two public hearings to facilitate public participation, we made the proposed rule available on the NMFS Web site, and we accepted comments via standard mail, facsimile, and through the Federal eRulemaking portal. We received over 57,000 comments on the proposed rule

from private, local, state, tribal and Federal entities. We also received peer review comments on the economic report and biological report. Comments ranged from general support of the rule to specific concerns regarding the analysis of threats. We have considered all public comments and peer review comments, and those that are responsive to the designation are addressed in this final rule in the following summary. We have assigned comments to major issue categories, and where appropriate, have combined similar comments.

Peer Review Comments

In August 2009, a draft biological report developed by the critical habitat review team (CHRT) was provided to five external scientists with expertise in leatherback sea turtles and leatherback prey species. All peer review comments were incorporated into the proposed rule and associated supplementary documents prior to publication in the **Federal Register.** Therefore, no peer review comments regarding the biological report will be detailed in this rule.

As a result of public comments on several sections of the draft biological report and the proposed rule, we updated the final biological report by adding detailed information on the presence of the prey feature considered a PCE in each of the areas identified in the proposed rule, as well as adding analysis and discussion on the usage of each area by leatherbacks for foraging.

A draft of the economic report was sent out to four peer reviewers in October of 2009. Many of the responses received prior to the publication of the proposed rule were incorporated into the economic report. The comments detailed below were received after the publication of the proposed rule, and have been addressed in this final rule.

Comment 1: One peer reviewer asked if there was a way to make the oil spill costs variable across areas, based on historical spill or area size.

Response: In response to this and other comments, we reviewed additional data from the U.S. Coast Guard and NOAA Office of Response and Restoration on oil spill response to determine if costs could be broken down further; however, due to vast uncertainties in the size and location of oil spills, and the absence of existing data on the effect of U.S. West Coast critical habitat designations on the cost or even the extent of a potential spill response, we have decided it is not feasible to provide meaningful quantitative estimates of the incremental cost of oil spill response due to this leatherback critical habitat designation. As such, the oil spill response cost estimates provided in the initial economic report and the proposed rule have been omitted from this final rule. In our final economic report we have detailed a qualitative discussion regarding potential economic impacts to oil spill response. This revision (i.e., replacing quantitative costs with a qualitative discussion of economic impacts to oil spill response activities) as a result of the high level of uncertainty is consistent with NMFS' economic analysis for the recently designated critical habitat for black abalone (76 FR 66806; October 27, 2011).

Comment 2: One peer reviewer questioned how our economic analysis treated proposed desalination plants, which may not ultimately be permitted or constructed. Specifically, each specific area evaluated has different ratios of existing to proposed desalination plants, so their ranking could be affected if you discounted the proposed plants in some way.

Response: In our analysis, we identified desalination plants as a potential threat to leatherback critical habitat in two areas (Areas 1 and 7) off the coast of California. We contacted Dean Reynolds and Ray Hoagland at the California Coastal Commission in order to obtain information on the probability that proposed desalination plants will be permitted and constructed. They conveyed that they do not have any statistical information on probability of proposed desalination plants being permitted or built. They also said that there are a wide variety of environmental, economic and political factors that affect whether a proposed desalination project is permitted. Also, although some desalination projects listed in the economic analysis may not ever be finalized, others will be proposed in the future, so they felt the economic analysis was sufficient given the available information. Therefore, we did not revise the analysis of desalination plants.

Public Comments

Comments on Specific Area Boundaries

Comment 3: Several commenters questioned the delineation of area boundaries with respect to prey abundance. Overall the comments on this topic appeared to seek additional information on how the area boundaries were created and whether the abundance of prey contributed to the location of area boundaries and the subsequent designation, particularly in the areas south of Point Sur, California.

Response: Many factors were used in determining the proposed area boundaries, including geographic and oceanographic features, leatherback presence, and leatherback prey concentration.

Neritic waters off the central California coast were included to encompass a prominent oceanographic front that occurs between cool, nearshore upwelling-modified waters and warmer offshore waters of the California Current. The front is located within 60 miles of the coast, providing a mechanism for aggregating leatherback prey, primarily brown sea nettles that have been advected from neritic central California waters, and moon jellies (*Aurelia sp.;* Benson, unpublished). The southern and offshore areas have been used by foraging leatherback turtles equipped with satellite-linked transmitters (Benson *et al.,* 2011) and are part of a contiguous marine bioregion that extends from Cape Mendocino to Point Arguello, California.

In response to this and other comments, we have reviewed all boundaries of our proposed specific areas and made several adjustments. These changes are detailed in the final biological report and below in the section, ''Summary of Changes from the Proposed Designation.''

Comment 4: A number of commenters stated that our proposed Area 7, which is located nearshore and offshore from Point Arena, to Point Vicente, California, should be modified to exclude the area south of Point Arguello, California due to the different ocean conditions and lack of jellyfish in the area. Other commenters questioned the offshore boundary of Area 7, which extended to a line connecting 38°57′14″ N./126°22′55″ W. and 33°44′30″ N./121°53′41″ W.

Response: As stated above, based on this and other comments related to the usage and boundaries of Area 7, we re-evaluated the features within this area and determined that it was appropriate to revise the boundaries for this area and provide a more detailed justification for these new boundaries. Due to differences in the geography, oceanography, and usage by leatherbacks between the northern and southern portions of our proposed Area 7, the southern portion of Area 7 (south of Point Arguello, California) is now identified as a separate area, Area 9. This separation of the southern and northern portions of our proposed Area 7 allowed us to look at areas with more uniform value in terms of leatherback habitat. Additionally, in an effort to be consistent with other area boundaries

marked by geographic features, the offshore boundary of Area 7 has been moved east to the 3,000 m isobaths. Additional information on changes to the area boundaries can be found in the section ''Summary of Changes from the Proposed Designation.''

Comments on Areas Included or Excluded From the Designation

Comment 5: Many commenters specifically suggested that NMFS should designate Areas 4, 5, 6, and 8 (or a subset of these four areas) as critical habitat for leatherback turtles because they are important migratory corridors necessary to gain access to the coastal foraging areas, and others stated that these offshore areas should be designated to be precautionary and account for oceanographic variability.

Other commenters provided general suggestions that since leatherbacks do not have predictable migration routes NMFS should designate large sections of ocean as critical habitat, if those areas are used by leatherbacks during their migrations.

Some commenters also suggested that Area 5 should be included for its importance as a secondary foraging area, as well as its importance for access to both the northern and southern coastal foraging areas, while another group of commenters suggested that Area 8 should be designated, as it is an area in which leatherbacks wait for upwelling to subside and water in Area 7 to warm, and because it is used as a passage to and from coastal foraging areas.

Response: We grouped these comments together, as they all recommended inclusion of offshore areas in this designation, many with particular interest in designating migration routes or areas that allow leatherbacks to access coastal foraging areas. In response to these comments and concerns, we re-evaluated the occupied areas within the U.S. West Coast EEZ, the boundaries of each of the areas, and the criteria used to determine whether the areas are eligible for designation as critical habitat and finally whether they were eligible for possible exclusions. Through this process, we detailed how each of the offshore areas are used by leatherbacks. This evaluation resulted in some adjustments to the area boundaries to better reflect the geographic and oceanographic features, leatherback presence, and prey concentrations, as well as the addition of a ninth area. These changes are detailed below in the section ''Summary of Changes from the Proposed Designation.''

In response to the comments focusing on the need to designate offshore areas for their value as migratory areas or corridors, we re-evaluated our analysis of all areas in terms of our proposed migratory pathway PCE. In our proposed rule, we recognized that to complete their life history, leatherback turtles must migrate through the offshore areas to access nearshore foraging areas; therefore, we proposed that an essential feature of leatherback habitat is ''migratory pathway conditions.'' We acknowledged, however, that based on the most current scientific information it was difficult to define specific migratory corridors, and we were therefore not able to provide any detail about what physical, biological, or hydrographic features specifically define ''migratory pathway conditions.'' We solicited additional information on this PCE during the public comment period. However, peer review and public comments did not provide any additional information leading us to identify such features, and many commenters agreed that available evidence indicates that leatherback turtles do not have predictable migration routes. While water temperature gradients may influence leatherback migration pathways, at this time we cannot identify any known or consistent physically defined migratory corridors or associated specific areas that would consistently contain features of a migratory corridor for leatherbacks off the U.S. West Coast. As such, we have eliminated the migratory pathway PCE from this critical habitat designation. Additional information detailing this change and the analysis can be found in the final Biological Report and below in the section ''Summary of Changes from the Proposed Designation.''

Given the elimination of the migratory pathway PCE, we then focused our response to this comment on the prey PCE and the foraging activity that was occurring in offshore areas. In our proposed rule, we noted that there is a distinct difference between nearshore and offshore areas with regard to leatherback foraging behavior and the availability of the prey PCE to leatherbacks. The intention of our prey PCE in the proposed rule was to differentiate between foraging areas and determine which areas truly contain the prey feature essential to the conservation of the species. Through discussions evaluating these public comments, we determined that our evaluation of the prey PCE should more systematically consider the quality, quantity, and density of prey in each area. As such, we have added the term ''density'' to the prey PCE definition in order to explicitly recognize that density of the prey is a critical characteristic of the prey PCE. Further clarification with respect to the components of the prey PCE is provided in later sections of this rule (see ''Summary of Changes from the Proposed Designation'').

Based on the elimination of the migratory pathway PCE, and the more systematic consideration of our prey PCE, we re-evaluated each area to determine if it contains the prey feature (including density) identified as essential to the conservation of the species. In our proposed rule, we made the determination that the prey PCE was present in every area. This determination was made based on information that leatherbacks forage periodically and opportunistically during migrations. However, during the proposed rule analysis we did not look further at the type of prey they forage on in those instances, and if that level of foraging is expected to support leatherback individual and population growth, reproduction, and development, as defined in our PCE. We found that the offshore areas 4, 5, 6, and 8 (in addition to nearshore areas 3 and 9) do not contain the prey PCE, and therefore do not meet the definition of critical habitat. Additional information on this analysis can be found in the final Biological Report and below in the section ''Summary of Changes from the Proposed Designation.''

In response to the comments suggesting that Area 5 should be designated based on its use as a secondary foraging area, as described above, we specifically looked at leatherback behavior and foraging within Area 5, and found that although some foraging activity has been documented in this area, this activity has been brief and inconsistent and the available evidence does not indicate this areas contains the prey PCE. Therefore, Area 5 does not meet the definition of critical habitat and will not be included in the final designation.

Comment 6: Several commenters suggested that the area proposed for designation is too large and should be reduced to include only the primary coastal foraging areas (Areas 1 and 6).

Response: In response to this and other comments, and as stated above, we re-evaluated our area boundaries and made several changes to better reflect the geographic and oceanographic features that contribute to use by leatherbacks, as well as leatherback presence and prey concentration in each area. Also, as mentioned above, we eliminated the proposed migratory pathway PCE, and therefore based our final designation on the prey PCE alone.

The resulting final designation is approximately 41,914 square miles, which is smaller than the proposed designation. The final designation focuses on the known and consistent coastal foraging areas that leatherbacks rely on after long migrations across the Pacific Ocean.

The decrease in size of the designated critical habitat is largely due to the offshore boundary change for Area 7. This change was initiated in response to commenters that questioned how boundaries were drawn and the overall size of Area 7. Area 7 was adjusted to reflect the oceanographic differences north and south of Point Conception, California. The Biological Report includes detailed discussion of this change. The final designation of Areas 1, 2, and 7, with adjustments to the area boundaries from the proposed rule, better represents the coastal foraging areas that are used by leatherback sea turtles and that contain the prey PCE.

Comment 7: The Ocean Conservancy and several other commenters questioned the exclusion of Area 3, and provided information that stated Area 3 is necessary as critical habitat as it encompasses the area between to the proposed Areas 1 and 2, and is part of the California Current System. Commenters also noted that it is possible that leatherbacks may shift their distribution and make greater use of Area 3 for foraging due to the El Niño Southern Oscillation events and global warming. The commenters also noted that Cape Blanco, within Area 3 is a major upwelling center, and is described as an area of persistent jellyfish abundance north and south of Cape Blanco. Other commenters suggested that the designation of Area 3 would allow for a contiguous band of critical habitat along the coast, and would ensure that there was not any gap in coverage for current coastal foraging areas.

Response: In response to comments, we re-evaluated the features found in Area 3 and determined that the boundary between Area 3 and Area 2 should be moved south to Cape Blanco, Oregon, as this area appears to be a more appropriate transition zone based on oceanographic features and data on leatherback presence. However, Area 3, the area between Cape Blanco, Oregon, and Point Arena, California, is characterized by cold, newly up-welled water. These waters provide nutrient input for phytoplankton production and subsequent energy transfer to higher trophic levels further south and offshore. However, these same waters are typically avoided by leatherbacks (Benson *et al.,* 2011). Although moon jellies can be abundant in this region, aggregations of sea nettles, the preferred prey of leatherbacks and prey of higher caloric value, are less common. For example, Graham (1993, 1994 in Suchman and Brodeur (2005)) hypothesized that brown sea nettles, the preferred prey of leatherbacks, remain in areas where a warm, low-chlorophyll shadow of water persists shoreward of the upwelling front such as in Monterey Bay. Such features are not known to regularly occur along such parts of the Oregon coastline. Furthermore, although leatherbacks are able to tolerate cold waters through a physiological mechanism that allow them to elevate body temperature through increased metabolic activity, occupying colder waters is expected to have energetic costs for leatherbacks when prey are less abundant or contain fewer calories per individual jellyfish species (i.e., the calories expended to maintain body temperature in cold waters may not be offset by consumption of low calorie moon jellies versus the higher calorie sea nettles). Our review of leatherback turtle telemetry data and multiple aerial surveys indicates that leatherbacks forage in warmer upwelled-modified waters where sea nettles are abundant and excessive energy is not lost trying to regulate body temperature (Benson *et al.,* 2011). Available data suggest that the waters north of Cape Blanco (now within Area 2) and the waters south of Point Arena (within Area 1) are used regularly for foraging. In contrast, the area between Cape Blanco and Point Arena (Area 3), is generally avoided by leatherbacks and does not provide ideal habitat for the production of their preferred prey species (i.e., sea nettles).

As such, we have determined that Area 3 does not contain the prey PCE. Therefore, this area is not eligible for designation as critical habitat.

Comment 8: Several commenters stated that there was no biological reason to expand critical habitat south of Point Sur, California since the available biological data indicate that leatherbacks rarely occupy that area, and this will result in a much greater critical habitat area than necessary.

Response: We agree with the commenters that data indicate that leatherbacks are more likely to occur in higher densities north of Point Sur, California than in areas to the south. However, leatherbacks have been tracked in the waters south of Point Sur (Benson *et al.* 2011); therefore, it is considered an occupied area and should therefore be considered as potential critical habitat.

As noted above, and in response to this and other comments, we re-evaluated the southern portion of Area 7, and determined that the waters south of Point Arguello, California are substantially different than the waters to the north; thus, we identified the waters south of Point Arguello to be a new area, Area 9. NMFS then evaluated Area 9 for its usage by leatherback sea turtles and for the presence of the prey PCE. It was found that Area 9 does not contain the prey PCE, as detailed below in the section ''Summary of Changes from the Proposed Designation,'' and thus does not meet the definition of critical habitat.

Comments on Tribal Lands

Comment 9: The Makah and Quileute tribes in Northwest Washington expressed concerns about the manner in which NMFS engaged them through the critical habitat designation process prior to the proposed rule. Each tribe objected to the proposed designation of critical habitat in marine areas identified as tribal usual and accustomed fishing grounds and requested that NMFS provide them an opportunity for government-to-government consultation to discuss the implications of the designation. The Quileute tribe also raised concerns about our consideration of areas beyond those addressed in the petition as well as the limited information supporting our proposed rule. Additionally, the National Ocean Service (NOS) and the Pacific Fisheries Management Council (PFMC) raised similar concerns and requested that NMFS clarify the impacts of this critical habitat designation on the Northwest tribes.

Response: As described in the proposed rule and documentation supporting this final rule, we acknowledge that the best available information on habitat use by leatherback turtles in the northeast Pacific Ocean is limited. We reviewed maps indicating that some Indian lands along the Washington coast likely overlap with areas under consideration as critical habitat for leatherback turtles. These overlapping areas consist of a narrow intertidal zone associated with several coastal Indian reservations, from the line of mean lower low water (an average of lower low water heights observed over a given period) to the extent of tribal land demarcated by the line of extreme low water (the lowest water height recorded for a given section of shoreline). In consideration of Executive Order 13175 ''Consultation and Coordination with Indian Tribal Governments'' and the 1997 Secretarial Order, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act,'' we

contacted senior tribal staff early in the process of preparing our proposed rule and discussed with them the nature of the designation. To further coordinate with tribal governments, we discussed leatherback critical habitat during a regular annual meeting with the Northwest Indian Fisheries Commission and member tribes in August 2008. Between the time of our proposed rule and this final rule we made numerous additional attempts to arrange meetings between the NMFS Northwest Region's Deputy Regional Administrator and members of all the coastal tribes in the U.S. northwest. Although we met with the tribes, the leatherback critical habitat topic was removed from the meeting agendas because the tribes identified other fishery management issues as having a higher priority. We were able to have a government-to-government meeting with the Makah tribe on June 9, 2011, to discuss the designation and the tribe's concerns with a senior NMFS administrator and lead agency staff working on the critical habitat designation.

Between the proposed and final rule, we re-assessed several spatial and biological elements of the proposed critical habitat designation and determined that the line of extreme low water more accurately depicted the shoreward extent of areas occupied by leatherback turtles (i.e., they are foraging in these waters and not accessing the beaches). Given this boundary change, there is no longer an overlap between designated areas and areas that meet the definition of Indian lands.

NMFS acknowledges the presence of tribal usual and accustomed fishing grounds within Area 2. We considered the tribal concerns and concluded that the benefits of excluding these particular usual and accustomed fishing areas do not outweigh the benefits of designating these areas as critical habitat for leatherback turtles. The tribes have not identified any treaty-related activities in their usual and accustomed fishing areas that are likely to affect jellyfish and therefore likely to be affected by a critical habitat designation. Moreover, usual and accustomed fishing areas, while vitally important to the exercise of treaty-secured fishing rights, are not reserved by the United States for the exclusive use of a tribe, nor are they subject to the sovereign authority of a tribal government, as is the case with Indian lands. For these reasons, we conclude there are no impacts from this critical habitat designation on treaty-secured fishing rights, and little impact to tribal sovereignty and self-governance.

During the government-to-government consultation, the Makah tribe expressed concern for their ability to engage in cooperative projects, such as future alternative energy development, within their usual and accustomed fishing grounds, if designated as critical habitat. Through that discussion we informed the Makah tribe that the designation of critical habitat will not preclude such projects from moving forward; however, any projects that are federally funded or authorized and that may impact leatherback sea turtles or the PCE will be required to undergo an ESA section 7 consultation to evaluate the impact of the project on listed species and designated critical habitat.

We acknowledge that the Makah Indian Tribe disagrees with our assessment and is concerned about potential impacts to the tribe's fishing rights. We will continue to coordinate with the tribe as we implement our responsibilities under section 7 with respect to leatherback turtles and address any conflicts, if they arise, in a government-to-government consultation.

Comments on Exclusions for National Security

Comment 10: The Department of Defense (DOD) commented that the proposed critical habitat area would overlap with sea space used by the Navy at the Point Mugu Sea Range, the Northwest Training Range Complex, and the Naval Undersea Warfare Center Keyport Range Complex. The Navy identified national security impacts if critical habitat were to be designated for the areas identified above, as critical habitat may restrict or prohibit implementation of required training and result in impacts to the Navy's readiness and ability to perform its mission. Therefore, the Navy requested that NMFS exclude these areas through the 4(b)(2) analyses. Additionally, The Oregon Military Department also identified areas offshore of Camp Rilea and recommended that NMFS not designate those waters as critical habitat.

Response: In response to the Navy's comments, multiple informal discussions occurred between NMFS and Department of Defense (DOD). During this time frame NMFS revised its critical habitat designation to include only one PCE, the prey PCE. As required by section 4(b)(8) of the ESA, we briefly evaluate and describe in this final rule to the maximum extent practicable, those activities that might occur within the areas designated and that may destroy or adversely modify critical habitat designated or be affected by such designation. We conclude that the Navy's present training activities are not the types of activities that may adversely modify critical habitat designated for the leatherback, specifically the prey PCE, or likely to be affected by the designation. As a result, we conclude that the present Navy training activities are not likely to be affected by this designation of critical habitat. Because designation is not likely to affect Navy activities, we conclude that the designation would have no appreciable impact on national security. Through our ESA section 4(b)(2) analysis, we determined that the benefits to national security of exclusion do not outweigh the benefits of designation. Therefore, Navy training ranges and the waters referenced by the Oregon Military Department will not be excluded for this designation.

Comment 11: We received comments that indicated that there are numerous military and government installations located within the proposed critical habitat. The commenter further stated that three military installations within the proposed designation are, or have recently, been subject to Integrated Natural Resource Management Plans, or INRMPs, including Vandenberg Air Force Base, Presidio of Monterey, and the Naval Post-Graduate School. Overall, the commenter expressed concern that critical habitat would negatively impact military and law enforcement actions along the U.S. West Coast.

Response: The commenter is correct in that there are existing INRMPs for military installations within the areas under consideration as critical habitat. However, under the ESA we must be able to conclude that a particular INRMP provides a benefit to the species at issue, and only then can a particular site associated with the INRMP be considered ineligible for designation. We reviewed the existing INRMPs but have determined that none contain sufficient information on direct and indirect effects on leatherback sea turtles, their prey, or the areas occupied to conclude that the INRMP would provide a benefit to the species. Therefore, we considered the areas associated with these INRMPs to be eligible for consideration as leatherback critical habitat.

Comments on Primary Constituent Elements

Comment 12: Several commenters indicated that NMFS should designate as critical habitat the passage corridors that leatherback turtles use to gain access to jellyfish concentrations in nearshore waters. Other commenters

stated that NMFS did not accurately evaluate the migratory pathway PCE of each area, as they were given the same score when rated for their passage conservation value.

Response: As noted above, in response to numerous comments regarding migratory corridors, we re-evaluated the migratory pathway PCE. In our proposed rule, we recognized that leatherback turtles must migrate through the offshore areas to access foraging areas in the nearshore environment; however, we acknowledged that it is difficult to define specific migratory corridor conditions. At this time, we cannot identify any known and consistent geographically defined migratory corridors or discrete areas that would consistently contain the features that define a migratory corridor for leatherbacks off the U.S. West Coast, and we have therefore eliminated the migratory pathway PCE from this critical habitat designation.

Both NMFS and the USFWS have identified some form of passage or migration corridors as PCEs in other critical habitat designations, but the species and the habitat involved differ significantly from leatherback sea turtles. For example, ''migratory corridor'' was identified as a PCE in NMFS' final critical habitat designation for the threatened southern distinct population segment (DPS) of North American green sturgeon. Through tagging studies and fisheries bycatch information, researchers found that green sturgeon are primarily associated with bottom habitats in the ocean and travel along the coast in a migration corridor that is defined by bathymetry (specifically, a 60 fathom contour) (74 FR 52300; October 9, 2009). Unlike green sturgeon, leatherback sea turtles are not well associated with bottom habitat or bathymetry, travel thousands of miles, and occupy the entire U.S. EEZ.

The final critical habitat designation for the DPS of Southern Resident killer whales (SRKW) identified ''passage conditions to allow for migration, resting, and foraging'' as a PCE (71 FR 229; November 29, 2006). For the SRKW, one specific area primarily defined by the passage feature was the Strait of Juan de Fuca, a relatively narrow marine corridor, through which all members of this DPS of killer whales must pass on their migrations between open ocean and coastal waters and inland waters and in which all of the members of this DPS forage in the late spring through the fall. Unlike this DPS of killer whales, leatherback sea turtles are able to use vast areas within the open ocean for migration.

In addition, the characteristics that cause leatherbacks to use an area for passage (i.e., the specific biological or physical features of habitat) are largely unknown. At this time, NMFS cannot identify any known and consistent geographically-defined migratory corridors for leatherbacks off the U.S. West Coast.

Without specific physical or biological features predictably occurring within a defined geographic area to define a passage corridor, such as depth, or even a specific location where many individuals are likely to pass through to access foraging areas, NMFS concludes that our previously defined passage PCE does not meet the statutory criteria in the ESA section 3(5)(A)(i) as implemented by our regulatory guidance for determining a PCE (50 CFR 424.12(b)).

Comment 13: Several commenters recommended that NMFS should identify water quality as a PCE, with specific concerns regarding the impact of non-point source pollution, storm water runoff, agricultural land runoff, plastic debris, trash, and heavy metals on leatherbacks and their prey. The Center for Biological Diversity (CBD) and Defenders of Wildlife expressed particular concern about the potential impacts of ocean acidification on leatherbacks, and cited a number of possible impacts ranging from changes in prey physiology to food web changes that might affect prey availability for leatherbacks.

Alternatively, other commenters suggested that water quality should not be identified as a PCE, as there is little or no information on the effects of water quality on sea turtles.

Response: In response to both perspectives, we re-evaluated whether to identify water quality as a separate PCE. At the proposed rule stage we reviewed available literature and previous agency determinations regarding water quality, and as a result did not identify water quality as a separate PCE. In our proposed rule we specifically requested comments and available data on this topic. In response to comments, we reviewed literature for new information, and we again conclude that we currently lack information to determine the relative impact and importance of water quality directly on the health of leatherback sea turtles. Thus, we do not identify water quality as an independent and separate PCE in this final designation. As more research is completed, and we learn more of the biological and ecological requirements of leatherbacks off the U.S. West Coast and how water quality and specific toxins and contaminants impact leatherbacks, we may determine that water quality should be a PCE. In our proposed rule we specified that the quality of the prey PCE is essential to the conservation of leatherback turtles and that this factor may depend on water quality. Adverse modification of leatherback critical habitat would result from actions that affect prey populations to the extent that they cannot provide for the conservation needs of leatherbacks.

To ensure that our interpretation of water quality as a PCE was appropriate, we reviewed all recent NMFS critical habitat designations. Of note, the critical habitat designations for two marine mammals, the Cook Inlet beluga whale and the SRKW distinct population segment, include water quality as a feature essential to the conservation of the species. Both of these marine mammals have relatively small populations that forage on a seasonal basis in core areas, such as narrow inlets or inland waters adjacent to urban areas with large human populations or industrialization. Cook Inlet belugas are not known to migrate, and little is known of the offshore movements of SRKWs following their summer/fall residency in ''core'' inland areas. Research has shown that killer whales accumulate high concentrations of contaminants, including PCBs, DDT, heavy metals and flame retardants, which may induce immune suppression or reproductive impairment and this may be having population level effects and impeding their recovery. NMFS determined that water ''free of toxins'' was essential to the conservation of the Cook Inlet beluga and ''water quality to support growth and development'' was essential to the conservation of the SRKWs given these species' limited range during all or parts of the year.

In contrast to SRKWs, leatherbacks are wide ranging, and the population as a whole does not depend on one or more ''core'' areas to access their prey. In addition, leatherbacks do not use inland waterways, where land-based and nearshore sources of pollution may present a greater threat to their recovery.

In response to specific concerns regarding ocean acidification, we acknowledge that there is growing concern that rising concentrations of atmospheric carbon dioxide will change the ocean's carbonate chemistry system (e.g., acidification/declining pH), and that those changes are expected to affect various biological and geochemical processes in the marine environment (Kleypas *et al.* 2006, Fabry *et al.* 2008). However, relating those changes to impacts on leatherback turtles and their prey remains speculative. For example,

Attrill *et al.* (2007) recently analyzed data from the North Sea and noted increased jellyfish occurrence in years where the water was more acidic. They suggested that increasing acidity may be detrimental to calcareous, skeleton-forming plankton and thus allow proliferation of jellyfish/gelatinous organisms into those niches. On the other hand, Richardson and Gibson (2008) reviewed this work and analyzed a larger geographic area, but they found no significant relationships between jellyfish abundance and acidic conditions in any of the regions investigated. These authors concluded that it would be tenuous to assign a specific role to pH in structuring zooplankton communities, and also noted that it is possible that more acidic conditions could have negative effects on jellyfish. However, even those effects are speculative: Recent work by Winans and Purcell (2010) concluded that moon jelly polyps are quite tolerant of acidic conditions; surviving and reproducing asexually even at the lowest tested pH. Given these recent reviews and studies, it is not clear what if any impacts ocean acidification may have on jellyfish, and there is much less information available on the potential impacts of ocean acidification directly on leatherback sea turtles. Therefore, it would be equally speculative to suggest that we can presently identify tangible management considerations to address ocean acidification's influence on leatherback turtles or their prey.

Comments on the Economic Analysis

Comment 14: One commenter questioned NMFS' use of the ''cost-effectiveness'' analysis. The commenter cited two sources (Loomis 2006 and Kroeger 2004) to help NMFS use a common metric to be able to estimate economic benefits rather than conservation benefits. Additionally, the commenter stated that for leatherback turtles the conservation benefits are no more difficult to measure than costs. The commenter suggested a specific methodology in papers by Loomis (2006) and Kroeger (2004), which would be applicable to valuing the benefits of designating critical habitat for leatherbacks. The commenter also noted that the approach used in the proposed rule compared apples and oranges within the context of economic costs and conservation benefits.

Response: As discussed in Section 1.2.1 of the economic analysis report, we used a form of cost-effectiveness analysis, which develops an ordinal measure of the benefits of critical habitat designation. Since it is difficult to monetize or quantify benefits of critical habitat designation, expert judgment is used to classify habitat areas based on their estimated relative value to the conservation of the species. For example, habitat areas can be rated as having a high, medium, or low biological value. A qualitative ordinal ranking, which can be done with available information, may better reflect the state of the science for the geographic scale considered here rather than a quantitative measure which depends on several assumptions. The ESA section 4(b)(2) analysis discusses the cost comparison process when evaluating whether to exclude areas from the designation.

We question the claim that the benefits of a critical habitat designation for leatherback turtles are no more difficult to measure than costs, and that the methodology in the referenced papers by Loomis (2006) and Kroeger (2004) would be applicable to valuing the benefits of designating critical habitat for leatherbacks. The referenced papers both rely on a benefits transfer approach to obtain a monetary value of policy measures. Kroeger (2004) provides a list of conditions that must be met in order for the benefits transfer methodology to be valid.

Benefit transfer methodology is used in Loomis (2006) to measure the value of increasing the number of sea otters in a clearly defined geographic range of the California Coast, and in Kroeger (2004), to measure the value of improved lynx conservation and conservation of natural landscapes. In both cases, the type and magnitude of the expected policy impacts are simple to describe with respect to the nature of the impacts, the geographic region where they would be realized, and the population which would be directly affected. By contrast, the anticipated type and magnitude of expected policy impacts due to critical habitat designation for leatherbacks are far less certain.

The vast uncertainty regarding the scope of a potential conservation benefit from this designation calls into question whether the policy context can be defined to a level of precision that meets Kroeger's (2004) qualifications.

By contrast, potential costs of regulatory measures are relatively easier to assess, due to the existence of financial data for entities impacted by previous critical habitat designations. There are numerous precedents for using cost effectiveness analysis or similar approaches, including economic analysis to measure regulatory impacts of critical habitat designation for salmon and steelhead, and for green sturgeon.

We further note that the criticism of the use of an ''apples and oranges'' comparison of economic costs of designation with the biological benefits of designation ignores a similar problem with the benefits transfer approach utilized in the Loomis (2006) and Kroeger (2004) studies. The benefits transfer methodology relies on benefit estimates from stated preference valuation studies, which assign a monetary value to a policy change using data from a survey that asks respondents to make an ''apples and oranges'' comparison between a hypothetical monetary cost of the policy change (their ''willingness to pay'') and the biological benefits the policy is supposed to create. It is unclear that asking untrained survey participants to report the subjective monetary cost they would be willing to bear in exchange for complicated and uncertain biological benefits will automatically result in a better policy assessment than relying on trained experts to subjectively compare biological benefits to monetary cost estimates.

Comment 15: One commenter questioned the framework and assumptions for the analysis of the range in total administrative consultation costs. Specifically, the costs are based on national data as opposed to data based solely on U.S. West Coast marine-related species. The commenter also stated that there was no explanation provided in order to justify the assumptions given for each category of costs.

Response: We do not have sufficient data for administrative costs specific to the U.S. West Coast to support statistically meaningful statements. We therefore used the best available data, which was based on a national level sample.

Section 1.3.2 of the economic analysis discusses the assumptions made with regard to administrative costs of ESA section 7 consultations. For example, costs associated with re-initiation of consultation, which would occur solely because of the critical habitat designation, are assumed to be attributed wholly to the critical habitat designation, and further assumed to be approximately half the cost of the original consultation that considered only jeopardy to the ESA listed species. We feel this is a valid assumption because re-initiations are less time-consuming, since the groundwork for the project has already been considered in terms of its impact on the species. We feel this is also a valid assumption due to the efficiencies in conducting an ESA section 7 consultation on both jeopardy to the species and adverse modification

to critical habitat at the same time (e.g., in staff time saved for project review and report writing). Because leatherback sea turtles are already listed as endangered, the critical habitat designation adds only incremental administrative costs when considering adverse modification in consultations that are already required under the ESA for the species.

Comment 16: One commenter questioned how the ''additional indirect impacts'' were calculated and stated that the property value impacts in the draft economic analysis were incorrectly measured and overstated. The commenter also stated that there will not be an impact on individual land owners since the property value is marine-based and that research indicates that property values actually increase as a result of critical habitat designation.

Response: While the designated critical habitat is located in the marine environment, some of the activities analyzed in the economic analysis are land-based (such as National Pollution Discharge Elimination System (NPDES) permitted facilities, agricultural pesticides, power plants, and desalination plants). It is the perceived limitations and restrictions of the land-based economic activities that are assumed to reduce the market value of property adjacent to critical habitat in comparison to property that is not adjacent to critical habitat. Further research has described a positive impact on property values due to residential and commercial development. Our economic analysis does not include either the potential reduced or increased market value of property in our estimation of the total economic impact of this critical habitat designation. Therefore, we have not revised our cost estimates in response to this comment.

Comment 17: One commenter disagreed with the draft economic analysis' method for assessing incremental impacts. One comment states that NMFS' consideration of all potential project modifications that may be required under section 7 of the ESA, regardless of whether those changes may also be required under the jeopardy provision, appears to be contrary to the reasoning of the *N.M. Cattle Growers Association* v. *U.S. Fish and Wildlife Service,* 248 F.3d 1277, 1283 (10th Cir. 2001), *Ariz. Cattle Growers Association* v. *Kempthorne,* 534 F. Supp. 2d 1013 (D. Ariz. 2008) and *Cape Hatteras Access Pres. Alliance* v. *U.S. Department of the Interior,* 344 F. Supp. 2d 108 (D.D.C. 2004) court decisions that the effects of listing and the jeopardy provision should not be considered as part of the impacts of a designation in the ESA 4(b)(2) analysis for a critical habitat designation. Another comment noted that the draft economic analysis did not adequately describe the methodology of how the incremental scores were developed and therefore appeared to result in arbitrary conclusions. Specifically, the economic analysis needed more explanation regarding the percentages attributed to the incremental scoring.

Response: As outlined in Section 1.3 of the economic report, the analysis does not attribute all potential project modifications required under section 7 to the critical habitat designation. Rather, it compares the state of the world with and without the designation of critical habitat for leatherbacks. This approach has been reviewed and determined legally valid by the courts (see *Arizona Cattle Growers* v. *Salazar,* 606F. 3d 1160 (9th Cir. 2010)). The ''without critical habitat'' scenario represents the baseline for the analysis, considering habitat protections already afforded leatherbacks under its Federal listing or under other Federal, State, and local regulations, including those afforded leatherbacks due to other listed species, such as green sturgeon, West Coast salmon and steelhead, delta smelt, and marine mammal species. The ''with critical habitat'' scenario attempts to describe the incremental impacts associated specifically with leatherback critical habitat designation. NMFS has put forth its best effort to consider the incremental cost of this critical habitat designation as compared to the world without this critical habitat designation. Although some level of protection would already be expected to exist under the listing of leatherbacks, we were unable to completely separate those costs. Section 1.4.4 of the economic analysis report discusses how incremental scores were developed. In response to this comment, we added information to this section to further clarify how the incremental scores were derived for each activity in each area.

To assign incremental scores, we first systematically reviewed existing laws and regulations, overlap with previously designated critical habitat and other relevant information for each activity in each of the three specific areas of the leatherback critical habitat. The output of this analysis resulted in qualitative ratings (high, medium, low) for each of the seven economic activities in each area. This process and results are discussed in our economic report. Based on these ratings, we then relied on the best professional judgment of the CHRT, to calculate the probability that leatherback critical habitat would be the primary driver of project modifications identified for each economic activity in each area. This probability is dependent upon a number of factors, including the details of current and potential projects and conservation efforts and the number of sensitive species present. By excluding impacts for which leatherback critical habitat is not a key reason for a conservation effort, this analysis focuses the quantification of impacts on those associated specifically with leatherback habitat conservation. Because the probability that any given conservation effort is being driven by leatherback conservation as opposed to other laws or regulations is uncertain, the economic analysis report presents a sensitivity analysis for these assumptions. Appendix C of the economic analysis describes alternative results assuming the extreme case that leatherbacks are always a primary driver of the conservation efforts (e.g., that 100 percent of the time fish screens are installed, it is primarily due to leatherback conservation needs).

Comment 18: One commenter states the 7 percent discount rate assumed in measuring costs is unreasonable and instead should utilize a ''social'' discount rate of 2–3 percent.

Response: In applying discount rate, we relied on guidance issued by the Office of Management and Budget (OMB) in Circular A–94, which states that a 7 percent discount rate should be used as a base-case for regulatory analysis to approximate the marginal pre-tax rate of return on an average investment in the private sector in recent years (before 1992). We also followed OMB Circular A–4, which indicates that estimates using a 3 percent discount rate should also be provided for regulatory analyses. Thus, our analysis provides present discounted values using discount rates of 3 and 7 percent. Given the present low interest rate environment, we consider the present values discounted at 3 percent to better reflect current economic conditions.

Comment 19: One commenter questioned NMFS' description of how various economic activities would impact the PCEs. Furthermore, the commenter stated that NMFS' estimation of the likelihood that such activities would require potential project modifications was also very weak.

Response: Due to a limited consultation history associated with many of the activities described, the CHRT was not able to estimate the likelihood of modifications to economic activities as a result of this critical habitat revision. Section 1.4.4 clarifies

how the uncertainty in identifying: (1) Which particular projects will in fact take place in critical habitat areas; and (2) which projects action agencies may consider to potentially result in the adverse modification or destruction of designated critical habitat for leatherbacks, leads to the assumption that all projects will go forward and all projects will require modification. Thus, the analysis is conservative, i.e., more likely to overestimate impacts to critical habitat rather than underestimate them.

Comment 20: One commenter stated that the assumption made that all NPDES capital costs are incurred in first year is not correct.

Response: Section 2.1.3 of the economic analysis provides a revised discussion of how the cost estimates for major NPDES-permitted facilities were developed. Note that capital costs originally presented were presented in value form, thus no additional discounting was needed. Costs are now presented in annual terms; however, note that the per-facility-cost remains the same.

Comment 21: One commenter disagreed with the draft economic report's method for assessing agricultural pesticide application. The commenter stated the draft economic report analyzed impacts from agricultural pesticide application on the leatherback prey and not to the leatherbacks themselves. Also, the commenter disagreed with the assumption that similar restrictions would be imposed on pesticide use to protect turtle habitat as are imposed to protect salmon habitat. Lastly, the commenter disagrees with the assumption that all crops will be lost as a result of restrictions on pesticide application.

Response: In estimating the economic impact of designating critical habitat, we must estimate the incremental costs associated with the designation and thus consider activities that may impact the essential features of the critical habitat. Impacts of an activity on leatherbacks themselves are not appropriate for us to consider when estimating the cost of designating this critical habitat. In this case we have identified the leatherback's prey, jellyfish, as the essential feature of the habitat. Therefore, our economic report considers how each activity may impact the quality, quantity, and density of prey. The project modifications and the methodology used in the leatherback critical habitat economic analysis were similar to that used in the salmon/steelhead and green sturgeon critical habitat analyses to calculate costs (i.e., foregone value from crop sales). However, in light of this comment, we reviewed this analysis and considered the series of Biological Opinions that have been issued by NMFS on various pesticides.

Reasonable and prudent alternatives of recent Biological Opinions that considered the effects of pesticides on listed salmonids indicate that total crop loss is not a realistic outcome. We also considered the recent economic analysis conducted in support of the critical habitat designation for black abalone along U.S. West coast areas (76 FR 66806; October 27, 2011). This analysis acknowledged that concentrations and effects of pesticide ingredients in marine waters are unknown. Based on this information, we cannot assume total crop loss is a reasonable outcome of any project modification due to leatherback critical habitat. There is currently insufficient data to determine what, if any, project modification would be required. Therefore, we have revised our economic analysis to include a qualitative discussion of potential impacts of pesticides and have removed the estimated costs associated with this activity.

Comment 22: One commenter states the total costs of power plants in Area 7 are not estimated correctly. The commenter refers NMFS to other sources that provide costs of retrofitting power plant facilities.

Response: In response to this comment, we reevaluated information regarding the impact of power plants on the leatherback critical habitat and concluded that the impact to the leatherback prey from thermal effluent is so uncertain that it is not reasonable to attribute the project modifications suggested in the Tetra Tech (2008) and Enercon (2009) documents and their associated costs to the designation of leatherback critical habitat. The costs found in these documents are associated with drastic transformations of the facilities that are not expected to be imposed on the plants as a result of an ESA section 7 consultation on leatherback critical habitat. With no other potential costs to use in our analysis, we determined that a qualitative approach would be the best way to address power plants.

Comment 23: One commenter states that while the Diablo Canyon Nuclear Power Plant's (DCNPP's) NPDES permit allows the use the auxiliary salt water biofouling control system and the ''firewall,'' the DCNPP does not in fact utilize it. The comment also noted that while freshwater is occasionally added to the discharge, freshwater has never been used as an anti-biofouling technique.

Response: While the DCNPP does not currently utilize the auxiliary salt water biofouling control system and the ''firewall,'' the fact remains that it is still in place and thus it could potentially be used at some point in the future. NMFS will work with the operators of the DCPP and the Federal permitting agency to aid in assessing impacts and to determine whether to re-initiate consultation on its NPDES permit due to adverse modification to critical habitat.

Comment 24: One commenter states that the desalination plant at the DCPP should not require project modifications to protect leatherback critical habitat, since impingement and entrainment are low at the DCPP. The commenter also states that the amount of water that flows through the DCPP desalination intake pump is insignificant.

Response: NMFS will work with the operators of the DCNPP as they assess whether re-initiation of consultation is necessary.

Comment 25: One commenter questions the use of costs for desalination plant impacts, due to their uncertainty.

Response: We acknowledge that there is uncertainty; however, we relied on the best available data in order to develop an estimated cost. We provide further discussion of the assumptions made in the economic report.

Comment 26: One commenter questions the draft economic analysis' use of the potential cost estimate of future tidal and wave energy projects; specifically, where identified facilities overlap with green sturgeon critical habitat.

Response: Although there are no tidal and wave energy projects currently in the specific areas identified, the economic analysis attempts to measure the scope of the potential impacts over a 20-year time frame. This involves predicting the occurrence and impacts of future projects.

All of the projects listed are in some sort of proposed stage and have not actually been built yet. It is uncertain which projects will actually be built and the number of future projects that may be proposed. The projects identified in the economic analysis are our best approximation of the number of tidal and wave energy projects that will exist in the applicable time period, based on available information. The economic report describes the methods we used to develop our estimates.

Comment 27: One comment provided additional information on the location of tidal and wave energy projects. The comment specifically describes one additional alternative energy project

permit that had been issued since the proposed rule was published.

Response: The economic analysis now includes an up-to-date list of projects, including the one described by the commenter.

Comment 28: Several comments state that wind energy should be considered for its impacts to both prey and passage PCEs because it ''may'' require special management consideration or protections. One commenter questions NMFS' treatment of wind energy in relation to other activities that were discussed qualitatively. Another commenter provides additional information on the location of two proposed wind energy projects.

Response: As described elsewhere in this notice, we have eliminated the passage PCE and thus the response to this comment will only pertain to the prey PCE. After reviewing the information on the two proposed wind energy projects, NMFS has concluded that there is a project, the Principal Power Offshore Wind Project, which is currently being proposed in Oceanside and Netarts, OR (Area 2). The second proposed wind energy project identified by the commenter, the Grays Harbor Ocean Energy and Coastal Protection project, missed the submittal of the Notice of Intent, and the Federal Energy Regulatory Commission (FERC) cancelled the preliminary permit in September 2010.

Section 2.6 of the Economic Report provides a revised discussion. The ''Tidal and Wave Energy'' activity is now known as ''Tidal, Wave, and Wind Energy.'' Leatherback sea turtles primarily use the west coast neritic waters for foraging, with the greatest density of turtles off the California coast within the 200 m isobath. Therefore, some overlap may be expected between the prey PCE and potential coastal wind energy projects.

Comment 29: One commenter suggests that assignment of the economic thresholds be given more explanation in the economic analysis.

Response: In the proposed rule, we compared the economic costs and conservation benefit of 8 areas, and we determined that 4 thresholds (high, medium, low and ultra low) would be necessary to adequately compare costs and benefits of these areas. The economic thresholds were determined by looking at a combination of values for each area, both total revenue for the activities identified in the proposed rule, as well as the costs we associated with the designation of critical habitat in each area. The high threshold was determined based on the revenue of each area, and we calculated the total revenue for each activity by area. The area with the highest revenue was Area 7; therefore, we took 3% of the total revenue for this area, which was between $20 million and $30 million. We then listed the high threshold at $20 million, assuming that any costs greater than 3% of total revenue would potentially be considered high economic costs to the industry. The other thresholds were determined based on area costs for this critical habitat designation.

The economic thresholds were re-evaluated during the final rule development and it was determined that the thresholds were appropriate for use in this final rule. Please see the section below, ''Exclusion of Particular Areas Based on Economic Impacts,'' for additional information.

Comment 30: Some commenters stated that they were unclear regarding the comparative analysis, specifically in the offshore areas where the relative value of migratory passage PCE is high and the economic costs are low.

Response: As noted earlier in this final rule, NMFS has eliminated the migratory pathway PCE, and has determined that the offshore areas do not meet the definition of critical habitat when evaluated for the presence of the prey PCE. Therefore, economic costs for the offshore areas are not evaluated in this final designation.

Comments on Activities That May Require Modification Through a Section 7 Consultation

Fishing and Fishing Gear

Comment 31: Oregon Governor Kulongoski commented that, in December 2009, the Oregon Fish and Wildlife Commission terminated a program that allowed use of large mesh drift gillnet gear targeting swordfish in Oregon waters. There had been no drift gillnet fishing under the permit program since 2004.

Response: This has been noted. NMFS appreciates the information.

Comment 32: The National Park Service commented that NMFS should consider the interaction between leatherback sea turtles and crab pots in the region of Point Reyes.

Response: The impact of crab pots on leatherbacks constitutes a direct take of turtles. Most pot fisheries along the U.S. West Coast are state fisheries and therefore a direct Federal nexus requiring an ESA section 7 consultation on the jeopardy standard is not present. If state pot fisheries are known to interact with leatherback turtles via entanglement, the states should apply for an ESA section 10(a)(1)(B) incidental take permit. The take of leatherback sea turtles without exemption provided by an Incidental Take Statement developed through formal section 7 consultation for a Federal action or authorization under a section 10(a)(1)(B) Incidental Take Permit for a non-Federal action constitutes an unauthorized take under section 9 of the ESA.

Comment 33: Several commenters, including the California Coastal Commission, Defenders of Wildlife, CBD, and several other organizations, commented that the regulation of the fishing industry is an activity that affects the proposed PCE passage. These and other commenters also urged NMFS to consider prohibiting use of drift gillnets or longlines within designated critical habitat for the protection of the species. Commenters stated that the use of fishing gear within critical habitat would greatly restrict migration and adversely modify the habitat.

Response: We acknowledge that fishing gear has the potential to capture, entangle and kill leatherback sea turtles. Federal fisheries that operate within U.S. waters, where leatherbacks are known to occur, are subject to ESA section 7 consultation for their direct and indirect impacts to the species. As mentioned above, the take of leatherback sea turtles by a Federal or state fishery without an Incidental Take Statement through formal section 7 consultation or a section 10(a)(1)(B) permit, respectively, constitutes an unauthorized take under section 9 of the ESA. NMFS has placed observers on Federal and state gillnet fisheries in order to monitor bycatch of sea turtles, marine mammals and other species. The take of turtles in longline fisheries (e.g., entanglement or hooking) occurs in fisheries that target highly migratory species (e.g., tuna, sharks, and swordfish). The use of longline gear to target highly migratory species is not allowed within the U.S. West Coast EEZ under the existing west coast fisheries management plans, therefore concern over possible interactions with this gear are unwarranted. There is limited use of bottom set longline gear to target ground fish. However, this gear is not the same type as is used for highly migratory species. The gear is set with only two vertical lines, and hooks are not suspended in the water column but rather rest on the bottom of the water so the bait is not an attractant to leatherbacks or other turtles. As such, the risk of entanglement is much lower than in other longline fisheries, and NMFS knows of no interactions between bottom-set longline gear and leatherback sea turtles.

As a result of this critical habitat designation, all Federal activities that occur within areas designated as leatherback critical habitat and that may impact the prey PCE will require consultation under ESA section 7. A critical habitat designation is not intended to determine which activities can and should occur within the designated area; rather, it provides a protective measure requiring consultation with NMFS to determine the impact to the habitat and any modifications of specific activities to avoid the adverse modification or destruction of critical habitat.

Further, as stated in response to comments above, and fully detailed in the section, ''Summary of Changes from the Proposed Rule,'' NMFS has eliminated the migratory pathway PCE from this critical habitat designation and analysis. We received no information during public comment that fisheries may affect leatherback prey. Therefore, we conclude that Federal fisheries will not have an impact on the leatherback prey PCE, and we have not considered the impact of fisheries on leatherback critical habitat in this final rule.

Comment 34: Several commenters, including the Pacific Fishery Management Council, West Coast Seafood Processors Association, and Alliance of Communities for Sustainable Fisheries, and the California Wetfish Producers Association (CWPA), commented that existing regulations are adequately protective of leatherback turtles in California, Oregon, and Washington waters. Fishermen and their organizations commented that fishing is not an activity that NMFS should include in the list of activities that affect the proposed PCEs, for the following reasons: (1) Fisheries have no impact on jellyfish or oceanographic conditions that may impact foraging habitat; and (2) fisheries do not impact migratory pathways, as the fishing industry has already worked to protect leatherbacks through modifications to the fisheries as a result of the ESA Section 7 process.

Response: We agree that existing regulations on the Federal fisheries provide protections to leatherback sea turtles in the U.S. West Coast EEZ. NMFS further agrees that while sea turtles may be directly affected through interactions with gear, we have no information to indicate that fisheries are likely to adversely impact the prey PCE. As explained in the economic report, we could find no evidence of impact from fisheries on leatherback prey; there are no jellyfish fisheries, and jellyfish are not a substantial bycatch species in existing fisheries. Additionally, as stated above, we have eliminated the migratory pathway PCE from this analysis. Therefore, we will not be discussing impacts to leatherback migration from fisheries.

Shipping Traffic and Oil Spills

Comment 35: Several commenters, including Defenders of Wildlife and CBD, stated that the proposed designation should include consideration of potential impacts to the shipping industry through the designation of critical habitat, as it is an activity that diminishes the quality of leatherback turtle habitat. Another commenter stated that NMFS failed to consider the U.S. Department of Transportation's plans to expand America's marine highway, and the commenter stated that this designation may hinder shipping to and from the U.S. West Coast.

Response: We agree that ship strikes result in sea turtle mortality. However, as mentioned previously, we have eliminated the migratory pathway PCE; therefore, this critical habitat designation will not further evaluate the impact of shipping on sea turtle migration. We could not determine any means by which shipping would affect the prey PCE. As such, and given the elimination of the PCE passage, we did not further investigate the impacts of the shipping industry on leatherback critical habitat.

As additional information related to these comments, NMFS is engaged in the development of traffic separation schemes (TSS), which are voluntary shipping lanes. The TSS are developed by the United States Coast Guard (USCG), and thus represents a Federal action that may be subject to evaluation under section 7 of the ESA. NMFS has worked closely with the USCG on the development of their port access route studies for the Long Beach and Los Angeles area and the San Francisco area to provide technical assistance on the presence and abundance of various protected species, including leatherback sea turtles. The USCG has been advised of their responsibilities as a Federal agency taking an action that may affect species listed on the ESA and designated critical habitat. Thus, when and if the USCG proposes changes to the existing TSS, we anticipate that NMFS will conduct an ESA section 7 consultation.

With regard to the comment on America's marine highways, as a Federal agency, the Department of Transportation is already required to initiate consultation with NMFS if its actions, such as increasing shipping traffic, may impact listed species and designated critical habitat, such as leatherback sea turtles.

Question 36: Several commenters, including the Minerals Management Service (now referred to as BOEM, Bureau of Ocean Energy Management), commented on the discussion in the proposed rule regarding the response to oil spills, such as the use of dispersants, booms, or skimmers, and the potential for these activities to affect leatherback turtles and their habitat. Commenters, including the NOS, also questioned the evaluation of oil spills and oil spill response, and the costs associated with such response.

Response: In response to the comments specifically addressing oil spill response and the way this activity type was evaluated in the draft economic report and the proposed rule, we expanded our research on this subject and met with the USCG to better understand the costs associated with oil spill response and the potential impacts on both leatherback sea turtles and their prey species. We also focused effort on determining the differences between oil spill responses in nearshore areas versus the offshore areas. As noted previously, we have determined that offshore areas do not contain the prey PCE as we have defined it. However, we did spend time trying to understand the likelihood of response in offshore and nearshore areas in order to address these questions. The results of that research are provided below.

Oil spill response is guided by Area Contingency Plans (ACPs) and Regional Contingency Plans (RCPs), developed by the USCG in coordination with state and Federal partners, and usually focuses on nearshore waters and coastlines. While the plans may have some strategies for response in open ocean areas, specifically in situations where there is a threat to land and sensitive shoreline resources, there are no existing protocols for offshore oil spill response, and the decision on how and whether to respond is left to the Federal On Scene Coordinator.

There are many factors that influence the decision to respond to an oil spill, including the feasibility and efficacy of responding to a spill, particularly in offshore areas where weather, ocean conditions, and other factors can significantly restrict response options which the USCG must consider. A number of options are considered by the USCG regarding the type of response, but the most common method for controlling and eliminating surface oil wherever it is found is via the use of oil skimming vessels (referred to as mechanical recovery). In rare cases where the seas are relatively flat, in-situ

burning may be employed. The operational effectiveness of both mechanical recovery and in-situ burning operations dramatically decreases with sea states above a 2-foot chop or 5- to 6-foot swell. Sea states off the U.S. West Coast, particularly in the offshore areas, often preclude the use of mechanical recovery techniques, thus the use of chemical dispersants is usually the preferred option in offshore waters. In general, the use of dispersants may temporarily increase the risk to the plankton community in the upper several meters of the water column but this risk is likely to be short-term and geographically limited (California Dispersant Plan, 2008). The impact of dispersants and dispersed oil on jellyfish is not well known, but putting oil into the water column via dispersants may actually be more detrimental to jellyfish than not applying dispersants; therefore a response in offshore waters may not necessarily benefit critical habitat for leatherbacks. In fact, the best approach in terms of impacts to prey PCE may be to not respond to the spill and instead rely on natural means such as evaporation to remove the oil and keep it out of the water column.

As mentioned previously, we have eliminated the migratory pathway PCE, and have determined that the offshore areas do not contain the prey PCE, as defined in this final rule. Therefore, the offshore areas are not eligible for designation as critical habitat. As such, this final designation only evaluates oil spill response and its potential impact on our prey PCE in Areas 1, 2, and 7. Since these areas are in the nearshore environment, it is likely that USCG will respond to a spill that occurs in these areas. In our proposed rule, we made the assumption that if critical habitat were designated, then the USCG may be more likely to launch a response to clean up the oil using chemical dispersants or other response techniques, and we developed associated costs for response based on this assumption. However, after additional research on oil spill response, we have determined that making this assumption does not necessarily reflect what is likely to occur in the event of an oil spill in Areas 1, 2 and 7. That is, the existence of leatherback critical habitat is likely to play a small part in the decision making on whether to respond and how to respond. Each spill is unique, and response is determined based on many complex factors, such as the type of oil, sea state, availability of mechanical or chemical materials, and risk to resources, particularly shoreline resources. Along the U.S. West Coast, NMFS is becoming more actively engaged in oil spill response planning and is reviewing ACPs and RCPs and providing information on protected species, including leatherbacks. Oil spill response is not like other Federal activities considered in this final rule. The ESA section 7 consultation occurs after the Federal activity (spill response) has occurred, through emergency consultation procedures, so there is limited opportunity to change activities during a response if a finding of jeopardy or adverse modification/destruction is made. NMFS' engagement at the ACP and RCP level is likely the optimal means of raising awareness of leatherback critical habitat and working within the spill response community to make changes to response protocols to protect critical habitat. At this time, we do not know what types of activities we would request that USCG modify to protect critical habitat during an oil spill response; therefore, we are unable to assign a dollar value to this activity.

In the proposed rule and draft economic report, the costs associated with spill response were based upon a model developed and published by Etkin (1999). The costs associated with spill clean-up using the model were quite low, less than $100,000. Since publication of the proposed rule, and as discussed above, we thoroughly evaluated several different options for oil spill costs, but there is no way to reliably predict what incremental effect, if any, critical habitat for leatherbacks would have on these costs. Accordingly, this rule includes no quantitative estimates of the incremental costs of critical habitat designation for leatherbacks on the cost of oil spill response.

Comment 37: Representative Woolsey noted that Area 3 is currently being considered by the Department of Interior for an oil lease, and requested that this be considered as an activity that may require modification through a section 7 consultation.

Response: We acknowledge that we did not directly consider oil leasing in our proposed designation, and intended to include this proposed leasing action in our final designation. However, we have since determined that Area 3, the location for the potential leasing is not eligible for designation as critical habitat as it does not contain the prey PCE. Therefore, further analysis of potential oil leasing in this area is not necessary.

With regard to existing oil platforms, we included the consideration of oil spills and leaks associated with existing platforms in our analysis of oil spill response.

Comment 38: Commenters expressed uncertainty about the occurrence of point source pollutants and pesticides residue in marine waters, and recommended that we consider the potential high risk of a shipping-related oil spill in the final designation.

Response: As described above, we have further explored the potential for oil spills in the marine environment. Please see our response to Comment 37.

Comment 39: Commenters specifically mentioned that NMFS failed to consider activities such as fishing and shipping traffic in areas 4 and 5 when excluding these areas from designation based on oil spill costs alone. Commenters suggested that offshore areas, specifically Areas 6 and 8, scored high on passage PCE but the overall conservation score decreased because of a low score for the prey PCE, then were eliminated because of economic costs. Commenters stated ''it is difficult to see NMFS's rationale for excluding these areas in the proposed rule.''

Response: As mentioned previously, we have eliminated the migratory pathway PCE, and we re-evaluated Areas 4, 5, 6 and 8, as well as our new Area 9, to determine if they contain the prey PCE. We found that Areas 4, 5, 6, 8, and 9 do not contain the prey PCE and therefore do not meet the definition of critical habitat and are not eligible for designation as critical habitat. Therefore, the ESA section 4(b)(2) analysis has been modified accordingly and now focuses on Areas 1, 2, and 7. Please see responses above for more specific information on shipping and fishing and impacts on prey PCE.

Comment 40: The U.S. West Coast National Marine Sanctuaries office noted that the entrance to the Strait of Juan de Fuca is an area of concern for oil spills due to vessel traffic and urged NMFS to consider this in final analysis.

Response: The southern portion of the entrance to the Strait of Juan de Fuca is included in Area 2. As noted above, we have re-evaluated the assumptions made in the proposed rule about oil spill response costs and we have considered the potential for oil spills to occur in this area. As described above, we have looked at the potential for oil spills to occur in coastal areas and determined that we can not quantify the costs of changes that would be made as we do not, at this time, know the types of changes that may be necessary to protect critical habitat during an oil spill response. We therefore provide only qualitative analysis of the changes. Please see our response to Comment 37.

Sanctuaries and Marine Reserves

Comment 41: The National Park Service, California Coastal Commission, the CWPA, and California Department of Fish and Wildlife urged NMFS to recognize protections provided to leatherback sea turtles and their habitats through existing networks of marine protected areas along the California, Oregon, and Washington coasts. Established Marine Protected Areas should be considered in economic analysis.

Response: Through the California Marine Life Protection Act, Marine Protected Areas (MPAs) in California state waters are primarily chosen to be formed due to the known or potential impact of overharvesting fish and to protect fish habitat to allow stocks to grow. As a result of these comments, we further considered the beneficial impacts of existing MPAs within the three specific areas, through the process of developing incremental scores and, if warranted, adjusted them accordingly.

Comment 42: The National Ocean Service commented that the addition of critical habitat for leatherbacks along the west coast is complementary, not duplicative of the authorities of the National Marine Sanctuary Act.

Response: NMFS agrees, and this clarification has been made in the final rule.

Comment 43: Some commenters noted that NMFS should acknowledge that the primary neritic foraging areas along the central California coast are already encompassed through the existence of marine reserves.

Response: NMFS agrees, and this acknowledgement has been made in the final rule.

Comment 44: CWPA commented that there was little or no input from NOAA's Sustainable Fisheries Division (SFD) and no consideration of state-implemented species and habitat protections, specifically California's Marine Life Protection Act, which provides protection for high biodiversity areas along the California coast.

Response: NMFS' SFD works closely with the Pacific Fishery Management Council. Members of the CHRT attended a Council meeting and gave several presentations on proposed leatherback critical habitat designation to the full Council, Management Teams and Advisory Subpanels and the Science and Statistical Committee, many of whose members include staff from the SFD. In addition, SFD staff attended the leatherback critical habitat public hearing held in Carlsbad, California in February, 2010 to hear public comments.

Existing protections at the Federal, State, and local level were incorporated into the analysis via the incremental scores developed for economic analysis.

Comment 45: Several commenters, including CWPA, indicate that California has implemented marine protected areas precisely in upwelling and retention areas where leatherback sea turtles are found. They also questioned why additional protection (i.e., critical habitat designation) of these same areas is necessary.

Response: MPAs that have been designated off the coast of California specify the restrictions placed on users of the areas that may pose a threat to particular species and/or their habitat. We are not aware of any restrictions that are included in such MPAs to protect and maintain the quality and density of leatherback prey, the PCE we have identified in revising leatherback habitat. The ESA requires that we evaluate critical habitat based on specific criteria, and the existence of other statutes or protected areas does not preclude the ability or our requirement to designate critical habitat. However, we acknowledge that existing protections are important and they are taken into consideration during the incremental scoring process as part of the existing baseline.

Comment 46: Some commenters noted that Monterey Bay and Gulf of Farallones are two important sites for leatherback foraging along the central California coast that are already encompassed in National Marine Sanctuaries and the State of California MPAs, and that therefore critical habitat in these areas is duplicative and unnecessary.

Response: Please see our previous responses to comments 41 and 45 regarding Marine Protected Areas.

Offshore Alternative Energy and Undersea Cables

Comment 47: The Defenders of Wildlife, CBD, and Pacific Gas & Electric commented on the potential effects of offshore tidal and wave energy and other alternative energy facilities on leatherback turtle habitat. In addition, BOEM questioned our analysis of how alternative energy structures would affect leatherback turtle migration corridors.

Response: The effects of wave energy and other alternative energy facilities on sea turtles or jellyfish is not fully understood, particularly because many facilities are still in the design phase, making it difficult to predict how an activity proposed in designated critical habitat might require changes to protect the leatherback prey PCE. It will be necessary for research in this area to produce data and analysis that can be used during ESA section 7 consultations. These consultations may include modifications to facilities to limit or avoid adverse modification or destruction of critical habitat. As discussed in other sections of this final rule, we have eliminated the migratory pathway condition PCE; therefore, we have not further discussed how permanent structures may impact leatherback migrations.

Comment 48: The North American Submarine Cable Association commented that the activities of their member companies have no effect on leatherback turtle prey and, accordingly, NMFS should state that ESA section 7 consultations on these activities will not be required after NMFS designates critical habitat. The Association questioned how projects may affect benthic stages of jellyfish, especially since we lack a thorough description of benthic habitat needed for jellyfish and/or a description of where this habitat exists off the U.S. West Coast.

Response: NMFS cannot say which activities would not require ESA section 7 consultation. It is the responsibility of the agency taking the action to determine if their actions impact listed species or designated critical habitat and therefore are subject the ESA section 7 consultation. We agree with the comment regarding the lack of information on the specific type and location of habitat important to the early polyp stages of jellyfish. It is reasonable to conclude that some activities that involve disturbing benthic substrates (like undersea cable installation/maintenance) could affect jellyfish particularly in the nearshore areas where polyp beds are expected to occur. However, given the current best available science, we are unable to describe such benthic habitat and where it may occur.

General Comments

Comment 49: Some commenters suggested that because the population trend for leatherback sea turtles in the Western Pacific is unknown, NMFS cannot say that excluding areas would not cause extinction.

Response: We acknowledge that the overall population trend of leatherback sea turtles in the Western Pacific is unknown. In our proposed rule, we determined that exclusion of specific areas based on economic costs would not impede conservation or result in the extinction of the species. This determination was based on the best data available regarding the potential conservation benefits of the proposed

designation in comparison to the current level of species protection in those areas. Following our review and consideration of public comments, we made several modifications to the proposed rule, which are detailed in ''Summary of Changes from the Proposed Designation.'' As a result of these changes, our analysis under section 4(b)(2) of the ESA was also revised. In this final rule, we do not exclude any areas meeting the definition of critical habitat.

Comment 50: Some commenters asserted that designating CH will promote data collection and analysis to aid in planning for ''resource uses'' in the areas and will become more important as the agency implements marine spatial planning.

Response: We agree and are already supporting research on the effects of contaminants on jellyfish as an indicator of health for leatherback sea turtles.

Comment 51: Some commenters contended that NMFS' assertion that only permanent or long-term structures should be considered for their potential to affect habitat and the passage PCE was arbitrary and capricious. They asserted that such a notion contradicts ESA requirements and marks an unreasoned departure from past critical habitat designations in marine waters, where fishing gear and other ''non-permanent'' structures are considered to have an effect on foraging or migration. They concluded that NMFS would be setting a harmful new precedent for excluding clear threats to critical habitat functions in future critical habitat designations.

Response: As described previously, we have removed the migratory pathway PCE conditions, and we have evaluated each area based on the prey PCE. Therefore, we will not further evaluate the type of structures that may impact passage. Please see our response to Comment 12 for additional information on this topic.

Comment 52: A commenter suggested that we use adaptive management in the final designation to ''deal with uncertain environmental variation.''

Response: ''Adaptive management'', or the iterative process of evaluating and modifying a management decision over time to optimize results and address uncertainties, is a useful tool for the conservation of endangered and threatened species and their habitat; however the ESA requires that we designate critical habitat through a regulatory process that requires us to make decisions based upon the best available information at the time. When or if new information becomes available, including the effects of environmental variation on current designated critical habitats, we will evaluate the information and determine if a revision to this critical habitat designation is necessary.

Summary of Changes From the Proposed Designation

Based on the comments received and our review of the proposed rule, we (1) eliminated ''migratory pathways'' as a PCE; (2) refined the description of the prey PCE specifically to clarify that density is an important element of the feature; (3) revised the boundaries of the areas in which the PCE may be found; and (4) re-evaluated each area for the presence of the PCE and determined which areas meet the definition of critical habitat and are thus eligible for designation. The following discussion describes in detail the rationale for these changes.

(1) Eliminated as a PCE ''migratory pathway conditions to allow for safe and timely passage and access to/from/within high use foraging areas.''

Several comments focused on migration routes as a PCE and our economic and biological analyses associated with that PCE. Such comments triggered our re-evaluation of this PCE. We reviewed available data and literature, evaluated public comments, and reevaluated the validity of the PCE based on applicable statutory and regulatory definitions and criteria. We explain our analysis in more detail below. In our proposed rule, we explained that while leatherbacks are known to migrate great distances on a seasonal basis across the Pacific Ocean to arrive at known foraging areas in the near-shore marine environment within the U.S. EEZ, the actual migratory routes to those areas are not well-known. We reviewed public comments to determine whether additional data were available to support our approach in the proposed rule. Our review of public comments and available data on leatherback turtle migration confirmed our general assumptions in the proposed rule regarding the seasonal migratory and forage behavior of leatherback sea turtles migrating long distances from nesting beaches and over-wintering areas in the western Pacific Ocean to arrive during the summer and fall off the U.S. West Coast to forage in areas of dense prey concentrations associated with the California Current Ecosystem. In other words, NMFS confirmed the existence of valid and useful data on the general migration of leatherbacks to and their occurrence in the geographic areas considered for designation as critical habitat. However, our review of public comments and the best available scientific data did not resolve the uncertainty regarding the occurrence and presence of any specific biological or physical features indicating that a given area constitutes a migratory pathway or provides defined migratory pathway conditions for leatherback sea turtles from offshore areas to near-shore high-use forage areas, movement within those areas, and transit among those areas.

In our proposed rule, we relied primarily on data indicating the presence of leatherbacks within the specified areas as a proxy for determining migratory pathway conditions (e.g., satellite telemetry, aerial surveys, nearshore ship-based research). While we recognized the importance of leatherback migration, we did not identify specific migratory pathway conditions, and acknowledged uncertainty regarding their occurrence and presence. Public comments and agency inquiry did not develop additional meaningful data to establish the occurrence or presence of such indicative conditions. Thus, while the general proxy approach was useful in identifying and framing the importance of leatherback seasonal migration to geographic areas off the U.S. West Coast, without further specific data regarding biological or physical features influencing migration to, from and among forage areas, it did not allow us to identify specific migratory conditions in any area under consideration. Rather, this approach indicated that the entire U.S. EEZ could be considered as a migratory corridor.

A PCE is a biological or physical feature essential to the conservation of the species for which special management consideration or protection might be required. These features must be reasonably specific and identifiable in order to be protected. Our analysis of migratory pathway conditions did not produce a reasonable description of the physical and biological feature itself, allow a reasonable demonstration of how the feature is essential to conservation of the leatherback sea turtle, provide an effective basis for identifying ''specific areas'' on which the feature is found, or inform our identification of the types of activities that might presently or prospectively pose a threat to the feature such that special management consideration or protections might be necessary. In addition, it presents the possibility of resulting in an over-designation of critical habitat. Accordingly, the migratory pathway conditions do not

meet the requirements of the ESA, and we decided to remove it as a PCE.

Both NMFS and the USFWS have identified passage as a PCE in other critical habitat designations; however, the species and habitats involved differed significantly from leatherback sea turtles. In those instances, passage was more narrowly defined, and it was essential that the species have access to passage through a discrete and identifiable section of habitat. Please see our responses to Comments 12 and 13 for additional information.

We considered the impact of removing migratory pathway conditions as a PCE and the possible effects on conservation of leatherbacks. If there were threats to leatherback passage through the open ocean, and there were a federal nexus to those threats, they could potentially be mitigated through a section 7 consultation on the species. For example, some commenters cited ship strikes and fishing gear entanglement as a threat to passage. These threats do not alter habitat features as defined in this rule; however, because they pose a direct threat to the species, these threats can be addressed through a jeopardy analysis. We also note that in the proposed rule we had concluded, after conducting a 4(b)(2) analysis for each area, that offshore areas containing the migratory pathway conditions PCE, but low or medium ratings for the prey PCE due to low levels of quality prey, should be excluded from the designation (i.e., Areas 4, 5, 6, and 8). While the migratory pathway PCE would have been found in Areas 1, 2 and 7, we only identified a single activity type, construction of long-term or permanent structures (e.g., alternative energy projects), that might trigger section 7 consultation and project modifications to protect the passage feature. Section 7 consultation would likely still be required for such activities to consider effects to the species under the jeopardy standard as well as adverse modification of the prey PCE.

At this time, and in light of the data and analysis described above, the migratory pathway conditions PCE, as defined in the proposed rule, lacks the required defined physical and biological features and specific passage locations, and we cannot demonstrate that this feature is ''essential to conservation of the species.'' Nor can we determine whether and where such pathway conditions might reasonably be ''known'' to occur within the nine specific areas evaluated for designation. Based on this re-evaluation, we conclude that this feature fails to meet the regulatory guidance for determining a PCE and cannot serve to qualify geographic areas as critical habitat under the ESA, section 3(5)(A)(i).

(2) Refinement of the prey PCE. We have added the term density to our definition of the prey PCE to reaffirm the importance of this quality to the feature. In our proposed rule, we associated the prey PCE with each area given the general co-occurrence of leatherbacks with prey species and the corresponding likelihood of foraging activity. At the same time we recognized that certain areas, particularly the near-shore areas, are more heavily used for foraging and are of greater conservation value to the species. As we discussed in the proposed rule, prey is a feature off the U.S. West Coast that is essential to the conservation of leatherback sea turtles. In our proposed rule, we recognized that all areas containing the prey PCE were not equal in terms of the quantity and type of prey available and in their value for conservation of the species. We also provided data and analysis indicating that the areas where dense aggregations of prey occurred were the most important forage habitats for the species. We acknowledged a significant distinction between the conservation value of nearshore areas and offshore areas in relation to this feature, noting that some areas were of marginal conservation value due to the absence of prey in sufficient density to make forage energetically efficient for migrating turtles (e.g., Areas 4, 5, 6, 8 and 9). Specific nearshore areas were shown to have significant conservation value as they displayed a high density of prey species and corresponding patterns of regular leatherback use for sustained forage (e.g., Areas 1, 2 and 7). At the same time, we proposed finding that the prey PCE was present in all eight areas evaluated for designation. The proposed rule did so, without reflecting sufficiently the importance of density of prey species as a characteristic of the PCE due to differences in dense aggregations of prey species and predicted use by leatherbacks for sustained foraging.

During public hearings on the proposed critical habitat, we received questions about the amount or density of prey species necessary for an area to be considered critical habitat. We also received written public comments suggesting that any area in which scyphomedusae may be found in the U.S. West Coast EEZ should be designated as critical habitat.

In evaluating these comments and reviewing data related to the occurrence of prey species in specific areas and leatherback use of such areas for foraging, we have decided in the final rule to specifically include ''density'' in the prey PCE, thus reaffirming its biological significance as an element of the habitat feature considered essential to conservation of leatherbacks. This refinement is consistent with the available literature, including recent work by Benson *et al.* (2011) and Benson *et al.* (2007) that highlights the importance of prey aggregations to foraging leatherbacks.

We further revised the eight areas evaluated for designation to ensure those areas took into account density in evaluating the prey PCE. While we cannot quantitatively describe the density of prey (e.g., number of jellyfish per square mile) necessary to support the energetic needs of leatherbacks that travel across the Pacific Ocean to forage off the U.S. West Coast, based on the available information, we know that not all areas in which jellyfish may be found provide sufficient condition, distribution, diversity, abundance and density to support leatherback individual and population growth, reproduction, and development. Please see (4) below for additional information on how the prey PCE was evaluated in each area.

(3) Adjustment to area boundaries and the addition of Area 9.

In our proposed rule, we identified the overall area occupied by the species. This did not change in the final rule. The proposed rule then identified eight specific areas within the U.S. West Coast EEZ, the limit of our regulatory authority for designating critical habitat, for evaluation to determine whether they qualified as critical habitat. We evaluated each of these areas to determine whether they contained a PCE, in which case the area would qualify as critical habitat. In our proposed rule, we explained that the boundaries for these areas were based on a best estimate of where leatherback sea turtles transition from migrating to foraging, and where there are changes in the composition or abundance of prey species. The boundaries were intended to reflect substantial data demonstrating leatherback presence in marine waters as well as oceanographic, hydrological and physical features that impact the location of prey.

During the public comment period, we received comments that questioned our rationale for drawing the original area boundaries. In response to these comments, we reviewed the literature and data available on leatherback foraging and movements, as well as new information on leatherback movements, to determine if the boundaries were drawn appropriately. After reviewing relevant oceanographic processes and

physical features, we made three changes to the area boundaries to better reflect documented breaks in coastal ocean biological and physical properties. Our approach in drawing these boundaries did not depart from the stated objective in the proposed rule. Rather, it reflected what we believe to be a more accurate depiction of the oceanographic, hydrological and physical features impacting the location of prey and likely use by leatherbacks.

Boundary changes include the following: (1) We moved the offshore boundary of Area 7 east to the 3,000 meter isobath to better reflect where foraging is known to occur off the coast of central and southern California, and to better distinguish between nearshore and offshore habitat. Additionally, in an effort to be consistent with other area boundaries marked by geographic features, the offshore boundary of Area 7 has been moved east to the 3,000 m isobath. This boundary change resulted in a decreased overall size of Area 7 from 46,100 sq. mi to 13,102 sq. mi. (2) We moved the boundary between Areas 2 and 3 from the Umpqua River south to Cape Blanco. Cape Blanco is a well-documented ''break'' in coastal ocean physical and biological properties due to differences in primary bottom types and current patterns that influence the dispersal and retention of larval fishes and invertebrates (Barth *et al.,* 2000; McGowan *et al.,* 1999; Peterson and Keister, 2002); therefore, it was determined to be an appropriate oceanographic boundary to distinguish between these two areas. This boundary change resulted in the increased overall size of Area 2 from 24,500 sq. mi. to 25,004 sq. mi. (3) We created a new Area 9 from the southern portion of the proposed Areas 7 and 8. Due to differences in the geography, oceanography, and usage by leatherbacks between the northern and southern portions of our proposed Areas 7 and 8, the creation of Area 9 allowed us to look at areas with more uniform value in terms of leatherback habitat.

The following paragraphs describe each final area (shown in Figure 1) and summarize the data used to determine each area occupied by leatherbacks:

Area 1: Neritic waters between Point Arena and Point Sur, California extending offshore to the 200 meter isobath. The specific boundaries are the area bounded by Point Sur (36° 18′22″ N./121° 54′9″ W.), then north along the shoreline following the line of mean lower low water to Point Arena, California (38° 57′14″ N./123° 44′26″ W.), then west to 38° 57′14″ N./123° 56′44″ W., then south along the 200 meter isobath to 36° 18′46″ N./122° 4′43″ W., then east to the point of origin at Point Sur. As described in our final Biological Report, leatherback presence is based on aerial surveys, telemetry studies, and fishery interactions. This area is a principal California foraging area (Benson *et al.* 2007b), characterized by high densities of primary prey species, brown sea nettle (*C. fuscescens*), particularly within upwelling shadows and retention areas (Graham 1994).

Area 2: Nearshore waters between Cape Flattery, Washington, and Cape Blanco, Oregon extending offshore to the 2000 meter isobath. The specific boundaries are the area bounded by Cape Blanco (42° 50′4″ N./124° 33′44″ W.) north along the shoreline following the line of mean lower low water to Cape Flattery, Washington (48° 23′10″ N./124° 43′32″ W.), then north to the U.S./Canada boundary at 48° 29′38″ N./124° 43′32″ W., then west and south along the line of the U.S. EEZ to 47° 57′38″ N./126° 22′54″ W., then south along a line approximating the 2,000 meter isobath that passes through points at 47° 39′55″ N./126° 13′28″ W., 45° 20′16″ N./125° 21′ W. to 42° 49′59″ N./125° 8′ 10″ W., then east to the point of origin at Cape Blanco. As described in our final Biological Report, leatherback presence is based on aerial surveys, telemetry studies, and fishery interactions. This area is the principal Oregon/Washington foraging area and includes important habitat associated with the Columbia River Plume, and Heceta Bank, Oregon. Great densities of primary prey species, brown sea nettle (*C. fuscescens*), occur seasonally north of Cape Blanco (Suchman and Brodeur 2005; Reese 2005; Shenker 1984). Jellyfish densities south of Cape Blanco appear to be dominated by moon jellies (*Aurelia labiata*) and egg yolk jellies (*Phacellophora camtschatica;* Suchman and Brodeur 2005; Reese 2005). Cape Blanco is a well-documented ''break'' in coastal ocean physical and biological properties due to differences in primary bottom types and current patterns that influence the dispersal and retention of larval fishes and invertebrates (Barth *et al.,* 2000; McGowan *et al.,* 1999; Peterson and Keister, 2002).

Area 3: Nearshore waters between Cape Blanco, Oregon and Point Arena, California extending offshore to the 2000 meter isobath. This line runs from 42°49′59″ N./125°8′10″ W. through 42°39′3″ N./125°7′37″ W., 42°24′49″ N./125°0′13″ W., 42°3′17″ N./125°9′51″ W., 40°49′38″ N./124°49′29″ W., 40°23′33″ N./124°46′32″ W., 40°22′37″ N./154°44′19″ W., to 38°57′14″ N./124°11′50″ W., then east to Point Arena. As described in our final Biological Report, leatherback presence is based on aerial surveys, telemetry studies, and fishery interactions. This area includes upwelling centers between Cape Blanco, Oregon and Point Arena, California and is characterized by cold sea surface temperatures (<13° C). High densities of jellyfish have been documented between Cape Blanco and the Oregon-California border; however, species composition is dominated by moon jellies (*A. labiata*) and egg yolk jellies (*Phacellophora camtschatica;* Suchman and Brodeur 2005; Reese 2005). Aerial surveys of leatherbacks and jellyfish prey indicate that moon jellies are also the dominant jelly species north of Point Arena, California.

Area 4: Offshore waters west and adjacent to Area 2. Includes waters west of the 2000 meter isobath line to the U.S. EEZ from 47°57′38″ N./126°22′54″ W. south to 43°44′59″ N./125°16′55″ W. As described in our final Biological Report, leatherback presence is based on aerial surveys, telemetry studies, and fishery interactions. This area is used primarily as a region of passage to/from Area 2 (see above). No information is available regarding presence of jellyfish in this area; however, due to its distance from the coast and lack of persistent frontal habitat, prey species are likely limited to low densities of moon jellies (*A. labiata*) and salps.

Area 5: Offshore waters south and adjacent to Area 4, and north of a line consistent with the California/Oregon border. Includes all U.S. EEZ waters west of the 2000-meter isobath. As described in our final Biological Report, leatherback presence is based on aerial surveys, telemetry studies, and fishery interactions. The eastern edge of this polygon is strongly influenced by an oceanographic front west of Cape Blanco, Oregon. The position and intensity of the front is variable, dependent on the strength of upwelling at Cape Blanco, and can be located within the extreme eastern edge of Area 5 during strong upwelling events. The front likely acts as an aggregation mechanism for zooplankton; however, no information is available about jellyfish densities. Given its distance offshore, jellyfish densities are likely variable and dominated by moon jellies that may be advected from nearby coastal waters (Suchman and Brodeur 2005; Reese 2005), therefore, importance as a foraging area to leatherbacks is secondary. This area is also a region of passage to/from Area 2 (see above).

Area 6: Offshore waters south and adjacent to Area 5, west and adjacent to the southern portion of Area 3 (see above) offshore to a line connecting N42.000/W129.000 and N38.95/

W126.382, with the eastern boundary beginning at the 2000 meter isobath (42°3′6″ N./125°9′53″ W.). As described in our final Biological Report, leatherback presence is based on aerial surveys, telemetry studies, and fishery interactions. Offshore waters south of the Mendocino Escarpment are characterized by frontal habitat created by the Cape Mendocino upwelling center. Similar to Area 5, frontal intensity is variable and dependent on the strength of upwelling at Cape Mendocino (Castelao *et al.* 2006). No information is available about jellyfish densities in the Area 6, however, given its distance offshore, jellyfish densities are likely low, dominated by moon jellies, and of secondary importance to leatherbacks as a foraging area.

Area 7: Offshore waters between the 200–3000 meter isobaths from Point Arena to Point Sur, California and waters between the coastline and the 3000 meter isobath from Point Sur to Point Arguello, California. This area includes waters surrounding the northern Santa Barbara Channel Islands (San Miguel, Santa Rosa, Santa Cruz, and Anacapa Islands). As described in our final Biological Report, leatherback presence is based on aerial surveys, telemetry studies, and fishery interactions. Offshore waters beyond the 200 meter isobath in this area are characterized by persistent ocean frontal habitat created by mesoscale retentive eddies and meanders associated with offshore-flowing squirts and jets anchored at coastal promontories between Point Arena and Point Sur, creating linkages between nearshore waters of Area 1 and offshore waters of the California Current. The recurrent oceanographic features at the edge of the continental shelf are occupied by aggregations of moon jellies (*A. labiata*) and lower densities of brown sea nettles (*C. fuscescens*). Telemetry data indicate that these offshore waters are commonly utilized by leatherbacks when jellyfish availability in Area 1 is poor, and as a region of passage to/from Area 1. Neritic waters between Point Sur and Point Arguello are also strongly influenced by coastal upwelling processes. Point Arguello is a well-documented ''break'' in coastal ocean physical and biological properties along the U.S. West Coast, separating newly upwelled waters of the central California coast from upwelled-modified and warm, lower salinity waters of the southern California Bight. The southern portion of the region includes Morro and Avila Bays, where large densities of brown sea nettles have been observed seasonally in fisheries monitoring surveys and trawl surveys.

Area 8: Offshore waters west and adjacent to Area 6, and west of the 3000 meter isobath adjacent to Areas 7, and 9 between Point Arena, California and the U.S. EEZ/Mexico maritime border. As described in our final Biological Report, leatherback presence is based on aerial surveys, telemetry studies, and fishery interactions. Although eddies and meanders originating from coastal capes and headlands may be present in this region after particularly strong upwelling events, frontal features are not persistent or abundant and the region is primarily characterized by warm, low salinity offshore waters. Due to its distance from the coast and lack of persistent frontal habitat, prey species are likely limited to low densities of moon jellies (*A. labiata*) and salps. Area 8 is primarily a region of passage for leatherbacks to/from Area 7 (see above).

Area 9: Southern California Bight waters extending from the coast to the 3000 meter isobath between Point Arguello and Point Vicente, and from Point Vicente to N32.589/W117.463 extending to the 3000 meter isobath. As described in our Final Biological Report, leatherback presence is based on aerial surveys, telemetry studies, and fishery interactions. Upwelling originating from Point Conception creates offshore frontal near the northern Santa Barbara Channel Islands (San Miguel, Santa Rosa, Santa Cruz, and Anacapa) extending to San Nicolas Island; however, most of this region is characterized by warm, low salinity waters. Little information is available about the presence of jellies in the area; however, trawl samples performed by the California Cooperative Fisheries Investigations (CalCOFI) suggest that moon jellies are the dominant scyphomedusae; therefore, this area is of secondary importance to leatherbacks as a foraging area. Leatherbacks use this area primarily as a region of passage to Area 7, particularly during the spring and early summer months. This area was created in recognition of the southern California Bight biogeographic region (Parrish *et al.* 1981) that lies south of Point Arguello/Point Conception extending to the U.S./Mexico maritime border and west to the 3000 meter isobath.

Additionally, as mentioned in our response above, the shoreward extent of the areas was moved from the mean lower low water line to the extreme low water line. In our proposed rule, we identified the mean lower low water line as the shoreward boundary for this designation; however, leatherbacks are unlikely to pursue prey beyond the extent of extreme low water (S. Benson, NMFS, September 2000, unpublished data). In light of this information, we determined that extreme low water is a more appropriate boundary for the shoreward extent of this critical habitat.

As depicted in Figure 1, NMFS's adjustment of boundaries in the final rule do not either increase or decrease the total geographic area evaluated for potential designation as critical habitat identified in the proposed rule. Areas 1, 2 and 7 were identified for designation in the proposed rule. Areas 1, 2 and 7 are also included in the final designation though the boundaries for those areas have been adjusted as explained above. While the boundaries to Areas 1 and 2 remain largely unchanged from the proposed rule, the final rule's adjustment to the boundaries of Area 7 results in a substantial decrease in the spatial extent of the final designation when compared with the proposed rule.

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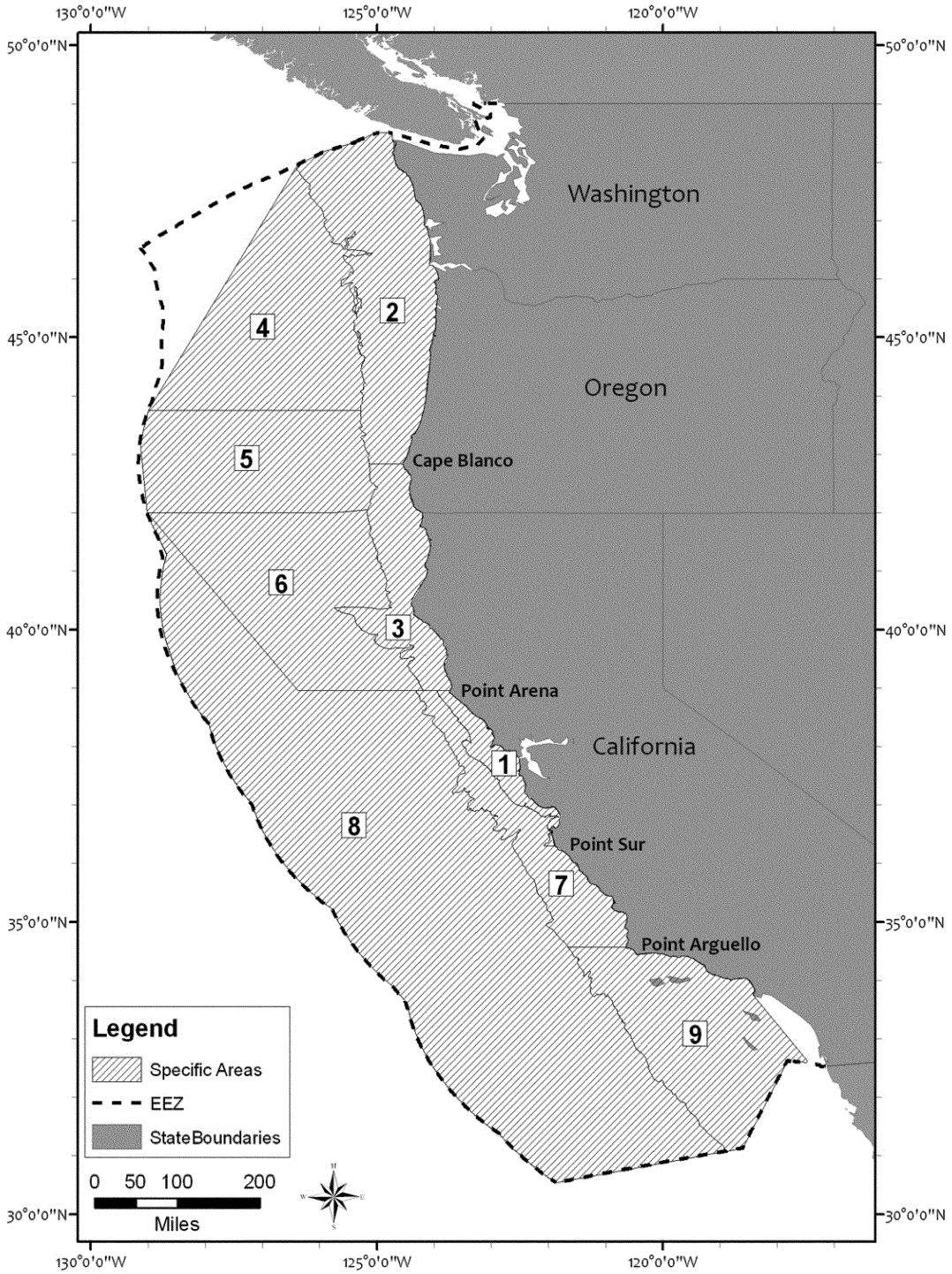
Figure 1. Geographical Areas Occupied by the species



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(4) Determining which areas meet the definition of critical habitat after the elimination of our migratory pathway PCE and using our refined prey PCE.

As described above, we eliminated our proposed migratory pathway PCE and therefore re-examined each of our areas to determine if the prey PCE, as refined in this final rule to include density, could be found within each of the nine areas. For each of the nine occupied areas, we evaluated the co-occurrence of leatherback turtles and their prey species based on the best available data. We specifically evaluated each area to predict whether and where the prey jellyfish could be consistently found in sufficient abundance, condition, distribution, diversity and density to provide for foraging that is

essential to the conservation of the species.

Coastal nutrient input, high productivity, and shallow waters (less than 1000 meters depth) are favorable for the life history of many species of scyphomedusae. The consistent availability of abundant prey in relatively small geographic areas associated with fixed or recurrent physical features influenced by coastal geomorphology is likely a key factor causing leatherbacks to travel to the U.S. West Coast to forage. In contrast to coastal areas, prey patches in open ocean regions are likely more dynamic, ephemeral, and unpredictable and do not have consistent conditions that produce the abundance and densities necessary for providing sufficient energy for foraging leatherbacks.

In addition, a telemetry and behavioral study has become available since the proposed rule was published (Benson *et al.* 2011). This study provides information and locations of high occurrences of leatherback foraging (described in the paper as area restricted search or ARS), and these foraging areas closely align with Areas 1, 2, and 7.

The proposed rule described the general co-occurrence of leatherback turtles and their prey species in areas offshore, including Areas 3, 4, 5, 6 and 8, as well as the southern and offshore portion of Area 7. Based on the available data, we could not identify or reasonably predict whether or where the refined PCE could be consistently found in sufficient abundance, condition, distribution, diversity and density to provide for foraging that is essential to the conservation of the species in areas 3, 4, 5, 6, 8 and 9, in a manner consistent with our definition and explanation of the prey PCE in this final rule. As such these areas do not meet the definition of critical habitat and therefore are not eligible for further consideration in this designation. Please see our more specific evaluation of each area below.

Area 1. The preferred prey of leatherback sea turtles, brown sea nettles (*C. fuscescens*), are found in abundance and high densities in this area particularly within upwelling shadows and retention areas. This area has been identified as the principal foraging area off the coast of California and contains features that produce abundant prey of sufficient condition, distribution, diversity and density to provide for foraging that is essential to the conservation of the species. Thus, this area meets the definition of critical habitat and is eligible for designation.

Area 2. The preferred prey of leatherback sea turtles, brown sea nettles (*C. fuscescens*), are found in abundance and high densities in this area. This area is the principal foraging area off of Oregon and Washington as great densities of brown sea nettles are found to seasonally associate with the Columbia River Plume and Heceta Bank in Oregon, north of Cape Blanco. Based upon the best available scientific information, these features produce prey of sufficient condition, distribution, diversity abundance and density to provide for foraging that is essential to the conservation of the species. Thus this area meets the definition of critical habitat and is eligible for designation.

Area 3. This area has features that produce an abundance of jellies, particularly during seasonal upwelling. However, south of Cape Blanco, Oregon to the Oregon-California border the area is dominated by moon jellies and egg yolk jellies. South of the Oregon-California border and north of Point Arena, moon jellies are the dominant species of jellies. These species are not the preferred prey for leatherbacks, although they may be consumed when brown sea nettles are not available. A recent publication analyzing movement of leatherbacks along the U.S. West Coast indicates that foraging behavior was not observed in Area 3 (Benson *et al.,* 2011). The water in this area (i.e., south of Cape Blanco, the boundary between Area 2 and Area 3) is colder than waters in adjacent Areas 1 and 7 to the south and Area 2 to the north (Huyer, 1983; Brodeur *et al.,* 2004). Cape Blanco is a coastal promontory that protrudes farther to the west than any other feature in the relatively straight coastline of the U.S. Northwest. The environmental variability associated with this feature suggests habitat partitioning between prey species. For example, Suchman and Brodeur (2005) found that brown sea nettles were more likely to be caught in waters north of Cape Blanco, while south of Cape Blanco, moon jellies were more prevalent. Thus, Area 3 may not be utilized by leatherbacks as a foraging region because it is energetically inefficient for leatherbacks to consume low caloric content prey (i.e., moon jellies) while maintaining their core body temperatures through swimming. Densities of brown sea nettles are likely insufficient to support regular foraging in the cold waters of Area 3. Based upon the best available scientific information, the oceanographic features of this area do not produce prey of sufficient condition, distribution, diversity, abundance and density to provide for foraging that is essential to the conservation of the species. Thus this area does not meet the definition of critical habitat.

Area 4. This area has been characterized as primarily a region of passage to/from Area 2; therefore, we evaluated it in terms of the prey PCE. Although there is limited information available regarding the presence of jellyfish in this area, the recent study by Benson *et al.* (2011) indicates that jellyfish feeding occurs in the area. Due to distance from the coast and lack of persistent frontal habitat, prey species are likely limited to low densities of moon jellies (*A. labiata*) and salps. Small densities of low caloric prey resources in Area 4 may be sufficient for counteracting calorie loss but are likely not necessary for leatherbacks to reach Area 2. Further, it is unlikely that the densities of brown sea nettles within Area 4 are sufficient to provide adequate energy for leatherback growth or reproduction. Based upon the best available scientific information, the oceanographic features of this area do not produce prey of sufficient condition, distribution, diversity, abundance and density to provide for foraging that is essential to the conservation of the species. Thus, this area does not meet the definition of critical habitat.

Area 5. This area was defined based on its use as passage for leatherbacks from far offshore waters to foraging sites in Area 2 and between Areas 1 and 2. The eastern edge of the area is influenced by an oceanographic front west of Cape Blanco, Oregon that is variable and dependent on the strength of upwelling at Cape Blanco. Although the front may act as an aggregation mechanism for zooplankton, no information is available on its impact on jellyfish densities or if it acts as a transport mechanism for jellyfish. Similar to other distant offshore areas, jelly densities are likely variable and dominated by moon jellies. Recent work by Benson *et al.* (2011) indicates that no foraging behavior was observed in Area 5 during their study period, 2000 through 2008. While prey may be present in Area 5, based upon the best available scientific information, we could not find areas that had prey of sufficient condition, distribution, diversity, abundance and density to provide for foraging that is essential to the conservation of the species. Thus, this area does not meet the definition of critical habitat.

Area 6. Similar to Area 5, frontal intensity is variable and dependent on the strength of upwelling at Cape Mendocino (Castelao *et al.* 2006). No information is available about jelly densities in the Area 6; however, given its distance offshore, jelly densities are

likely low, dominated by moon jellies. Recent work by Benson *et al.* (2011) showed that no leatherbacks foraged in Area 6 during their study period 2000 through 2008. While prey may be present in Area 6, based upon the best available scientific information, we could not find areas that have prey of sufficient condition, distribution, diversity, abundance and density to provide for foraging that is essential to the conservation of the species. Thus, this area does not meet the definition of critical habitat.

Area 7. A quasi-stationary front occurs in this area near the 2000 m to 3000 m isobaths as warm offshore waters meet cooler coastal upwelled water. As upwelling winds relax, this front moves closer to the coast and likely aggregates sea nettles that have been advected from nearby coastal waters (Area 1). The neritic waters between Point Sur and Point Arguello are also strongly influenced by coastal upwelling processes that produce abundant and dense aggregations of leatherback prey. Telemetry data indicate that these offshore waters are utilized for foraging by leatherbacks (Benson *et al.* 2011), particularly if foraging opportunities in Area 1 are poor, as evidenced by leatherbacks spending more time engaged in ARS behavior in this area than in Areas 3, 4, 5,6, 8 or 9. Based upon the best available scientific information, the oceanographic features of this area produce prey of sufficient condition, distribution, diversity, abundance and density to provide for foraging that is essential to the conservation of the species. Thus, this area meets the definition of critical habitat.

Area 8. This area has been identified primarily as an area of passage for leatherbacks moving from distant offshore waters to nearshore foraging Areas 1 and 7. Unlike Area 7, frontal features are less abundant and more ephemeral in Area 8. The region is primarily characterized by warm, low salinity offshore waters. Due to the great distance from the coast, prey species are likely limited to low densities of moon jellies (*A. labiata*) and salps. Recent work by Benson *et al.* (2011) indicates that foraging behavior is rare and inconsistent in this area. Additional information from Benson (unpublished data, 2008) indicated that during a ship-based survey within these waters, an offshore front was observed over 100 miles from shore. Brown nettles were found in poor condition (small and dying) that were likely advected from coastal waters to the offshore front. Although leatherbacks could potentially attempt to feed in this area, the relatively low densities and poor condition of brown sea nettles in this area would likely not provide adequate energy for leatherback growth and reproduction. Based upon the best available scientific information, the oceanographic features of this area do not produce prey of sufficient condition, distribution, diversity, abundance and density to provide for foraging that is essential to the conservation of the species. Thus, this area does not meet the definition of critical habitat.

Area 9. This area was identified as primarily an area of passage in our proposed rule. Therefore, we re-evaluated it in terms of the prey PCE. Most of this area is characterized by warm, low salinity waters, although upwelling originating from Point Conception creates offshore fronts near the northern Santa Barbara Channel Islands and extending south to San Nicolas Island. Little information is available regarding the presence of jellyfish in the area; however, trawl samples suggest that moon jellies are the dominant scyphomedusae. A recent report on telemetry work on leatherbacks indicates some limited foraging behavior around the Channel Islands, and within the southern California Bight by a single individual during spring while moving toward Areas 1 and 7 (Benson *et al.* 2011). Area 9 was primarily used for passage to Areas 1 and 7 by turtles that entered the California Current during the spring. We have no information to indicate whether brown sea nettles are found in sufficient abundance or density to allow for efficient foraging by leatherbacks. Based upon the best available scientific information we could not conclude that this area contained the prey PCE. Thus, this area does not meet the definition of critical habitat.

Critical Habitat Identification and Designation

The ESA defines critical habitat under section 3(5)(A) as: ''(i) the specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species.''

If critical habitat is designated, section 7 of the ESA requires Federal agencies to insure they do not fund, authorize, or carry out any actions that will result in the adverse modification or destruction of that habitat. This requirement is in addition to the section 7 requirement that Federal agencies insure their actions do not jeopardize the continued existence of listed species.

In the following sections, we describe our methods for evaluating the areas considered for designation as critical habitat, our final determinations, and the final critical habitat designation. This description incorporates the changes described above in response to public comments and peer reviewer comments.

Methods and Criteria Used To Identify Critical Habitat

In accordance with section 4(b)(2) of the ESA and our implementing regulations (50 CFR 424.12(a)), this final rule is based on the best scientific information available regarding leatherback sea turtles' present and historical range, habitat and biology, as well as threats to its habitat.

To assist with the consideration of revising leatherback critical habitat, we convened a CHRT consisting of biologists and managers from NMFS Headquarters, the Southwest and Northwest Regional Offices, and the Southwest Fisheries Science Center. The CHRT members had experience and expertise on leatherback biology, distribution and abundance of the species along the U.S. West Coast as it relates to oceanography, ESA section 7 consultations and management, and/or the critical habitat designation process. The CHRT used the best available scientific data and their best professional judgment to: (1) Verify the geographical area occupied by the leatherbacks at the time of listing; (2) identify the physical and biological features essential to the conservation of the species that may require special management considerations or protection; (3) identify specific areas within the occupied area containing those essential physical and biological features; (4) evaluate the conservation value of each specific area; and (5) identify activities that may affect any designated critical habitat. The CHRT evaluation and conclusions are described in detail in the following sections.

Physical or Biological Features Essential for Conservation

Joint NMFS and USFWS regulations (50 CFR 424.12(b)) state that in determining what areas are critical habitat, the agencies ''shall consider those physical and biological features that are essential to the conservation of

a given species and that may require special management considerations or protection.'' Features to consider may include, but are not limited to: ''(1) Space for individual and population growth, and for normal behavior; (2) Food, water, air, light, minerals, or other nutritional or physiological requirements; (3) Cover or shelter; (4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally; (5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.'' *Id.* The regulations also require agencies to ''focus on the principal biological or physical constituent elements'' (i.e., PCEs) within the specific areas considered for designation that are essential to conservation of the species. PCEs may include, but are not limited to, the following: spawning sites, feeding sites, water quality or quantity, geological formation, and tide.

Primary Constituent Elements

We have identified one PCE essential for the conservation of leatherbacks in marine waters off the U.S. West Coast: The occurrence of prey species, primarily scyphomedusae of the order Semaeostomeae (e.g., *Chrysaora, Aurelia, Phacellophora,* and *Cyanea*), of sufficient condition, distribution, diversity, abundance and density necessary to support individual as well as population growth, reproduction, and development of leatherbacks.

As described above in the section ''Summary of changes from the proposed designation,'' public comments led us to take a closer look at the prey PCE to better describe the characteristics that make the PCE essential to the conservation of leatherbacks. Leatherbacks have high caloric needs, and their preferred gelatinous prey have low nutritional value individually, but consumed in large amounts can satisfy the energetic needs of subadult and adult leatherback sea turtles. As noted in our proposed rule, leatherbacks must consume 20 to 30 percent of their body weight each day, or roughly 50 large jellyfish. Adult leatherbacks (250–450 kg) may consume 70–90 kg of jellyfish per day to meet their energetic needs (Wallace *et al.* 2006). Leatherback sea turtles may opportunistically feed in areas with low densities of jellyfish, but these patches of prey are not sufficient to support the energetic needs to promote individual and population growth, reproduction and development. Telemetry studies and aerial surveys by Benson *et al.* (2011 and 2007) confirm that leatherbacks are most often found foraging in retention areas that are created by points and headlands, and at dynamic mesoscale features including fronts, eddies, and regions of low eddy kinetic energy.

Therefore, we have refined our description of the leatherback prey PCE to specifically include density, along with sufficient condition, distribution, diversity, and abundance described in our proposed rule. Our approach is similar to the agency's designation of critical habitat for North Pacific right whales. Baleen whales and leatherback turtles both forage on relatively small prey. Baleen whales rely on dense aggregations of small fish and krill to satisfy their caloric needs, in the same way as leatherbacks rely on dense aggregations of jellyfish. For the North Pacific right whale critical habitat designation, we identified prey as the sole PCE. Although North Pacific right whales' preferred prey, copepods, are ubiquitous in the North Pacific, we identified the need for a certain density of prey, and located an area in the ocean where physical forcing mechanisms concentrate copepods in sufficient densities to allow for efficient feeding by whales (79 FR 19000, April 8, 2008).

Geographical Area Occupied and Specific Areas

One of the first steps in this critical habitat review process was to define the geographical area occupied by the species at the time of listing. As described above, leatherbacks are distributed throughout the oceans of the world including along the U.S. West Coast within the U.S. EEZ. The CHRT reviewed available data sources to identify locations within and adjacent to the petitioned area that contain the prey PCE. Information reviewed included: Turtle distribution data from nearshore aerial surveys (Peterson *et al.,* 2006; Benson *et al.,* 2006; 2007b; 2008; NMFS unpublished data); offshore ship sightings and fishery bycatch records (Bowlby, 1994; Starbird *et al.,* 1993; Bonnell and Ford, 2001; NMFS SWR Observer Program, unpublished data); satellite telemetry data (Benson *et al.,* 2007a; 2007c; 2008; 2009; NMFS unpublished data); distribution and abundance information on the preferred prey of leatherbacks (Peterson *et al.,* 2006; Harvey *et al.,* 2006; Benson *et al.,* 2006; 2008); bathymetry (Benson *et al.,* 2006; 2008); and regional oceanographic patterns along the U.S. West Coast (Parrish *et al.,* 1983; Shenker, 1984; Graham, 1994; Suchman and Brodeur, 2005; Benson *et al.,* 2007b).

Joint NMFS and FWS regulations provide that areas outside of U.S. jurisdiction not be designated as critical habitat (50 CR 424.12(h)), so any areas outside of the U.S. EEZ were excluded from our analysis. Thus, the occupied geographic area under consideration for this designation was limited to areas along the U.S. West Coast within the U.S. EEZ from the Washington/Canada border to the California/Mexico border.

Unoccupied Areas

Section 3(5)(A)(ii) of the ESA authorizes designation of ''specific areas outside the geographical areas occupied by the species at the time it is listed'' if those areas are determined to be essential to the conservation of the species.'' In our proposed rule we stated that we did not identify any specific areas outside the geographic area occupied by leatherbacks that may be essential for the conservation of the species. We did not receive any public or peer review comments on this topic, therefore, no unoccupied areas will be included in this analysis.

Special Management Considerations or Protections

An occupied area may be designated as critical habitat only if it contains physical or biological features essential to the conservation of the species that ''may require special management considerations or protection.'' Joint NMFS and USFWS regulations (50 CFR 424.02(j)) define ''special management considerations or protection'' to mean ''any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species.'' We have identified a number of activities that may threaten or adversely impact our identified PCE. In our proposed rule, we grouped these activities into eight activity types: Aquaculture, pollution from point sources (e.g., National Pollution Discharge Elimination System (NPDES)); runoff from agricultural pesticide use; oil spill response; power plants; desalination plants; tidal, wave, and wind energy projects; and liquefied natural gas (LNG) projects.

In our proposed rule, aquaculture was described as an activity that may adversely impact our migratory pathway PCE. With the removal of that PCE, aquaculture is no longer considered an activity that may impact this critical habitat designation. As such, the remaining seven activity types have been evaluated for their potential to impact the prey PCE by altering prey abundance or prey contamination levels with Areas 1, 2, and 7. Based on the present and potential impacts from these activities, we have determined that the prey feature may require special

management consideration or protection.

TABLE 1—SUMMARY OF OCCUPIED SPECIFIC AREAS, SURFACE AREA COVERED AND ACTIVITIES THAT MAY AFFECT THE PREY PCE IN EACH AREA SUCH THAT SPECIAL MANAGEMENT CONSIDERATIONS OR PROTECTION MAY BE REQUIRED

[Please see the economic report for additional details]

Specific area	Est. area (sq. mi)	Activities that may impact the PCE Prey
Area 1	3,807 (9,862 sq. km)	Point pollution (NPDES permitting), pesticide application, oil spill response, power plants, desalination plants, tidal and wave energy projects.
Area 2	25,004 (64,760 sq. km)	Point pollution (NPDES permitting), pesticide application, oil spill response, tidal, wave and wind energy projects, LNG.
Area 7	13,102 (33,936 sq. km)	Point pollution (NPDES permitting), pesticide application, oil spill response, power plants, desalination plants.

ESA Section 4(b)(2) Analysis

Section 4(b)(2) of the ESA requires the Secretary of Commerce (Secretary) to designate critical habitat based on the best scientific data available, after taking into consideration the economic impact, impacts on national security and any other relevant impact, of specifying any particular area as critical habitat. Section 4(b)(2) further states that the Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of designation, unless he determines that failure to designate will result in the extinction of the species.

The ESA does not define what ''particular area'' means in the context of section 4(b)(2), or the relationship of particular areas to ''specific areas'' that meet the statute's definition of critical habitat.

In previous sections of this final rule, we detailed the 9 occupied areas, within the geographic range of the species, that were initially evaluated for eligibility as critical habitat. Through that process, we determined that Areas 1, 2 and 7 are eligible for designation as critical habitat. As there was no biological basis to further subdivide these three ''specific areas'' into smaller units, we treated these areas as the ''particular areas'' for our initial consideration of the impacts of designation. The following sections detail the analysis that was done to consider economic and other impacts from this designation to determine if any particular areas should be excluded.

Benefits of Designation

As described above, section 4(b)(2) of the ESA requires that we balance the benefit of designation against the benefit of exclusion for each particular area. The primary benefit of a critical habitat designation is the protection afforded under section 7 of the ESA, which requires that all Federal agencies insure that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of designated critical habitat. This is in addition to the requirement that all Federal agencies ensure that their actions are not likely to jeopardize the continued existence of any listed threatened or endangered species. The designation of critical habitat also provides other benefits, such as improving education and outreach by informing the public about areas and features important to species conservation. At this time, we lack information that would allow us to quantify or monetize the benefits of designating critical habitat for leatherback sea turtles and have instead relied on a qualitative review of the potential benefits.

In our proposed rule, we used the overall conservation value ratings that were developed for each area to represent the qualitative benefit of designation, and we requested public comments on methods for pursuing a quantitative analysis of the benefits of designation. Public comments suggested that there are examples of true cost and benefit analyses for other species, although the intrinsic value of a leatherback sea turtle and its habitat have not been quantified or given a specific monetary value. These comments prompted a review of the analysis done in the proposed rule to determine the overall benefit of designation.

The benefit of designation depends on several factors, including the conservation value of the area to the species, the seriousness of the threats to that conservation value, and the extent to which an ESA section 7 consultation or the educational aspects of designation will address those threats. We began this process by re-examining the conservation value of each specific area based upon the new area boundaries for Areas 2 and 7, as well as the elimination of the migratory pathway PCE. We reviewed the best available information to specifically evaluate each particular area in terms of density of prey, prey species composition, prey aggregating mechanisms within the area, and inter-annual variability (e.g., El Niño (Barber and Chavez, 1983), or Pacific Decadal Oscillation cycles (McGowan *et al.,* 1998; 2003)) to determine the conservation value of each area. Through this evaluation (see Table 2), we determined that all three areas have a high conservation value for leatherback turtles. We then evaluated the extent to which an ESA section 7 consultation and the educational aspects of designation will address threats to the PCE from the activity types identified as having the potential to impact critical habitat. Lastly, we incorporated available information on leatherback foraging use of each area to determine our final conservation benefit of designation score for each area. The following sections further detail this process.

Conservation Value

As mentioned above, to determine the conservation value of each area based on the prey PCE, we scored each area for its importance in four main prey categories: Density of prey; composition of prey species; aggregation mechanism present; and inter-annual variation. We also acknowledge that these categories should be weighted for their relative importance in creating optimal foraging habitat. Therefore, density of prey was weighted at 40 percent of the total area conservation score, while prey species composition, aggregation mechanism, and inter-annual variability were weighted at 25 percent, 25 percent, and 10 percent, respectively.

We first scored each area from 1 to 5 for each prey category, with 5 representing a very high conservation value. Then each score was weighted based on its particular category. For

example, in Area 1, prey concentration was given a score of 5, meaning that it has a very high concentration of prey. The prey concentration category is weighted at 40 percent importance overall, so the weighted score for prey concentration in Area 1 is 2. All weighted scores across categories were added to calculate a total weighted score for each area, as shown in Table 2. Finally, the conservation value was assigned to each area based on the total weighted score. Scores from 4.0 to 5.0 were given a high conservation value, scores from 3.0 to 3.9 were given a medium conservation value, and all scores of 2.9 or lower were given a low conservation value. All three of our particular areas scored a high conservation value, which is consistent with scientific literature and observations of a high level of leatherback foraging in these areas.

TABLE 2—THE SCORES FOR EACH AREA BASED ON THE FOUR PREY CATEGORIES, THE WEIGHTED ADJUSTMENT TO SCORES BASED ON THE OVERALL IMPORTANCE OF EACH PREY CATEGORY, AND THE CONSERVATION RATING

Area	Density of prey (0.4)	Prey species composition (0.25)	Aggregating mechanism (0.25)	Inter-annual variability (0.1)	Total weighted score	Conservation value
1	5 (2.0)	5 (1.25)	5 (1.25)	4 (0.4)	4.9	High.
2	4 (1.6)	5 (1.25)	4 (1)	4 (0.4)	4.25	High.
7	4 (1.6)	4 (1)	4 (1)	4 (0.4)	4	High.

ESA Section 7 Benefits

When considering the extent to which an ESA section 7 consultation will benefit the species in an area designated as critical habitat, we considered the importance of the area and the types of threats to the PCE that may be addressed through such consultation. Under ESA section 7, Federal agencies must insure that their actions will not result in destruction or adverse modification of critical habitat.

Educational Benefits

Educational benefits are included in this analysis to recognize that a critical habitat designation may provide educational benefits to leatherbacks, especially if it raises the awareness of Federal, state and local agencies that engage in or authorize activities that may affect the species or its habitat. Such awareness may lead to protective regulations or policies at the state or local levels that in turn help to educate the general public. After considering the types of activities that may affect leatherback habitat we believe that it is more likely that nearshore coastal areas would yield greater educational benefits than offshore areas simply due to their proximity and accessibility to the public.

U.S. West Coast states maintain jurisdiction offshore to 3 nm wherein occurs the vast majority of human activities in the marine environment (e.g., fishing, swimming, boating). All three states have agencies and entities that provide education and encourage public conservation of coastal resources, including marine species habitats. For example, the California Coastal Commission has active public education and outreach efforts focused on coastal beaches and waters, including an ''Adopt-a-Beach'' program and ''California Coastal Cleanup Day'' that annually draws tens of thousands of participants. The California Department of Fish and Game is actively involved in implementing the state's Marine Life Protection Act and the identification of Marine Protected Areas. Similar agencies, programs, and strategies exist in Washington and Oregon, including: the Washington Department of Ecology Coastal Zone Management Program; Oregon Division of State Lands Coastal Management Program; Oregon Coastal Zone Management Association; and the Oregon Nearshore Marine Resources Management Strategy (Oregon Department of Fish and Wildlife, 2006), which defines the ''nearshore ocean'' as the area from the coastal high tide line offshore to the 30-fathom (180 feet or 55 meter) depth contour (i.e., well within the Area 2 boundary). All of these agencies and entities produce and distribute numerous brochures, maps, and educational resources that emphasize actions to protect habitats in the nearshore coastal zone used by leatherbacks.

Leatherback Foraging Use

Leatherbacks in the Pacific expend tremendous time and energy migrating to and along the U.S. West Coast to forage on jellyfish. To gain insights into potential preferences, we reviewed the available data and literature to help quantify the use of each specific area for foraging. NOAA's Southwest Fisheries Science Center, (Benson *et al.* 2011), has been investigating leatherback use of the coastal waters of California, Oregon, and Washington. Satellite transmitters have been applied to leatherback sea turtles at western Pacific nesting beaches and at California foraging grounds. Benson *et al.* (2011), modeled the daily position estimates for tagged animals and then used movement data from each independent transmitter to infer if the turtle was engaged in ''Area Restricted Search'' (foraging) or ''Transit'' (directed travel between areas). This new research, in coordination with other data on foraging behavior, has provided additional information regarding the usage of each specific area and is summarized below.

Area 1: Satellite data indicate foraging behavior between Bodega Bay and northern Monterey Bay, and between Bodega Bay and Point Arena when warmer water extends northward from Point Reyes (usually during September). Data were used from individuals that were captured off the central California coast, and that returned the following year.

Area 2: Satellite data indicate foraging in shelf waters between the 200 m and 2000 m isobaths. These data come from four individuals that moved into this area one year after the transmitters were deployed at Jamursba-Medi (Papua Barat, Indonesia). While this is a small sample size, it reflects the best available data at this time.

Area 7: Satellite data indicate that foraging behavior occurred near the 2000 meter isobath, west of Monterey Bay and Big Sur, and west of Morro and Avila Bays. Foraging typically occurs in Area 7 during the spring and early summer, when neritic waters are cool. Turtles that foraged in this area eventually moved further east or north, into Area 1 during the late summer.

Benefit of Designation Summary

When evaluating the overall Benefit of Designation, we considered the three factors outlined above: Conservation Value, Foraging Behavior, and Section 7 and Educational Benefits. Each factor was scored as high, medium or low for each particular area. We than assigned a number to each score, with high = 3, medium = 2 and low = 1. Therefore each

area had a potential total Benefit of Designation between 3 and 9. A total score of 3 and 4 indicates a low Benefit of Designation, scores from 5 to 7 indicate a medium Benefit of Designation, and scores 8 and 9 indicate a high Benefit of Designation.

Areas 1, 2 and 7 all scored high (3) for each factor. These areas have a high conservation value, as determined in Table 2, they also have a high value for foraging, as documented in the literature, and due to their proximity to the coastline and the number of activity types that may impact the habitat, and they also have a high section 7 and educational benefit.

TABLE 3—BENEFIT OF DESIGNATION WAS DETERMINED BASED ON THE CONSERVATION VALUE OF EACH AREA, LEATHERBACK FORAGING BEHAVIOR, AND THE EXPECTED BENEFITS AFFORDED THROUGH THE DESIGNATION OF CRITICAL HABITAT FROM ESA SECTION 7 AND EDUCATIONAL PROGRAMS

Area	Conservation value	Foraging behavior	Section 7 and educational benefit	Benefit of designation
1	High (3)	High (3)	High (3)	9—High.
2	High (3)	High (3)	High (3)	9—High.
7	High (3)	High (3)	High (3)	9—High.

Economic Benefits of Excluding Particular Areas (Economic Impacts of Designation)

The economic report, supplemental to this final rule, details the specific costs and calculations used to determine the anticipated economic impacts or costs of the critical habitat designation, and therefore the economic benefit of excluding particular areas from designation. To determine the economic costs associated with the designation of each particular area, we first accounted for the baseline level of protection afforded to leatherbacks and their habitat. To determine the baseline we considered three major factors, (1) the overlap of previously designated critical habitat for other species within leatherback critical habitat, (2) the presence of other listed species and protected marine mammals within leatherback critical habitat, and (3) the Federal, State and local protections already in place to conserve and protect marine resources. Using these factors we assigned a qualitative rating of ''high'', ''medium'' or ''low'' to each activity type in each area. The activities in each of the three specific areas received either a ''high'' or ''medium'' rating. Further discussion of how these ratings were assigned is presented in section 1.4.3 of our economic report.

Once we determined the baseline protections for each activity in each specific area, we assigned incremental scores to each activity in each area to estimate the portion of costs expected to be attributed to this critical habitat designation. The incremental scores were assigned based on the qualitative estimates of the baseline protections rating of high, medium or low. In areas where baseline protections were considered to be high, the portion of any project modification costs attributable to leatherback critical habitat designation would be low and thus the assigned incremental score was low. In areas where lower baseline protections exist, it is expected that the majority of any project modification costs would be associated with the leatherback critical habitat designation; thus the assigned incremental score should be high. Given the uncertainty of project modifications and associated costs, we used a conservative approach that would potentially over rather than under-estimate costs associated with leatherback critical habitat. For activities and areas with more existing protections (e.g., areas with marine sanctuaries or designated critical habitat for other listed species) and thus a ''high'' level of baseline protection, we estimated that 30 percent of any project modification costs would be attributable to leatherback critical habitat. Thus an incremental score of 0.3 was applied to these activities. For activities that occur in areas with fewer existing protections (e.g., areas overlapping the range of other listed species but not their critical habitat), and rated as having a ''medium'' level of baseline protections, we assumed that 50 percent of costs would be attributable to designation of leatherback critical habitat, and assigned an incremental score of 0.5. Sections 1.4.3 and 1.4.4 of our economic report provide more detail on incremental scoring.

For each potentially affected economic activity, we estimated the number of potentially affected projects and identified project modifications that may be necessary to avoid destruction or adverse modification of specific areas considered for designation as leatherback critical habitat. Where possible we also estimated the costs of potential project modifications. The majority of activity costs were projected 20 years into the future and, where applicable, costs were adjusted for inflation to reflect $2009 values (with a 3 and 7 percent discount rates applied to future costs). We then calculated low and high cost scenarios based on spatial considerations for activities that occur on land (e.g., agriculture pesticide application). Where applicable, the high cost scenario estimated costs for activities within 5 miles of the coastline; the low cost scenario estimated costs for activities within 1 mile of the coastline (i.e., a smaller subset of potential activities). Projections of future activities were developed using geographic information systems and other published data on existing, pending, or future actions (e.g., FERC permit license data for LNG projects). Estimated costs were calculated for all activities except power plants, wind energy projects, and LNG facilities and oil spill response; for these we relied on a qualitative assessment. The mid-point value between the high and low cost scenarios was used as the estimated incremental cost for the designation of each area.

Exclusion of Particular Areas Based on Economic Impacts

The benefit of designation is not directly comparable to the economic benefit of excluding a particular area (i.e., avoiding economic costs). We had sufficient information to monetize the estimated economic benefits of exclusion, but were not able to monetize the conservation benefit of designation. To qualitatively scale the economic cost estimates in the same manner as the conservation benefit of designation, we created economic thresholds (see Table 4) and assigned each area an economic rating based on the mid-point of the estimated annualized costs.

TABLE 4—ECONOMIC THRESHOLDS AND CORRESPONDING ECONOMIC BENEFIT OF EXCLUSION

Threshold	Economic rating
$20,000,000 or more	High.
$700,000–$19,999,999	Medium.
$25,000–$699,999	Low.
$0–$24,999	Very Low.

As shown in Table 4 above, we did not change our economic thresholds from the analysis done in our proposed rule; however, the calculations behind these thresholds were re-evaluated to make sure they remained appropriate.

The high economic threshold was set at $20 million or more, based on an estimate of 3 percent of total revenue for activities associated with Area 2, the area with the highest estimated revenues and costs in this final designation. The economic threshold between medium and low economic costs was set at $700,000 based on the mid-point cost per area. A very low cost threshold was set at less than $25,000.

Each of the three areas evaluated were rated as having a medium economic impact (see Table 5). The dollar thresholds do not represent a judgment that areas with medium conservation value are worth no more than $19,999,999, or that areas with very low conservation value ratings are worth no more than $24,999. These thresholds represent the levels at which we believe the economic impact associated with a particular area would outweigh the conservation benefits of designating that area.

Our selection of dollar thresholds was intended to create an efficient process and not because of a judgment about absolute equivalence between a certain dollar amount and the benefit of designation. The statute directs us to balance dissimilar interests, and it emphasizes the discretionary nature of the weight to give any impact and the decision to exclude.

To weigh the benefits of designation against the benefits of exclusion, we compared the conservation benefit of designation against the economic benefit of exclusion. Areas were determined to be eligible for exclusion based on economic impacts using one simple decision rule: An area was eligible for exclusion based on economic impacts if the economic benefit of exclusion is greater than the conservation benefit of designation. The dollar thresholds and decision rule provided a relatively simple process for identifying specific areas warranting consideration for exclusion. Table 5 below provides information regarding each area's eligibility for exclusion based on our analysis.

As shown in Table 5, Areas 1, 2, and 7 are not eligible for exclusion based on economic benefits of exclusion, as these benefits do not directly outweigh the conservation benefit of designation. Areas 1, 2 and 7 all scored a high Benefit of Designation score. Area 1 scored a medium Economic Benefit of Exclusion, and Areas 2 and 7 scored a low Economic Benefit of Exclusion. Therefore for each of these areas the Benefit of Designation outweighs the Economic Benefit of Exclusion. NMFS has therefore determined that these 3 areas are not Eligible for exclusion based on economic impacts.

TABLE 5—COMPARISON OF THE ECONOMIC BENEFITS OF EXCLUSION AND THE CONSERVATION BENEFITS OF DESIGNATION, INDICATING WHICH AREAS ARE ELIGIBLE FOR EXCLUSION BASED ON ECONOMIC IMPACTS.

Areas	Mid-point of annualized cost	Economic benefit of exclusion	Conservation benefit of designation	Eligible for exclusion based on economic impacts?
1	$4,125,000	Medium	High	No.
2	238,000	Low	High	No.
7	276,000	Low	High	No.

Note: The cost estimates above do not include estimated costs for oil spill response, power plants, LNG or wind energy projects. See the economic report for more details.

Exclusions Based on Impacts on National Security

Section 4(b)(2) of the ESA directs the Secretary to consider possible impacts on national security when determining critical habitat. Discussions with the DOD indicated that there is an overlap between the areas originally proposed as critical habitat and areas off the Washington State and Southern California coasts where the U.S. Navy conducts training exercises. DOD proposed exclusion of the overlap areas from critical habitat designation based on national security. During this time frame NMFS revised its critical habitat designation to include only one Primary Constituent Element (PCE), the prey PCE. As required by section 4(b)(8) of the ESA, NMFS briefly evaluated and described in this final rule to the maximum extent practicable, those activities that might occur within the areas designated that may destroy or adversely modify critical habitat designated or be affected by such designation. NMFS concluded that the Navy's present training activities are not the types of activities which may adversely modify critical habitat designated for the leatherback, specifically the prey PCE, or likely to be affected by the designation. As a result, NMFS found that the present Navy training activities are not likely to be affected by this designation of critical habitat. Because designation is not likely to affect Navy activities, NMFS concluded that the designation of critical habitat will not cause an appreciable impact on national security, and therefore the benefits of exclusion do not outweigh the benefits of designation. No exclusion based on impacts to national security was warranted.

Exclusions Based on Other Relevant Impacts

As noted, we are required to consider other relevant impacts of designating a particular area as critical habitat before a final designation. In the proposed rule, we explained that impacts to tribes, particularly those related to tribal sovereignty over management of natural resources on tribal lands and maintenance of relationships for cooperative conservation of such resources, were relevant impacts for evaluation in the ESA 4(b)(2) analysis to determine whether tribal lands were eligible for exclusion. We considered the impacts to tribal lands and resources and the relationship between the agency and affected Tribes. Based on comments from and coordination and consultation with federally recognized indian tribes in response to the proposed rule, we re-evaluated the potential impacts to affected Tribes with a focus on tribal

lands and access to usual and accustomed areas for fishing in accordance with established treaty rights.

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. Pursuant to these authorities lands have been retained by Indian Tribes or have been set aside for tribal use. These lands are managed by Indian Tribes in accordance with tribal goals and objectives within the framework of applicable treaties and laws. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, outlines the responsibilities of the Federal Government in matters affecting tribal interests. Indian lands are those defined in the Secretarial Order ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'' (June 5, 1997), including: (1) Lands held in trust by the United States for the benefit of any Indian tribe; (2) land held in trust by the United States for any Indian Tribe or individual subject to restrictions by the United States against alienation; (3) fee lands, either within or outside the reservation boundaries, owned by the tribal government; and (4) fee lands within the reservation boundaries owned by individual Indians. When we consult with Tribes on matters affecting tribal interests including land and natural resources, we must do so on a government-to-government basis in recognition of the 1997 Secretarial Order.

As described in the proposed rule and documentation supporting this final rule, we acknowledge that the best available information on habitat use by leatherback turtles in the northeast Pacific Ocean is limited. As such we reviewed maps indicating that some Indian lands along the Washington coast likely overlap with areas under consideration as critical habitat for leatherback turtles. These overlapping areas consist of a narrow intertidal zone associated with several coastal Indian reservations, from the line of mean lower low water (the shoreward extent of the proposed critical habitat) to the extent of tribal land demarcated by the line of extreme low water. In consideration of Executive Order 13175 ''Consultation and Coordination with Indian Tribal Governments'' and the 1997 Secretarial Order, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act,'' we made numerous additional attempts to meet with members of the Makah and Quileute tribes. A government-to-government meeting with the Makah tribe was held in June 2011 to discuss the designation.

Between the proposed and final rule, we re-assessed several spatial and biological elements of the proposed critical habitat designation and determined that the line of extreme low water more accurately depicts the shoreward extent of areas occupied by leatherback turtles (i.e., they are foraging in these waters and not accessing the beaches). Given this boundary change, there is no longer an overlap between designated areas and areas that meet the definition of Indian lands. Thus, the benefits of exclusion identified in the proposed rule related to avoidance of impacts to tribal lands and related tribal sovereignty and management of resources are substantially reduced or avoided altogether with the absence of tribal lands in the final designation.

NMFS acknowledges the presence of tribal usual and accustomed fishing grounds within Area 2. We considered the tribal concerns and concluded that the benefits of excluding these particular usual and accustomed fishing areas do not outweigh the benefits of designating these areas as critical habitat for leatherback turtles. The tribes have not identified any treaty-related activities in their usual and accustomed fishing areas that are likely to affect jellyfish and therefore likely to be affected by a critical habitat designation. Moreover, usual and accustomed fishing areas, while vitally important to the exercise of treaty-secured fishing rights, are not reserved by the United States for the exclusive use of a tribe, nor are they subject to the sovereign authority of a tribal government, as is the case with Indian lands.

As required by section 4(b)(8) of the ESA, NMFS briefly evaluated and described in this final rule, to the maximum extent practicable, those activities that might occur within the areas designated that may destroy or adversely modify critical habitat designated or be affected by such designation. NMFS concluded that the tribes' present fishing activities are not the types of activities that may adversely modify critical habitat designated for the leatherback, specifically the prey PCE, or likely to be affected by the designation.

For these reasons, we conclude there is no impact of a critical habitat designation to treaty-secured fishing rights, and little impact to tribal sovereignty and self-governance. Given the high conservation value of Area 2, we have determined that the benefits of excluding the area overlapping with usual and accustomed fishing grounds do not outweigh the benefits of including this area in the final designation. We are making no exclusions under 4(b)(2) based on other relevant impacts.

Critical Habitat Designation

Based on the information provided below, the public comments received and the further analysis that was done since the proposed rulemaking, we hereby designate as critical habitat for leatherbacks Areas 1, 2, and 7, which include approximately 41,913 square miles (108,558 square km) of marine habitat in California, Oregon, and Washington and offshore Federal waters. The designated critical habitat areas contain the physical or biological feature—prey species—essential to the conservation of the species that may require special management considerations or protection. We are not exercising our discretion to exclude any areas from this designation based on economic, national security or other relevant impacts.

Effects of Critical Habitat Designation

Section 7(a)(2) of the ESA requires Federal agencies to insure that any action authorized, funded, or carried out by the agency (agency action) does not jeopardize the continued existence of any threatened or endangered species or destroy or adversely modify designated critical habitat. When a species is listed or critical habitat is designated, Federal agencies must consult with NMFS on any agency actions to be conducted in an area where the species is present and that may affect the species or its critical habitat. During the consultation, we would evaluate the agency action to determine whether the action may adversely affect listed species or critical habitat and issue our findings in a biological opinion or concurrence letter. If we conclude in the biological opinion that the agency action would likely result in the destruction or adverse modification of critical habitat, we would also recommend any reasonable and prudent alternatives to the action. Reasonable and prudent alternatives (defined in 50 CFR 402.02) are

alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid the destruction or adverse modification of critical habitat.

Regulations (50 CFR 402.16) require Federal agencies that have retained discretionary involvement or control over an action, or where such discretionary involvement or control is authorized by law, to reinitiate consultation on previously reviewed actions in instances where: (1) Critical habitat is subsequently designated; or (2) new information or changes to the action may result in effects to critical habitat not previously considered in the biological opinion. Consequently, some Federal agencies may request reinitiation of a consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy critical habitat. Activities subject to the ESA section 7 consultation process include activities on Federal lands and activities on private or state lands requiring a permit from a Federal agency (e.g., an ESA section 10(a)(1)(B) permit from NMFS) or some other Federal action, including funding (e.g., Federal Highway Administration (FHA)). ESA section 7 consultation would not be required for Federal actions that do not affect listed species or critical habitat and for actions on non-federal and private lands that are not federally funded, authorized, or carried out.

Activities That May Be Affected

Section 4(b)(8) of the ESA requires, to the maximum extent practicable, in a final regulation to designate or revise critical habitat, an evaluation and brief description of those activities (whether public or private) that may destroy or adversely modify such habitat or that may be affected by such designation. A variety of activities may affect leatherback critical habitat and, when carried out, funded, or authorized by a Federal agency, will require an ESA section 7 consultation. These Federal actions and/or regulated activities (detailed in the economic report and in previous sections of this rule) include: regulation of point source pollution, particularly NPDES facilities and pesticide application (e.g., EPA); oil spill response (e.g., U.S. Coast Guard and EPA have response authorities); power plants (e.g., Nuclear Regulatory Commission (NRC) regulates commercial nuclear power); desalination plants (e.g., EPA regulates discharge/USCG and U.S. Army Corps of Engineers are involved with permitting or approving structures or placing fill that may affect navigation); tidal/wave/wind energy (e.g., FERC or BOEM permitting, licensing or leasing); and LNG projects (e.g., FERC or USCG permitting requirement). Private entities' implementation of activities related to the foregoing categories could be affected to the extent those activities rely on federal funding, permitting or other authorization. These activities would need to be evaluated with respect to their potential to destroy or adversely modify critical habitat. Formal consultation under section 7(a)(2) of the ESA could result in changes to the activities to minimize adverse impacts to critical habitat or avoid destruction or adverse modification of such habitat. We believe this final rule will provide Federal agencies, private entities, and the public with clear notification of critical habitat for leatherback sea turtles and the boundaries of such habitat. This designation will also allow Federal agencies and others to evaluate the potential effects of their activities on critical habitat to determine if an ESA section 7 consultation with NMFS is needed.

Information Quality Act and Peer Review

The data and analyses supporting this designation have undergone a pre-dissemination review and have been determined to be in compliance with applicable information quality guidelines implementing the Information Quality Act (IQA) (Section 515 of Public Law 106–554). In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review pursuant to the IQA. The Bulletin established minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation with regard to certain types of information disseminated by the Federal Government. The peer review requirements of the OMB Bulletin apply to influential or highly influential scientific information disseminated on or after June 16, 2005. To satisfy our requirements under the OMB Bulletin, we obtained independent peer review of the Biological and Economic Reports that support the designation of critical habitat for the leatherback sea turtle and incorporated the peer review comments prior to and within this rulemaking.

Classification

Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this final rule is significant under Executive Order 12866. An economic report and 4(b)(2) report have been prepared to support the exclusion process under section 4(b)(2) of the ESA and our consideration of alternatives to rulemaking.

National Environmental Policy Act

We have determined that an environmental analysis as provided for under the National Environmental Policy Act of 1969 for critical habitat designations made pursuant to the ESA is not required. See *Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S.Ct 698 (1996).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency publishes a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis describing the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). We have prepared a final regulatory flexibility analysis (FRFA). This document is available upon request (see **ADDRESSES**), via our Web site *http://www.nmfs.noaa.gov/pr/species/turtles/leatherback.htm#documents,* or via the Federal eRulemaking web site at *http://www.regulations.gov.* The results of the FRFA are summarized below. A description of the action, why it is being considered, and the objectives of and legal basis for this action are contained in the preamble of this rule.

The impacts to small businesses were assessed for the following six activities: NPDES activities; agriculture; oil spills; power plants; tidal, wave, and wind energy projects; and LNG projects. The impacts on small entities were not assessed for desalination plants facilities due to lack of information.

At the present time, little information exists regarding the cost structure and operational procedures and strategies in the sectors (noted above) that may be directly affected by the critical habitat designation. In addition, a great deal of uncertainty exists with regard to how potentially regulated entities will attempt to avoid the destruction or adverse modification of critical habitat. This is because relatively little data

exist on the effects to leatherback sea turtles and their prey from aspects of the activities identified. With these limitations in mind, we considered which of the potential economic impacts we analyzed might affect small entities. These estimates should not be considered exact estimates of the impacts of potential critical habitat to individual businesses.

Small entities are defined by the Small Business Administration size standards for each activity type. We identified a total of 3,385 entities as small businesses involved in the activities listed above that would most likely be affected by the critical habitat designation. The majority (≤ 97 percent) of these entities would be considered small entities. The estimated economic impacts on small entities vary depending on the activity type and location. The estimated annualized costs associated with ESA section 7 consultations incurred per small entity range from $0 to $25,350 per area-activity type combination, with the largest annualized impacts estimated for entities involved in tidal and wave energy projects ($0 to $25,350). These amounts are most likely overestimates, as they are based on assumptions that such actions may not be able to proceed if a consultation finds that the project adversely modified critical habitat.

As required by the RFA (as amended by the SBREFA), we considered various alternatives to the critical habitat designation for the leatherback. The first alternative, not designating critical habitat for leatherbacks, would impose no economic, national security, or other relevant impacts, but would not provide any conservation benefit to the species. This alternative was rejected because such an approach does not meet the legal requirements of the ESA and would not provide for the conservation of the species if such benefits could be gained through designation.

The second alternative, designating a subset of the areas eligible as critical habitat, was also rejected. The determination of which particular areas to exclude, if any, is subject to the Secretary's discretion after consideration of impacts of the designation in accordance with section 4(b)(2) of the ESA. After evaluating each of our particular areas through a ESA section 4(b)(2) analysis, it was determined that the economic benefits of exclusion did not outweigh the conservation benefit to the species of designation, therefore, we determined that no exclusions would be made.

The third alternative, our preferred alternative, of designating all potential critical habitat areas (i.e., no areas excluded) was considered and accepted. We accepted this alternative after conducting an ESA section 4(b)(2) analysis, and determining that the economic benefits of exclusion did not outweighed the conservation benefit to the species. We selected this third alternative because it would result in a critical habitat designation that provides for the conservation of the species, and meets ESA and joint NMFS and USFWS regulations concerning critical habitat at 50 CFR part 424.

Coastal Zone Management Act

Section 307(c)(1) of the Federal Coastal Zone Management Act of 1972 requires that all Federal activities that affect land or water use or natural resources of the coastal zone be consistent with approved state coastal zone management programs to the maximum extent practicable. We have determined that this designation of critical habitat is consistent to the maximum extent practicable with the enforceable policies of approved Coastal Zone Management Programs of California, Oregon, and Washington. The determination was submitted for review by the responsible agencies in the aforementioned states, and no objections were received.

Federalism

Executive Order 13132 requires agencies to take into account any Federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt state law, or impose substantial direct compliance costs on state and local governments (unless required by statute). We have determined that the designation of critical habitat for the leatherback sea turtle under the ESA does not have federalism implications. Consistent with the requirements of Executive Order 13132, recognizing the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, and in keeping with Department of Commerce policies, the Assistant Secretary for Legislative and Intergovernmental Affairs has provided notice of this designation and requested comments from the appropriate officials in states where leatherback sea turtles occur.

Paperwork Reduction Act

This final rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act, we make the following findings: (a) The designation of critical habitat does not impose an ''enforceable duty'' on state, local, tribal governments or the private sector and therefore does not qualify as a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an ''enforceable duty'' upon non-federal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' Under the ESA, the only regulatory effect is that Federal agencies must ensure that their actions do not jeopardize the continued existence of the species or destroy or adversely modify critical habitat under section 7. While non-federal entities that receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid jeopardy and the destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; (b) We conclude that this final rule would not significantly or uniquely affect small governments because it is not likely to produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. In addition, the designation of critical habitat imposes no obligations on local, state or tribal governments. Therefore, a Small Government Agency Plan is not required.

Takings

Under Executive Order 12630, Federal agencies must consider the effects of their actions on constitutionally protected private property rights and avoid unnecessary takings of property. A taking of property includes actions that result in physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use. In accordance with Executive Order 12630, the critical habitat designation does not pose significant takings implications. A takings implication assessment is not required here. This designation affects only Federal agency

actions (i.e., those actions authorized, funded, or carried out by Federal agencies). Therefore, the critical habitat designation does not affect landowner actions that do not require Federal funding or permits. Additionally, this final critical habitat designation does not preclude the development of Habitat Conservation Plans and issuance of incidental take permits for non-Federal actions.

Government to Government Relationships With Tribes

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, outlines the responsibilities of the Federal Government in matters affecting tribal interests. If NMFS issues a regulation with tribal implications (defined as having a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes) we must consult with those governments or the Federal Government must provide funds necessary to pay direct compliance costs incurred by tribal governments.

The critical habitat designation does not overlap with Indian lands (see Exclusions for Indian Lands section above). However, we acknowledge the presence of tribal usual and accustomed fishing grounds within Area 2. During both the public comment period and the government-to-government consultation process we heard the concerns of coastal tribes related to the overlap of critical habitat and the tribal usual and accustomed fishing areas. NMFS briefly evaluated and described in this final rule, to the maximum extent practicable, those activities that might occur within the areas designated that may destroy or adversely modify critical habitat designated or be affected by such designation. NMFS concluded that the tribes, present fishing activities are not the types of activities that may adversely modify critical habitat designated for the leatherback, specifically the prey PCE, or likely to be affected by the designation.

For these reasons, we considered the tribal concerns and concluded that the benefits of excluding these particular usual and accustomed fishing areas do not outweigh the benefits of designating these areas as critical habitat for leatherback turtles. The tribes have not identified any treaty-related activities in their usual and accustomed fishing areas that are likely to affect jellyfish and therefore likely to be affected by a critical habitat designation. Moreover, usual and accustomed fishing areas, while vitally important to the exercise of treaty-secured fishing rights, are not reserved by the United States for the exclusive use of a tribe, nor are they subject to the sovereign authority of a tribal government, as is the case with Indian lands. Additionally, other activities may occur within the tribal usual and accustomed fishing areas that may require a section 7 consultation for leatherback critical habitat; therefore, we conclude there is no impact of a critical habitat designation to treaty-secured fishing rights, and little impact to tribal sovereignty and self-governance.

We acknowledge that the Makah Indian Tribe disagrees with our assessment and is concerned about potential impacts to the Tribe's fishing rights. We will continue to coordinate with the Tribe as we implement our responsibilities under section 7 with respect to leatherback turtles, in the event a conflict does in fact arise between conservation of leatherback critical habitat and the exercise of tribal rights.

Energy Effects

Executive Order 13211 requires agencies to prepare a Statement of Energy Effects when undertaking a ''significant energy action.'' According to Executive Order 13211, ''significant energy action'' means any action by an agency that is expected to lead to the promulgation of a final rule or regulation that is a significant regulatory action under Executive Order 12866 and is likely to have a significant adverse effect on the supply, distribution, or use of energy. We have considered the potential impacts of this action on the supply, distribution, or use of energy (see economic report). Activities associated with the supply, distribution, or uses of energy that may be affected by the critical habitat designation include the operation of: (1) Power plants; (2) proposed and potential tidal, wave and wind energy projects; and (3) liquefied natural gas projects.

The final economic analysis identified seven power plants that may be affected by this critical habitat designation. Future management and required project modifications for leatherback critical habitat related to power plants under ESA section 7 consultation include: cooling of thermal effluent before release to the environment; treatment of any contaminated waste materials; and modifications associated with permits issued under NPDES. All of the power plants are located on the California coast and are subject to existing regulations through the NRC and California Energy Commission.

The economic analysis identified eleven tidal, wave, or wind energy projects that may be affected by this critical habitat designation. Nine of these energy projects have received preliminary permits from the FERC, one of the projects has a pending application and one of the projects is proposed. Given the necessary timeframes for project construction, it may be reasonable to assume that this set of projects will incur modification costs related to leatherback critical habitat within the next 20 years. However, it should also be noted that other new permit applications are likely to be filed in the future, and that rate of application may be increasing.

Given that these projects are in their preliminary stages, it is not clear what effects the projects will have on habitats and natural resources, nor what effects a critical habitat designation would have on these projects. The exact nature of habitat impacts is difficult to predict; however, possible impacts to features of the potential leatherback critical habitat include disturbance to prey species during their benthic polyp stage.

The economic analysis identified two LNG projects that may be affected by leatherback critical habitat. FERC regulates LNG projects, and there is one proposed LNG project and one potential LNG project within the analyzed areas. Like the alternative energy projects, there is a high degree of uncertainty regarding whether these proposed projects will be implemented. As a result, it is unclear at this time what effects a critical habitat designation would have on these proposed LNG projects. However, available information indicates that project modifications may include: biological monitoring; spatial restrictions on project installation; and specific measures to respond to catastrophes. We have determined that the energy effects of this rule are unlikely to exceed the energy impact thresholds identified in Executive Order

13211 and that this rulemaking is, therefore, not a significant energy action.

References Cited

A complete list of all references cited in this rule making can be found on our Web site at *http://www.nmfs.noaa.gov/pr/species/turtles/leatherback.htm#documents,* and is available upon request from the NMFS [see **ADDRESSES**].

List of Subjects in 50 CFR Part 226

Endangered and threatened species.

Dated: January 11, 2012.

Eric C. Schwaab,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, this final rule amends part 226, title 50 of the Code of Federal Regulations as set forth below:

PART 226—DESIGNATED CRITICAL HABITAT

■ 1. The authority citation of part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

■ 2. Revise § 226.207, to read as follows:

§ 226.207 Critical habitat for leatherback turtles (*Dermochelys coriacea*).

Critical habitat is designated for leatherback turtles as described in this section. The textual descriptions of critical habitat in this section are the definitive source for determining the critical habitat boundaries. The overview map is provided for general guidance purposes only and not as a definitive source for determining critical habitat boundaries.

(a) The waters adjacent to Sandy Point, St. Croix, U.S. Virgin Islands, up to and inclusive of the waters from the hundred fathom curve shoreward to the level of mean high tide with boundaries at 17°42′12″ N. and 64°50′00″ W.

(b) All U.S. coastal marine waters within the areas in paragraphs (b)(1) and (2) of this section and as described in paragraphs (b)(3) and (4) of this section and depicted in paragraph (b)(5) of this section:

(1) California.

(i) The area bounded by Point Sur (36°18′22″ N./121°54′9″ W.) then north along the shoreline following the line of extreme low water to Point Arena, California (38°57′14″ N./123°44′26″ W.) then west to 38°57′14″ N./123°56′44″ W. then south along the 200 meter isobath to 36°18′46″ N./122°4′43″ W. then east to the point of origin at Point Sur.

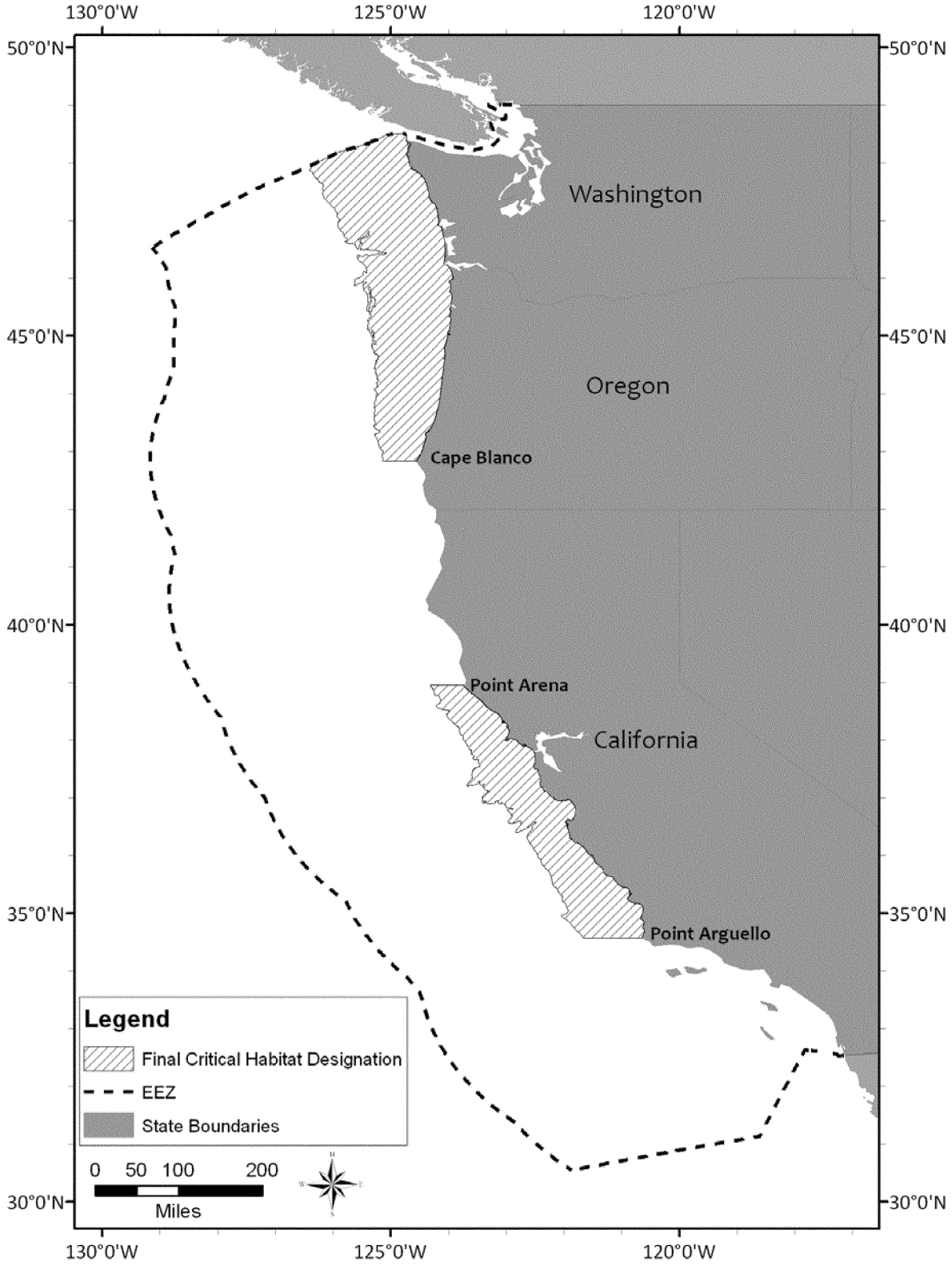
(ii) Nearshore area from Point Arena, California, to Point Arguello, California (34°34′33″ N./120°38′41″ W.), exclusive of Area 1 (see above) and offshore to a line connecting 38°57′14″ N./124°18′36″ W. and 34°34′32″ N./121°39′51″ W along the 3000 meter isobath.

(2) Oregon/Washington. The area bounded by Cape Blanco, Oregon (42°50′4″ N./124°33′44″ W.) north along the shoreline following the line of extreme low water to Cape Flattery, Washington (48°23′10″ N./124°43′32″ W.) then north to the U.S./Canada boundary at 48°29′38″ N./124°43′32″ W. then west and south along the line of the U.S. Exclusive Economic Zone to 47° 57′38″ N./126° 22′54″ W. then south along a line approximating the 2,000 meter isobath that passes through points at 47° 39′55″ N./126°13′28″ W., 45°20′16″ N./125°21′ W. to 42°49′59″ N./125°8′10″ W. then east to the point of origin at Cape Blanco.

(3) Critical habitat extends to a water depth of 80 meters from the ocean surface and is delineated along the shoreline at the line of extreme low water, except in the case of estuaries and bays where COLREGS lines (defined at 33 CFR part 80) shall be used as the shoreward boundary of critical habitat.

(4) Primary Constituent Elements. The primary constituent element essential for conservation of leatherback turtles is the occurrence of prey species, primarily scyphomedusae of the order Semaeostomeae (*Chrysaora, Aurelia, Phacellophora,* and *Cyanea*), of sufficient condition, distribution, diversity, abundance and density necessary to support individual as well as population growth, reproduction, and development of leatherbacks.

(5) A map of critical habitat for leatherback sea turtles follows.



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LIST OF PUBLIC LAWS

This is the final list of public bills from the first session of the 112th 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. 1540/P.L. 112–81

National Defense Authorization Act for Fiscal Year 2012 (Dec. 31, 2011; 125 Stat. 1298)

H.R. 515/P.L. 112–82

Belarus Democracy and Human Rights Act of 2011 (Jan. 3, 2012; 125 Stat. 1863)

H.R. 789/P.L. 112–83

To designate the facility of the United States Postal Service located at 20 Main Street in Little Ferry, New Jersey, as the "Sergeant Matthew J. Fenton Post Office". (Jan. 3, 2012; 125 Stat. 1869)

H.R. 1059/P.L. 112–84

To protect the safety of judges by extending the authority of the Judicial Conference to redact sensitive information contained in their financial disclosure reports, and for other purposes. (Jan. 3, 2012; 125 Stat. 1870)

H.R. 1264/P.L. 112–85

To designate the property between the United States Federal Courthouse and the Ed Jones Building located at 109 South Highland Avenue in Jackson, Tennessee, as the "M.D. Anderson Plaza" and to authorize the placement of a historical/identification marker on the grounds recognizing the achievements and philanthropy of M.S. Anderson. (Jan. 3, 2012; 125 Stat. 1871)

H.R. 1801/P.L. 112–86

Risk-Based Security Screening for Members of the Armed Forces Act (Jan. 3, 2012; 125 Stat. 1874)

H.R. 1892/P.L. 112–87

Intelligence Authorization Act for Fiscal Year 2012 (Jan. 3, 2012; 125 Stat. 1876)

H.R. 2056/P.L. 112–88

To instruct the Inspector General of the Federal Deposit Insurance Corporation to study the impact of insured depository institution failures, and for other purposes. (Jan. 3, 2012; 125 Stat. 1899)

H.R. 2422/P.L. 112–89

To designate the facility of the United States Postal Service located at 45 Bay Street, Suite 2, in Staten Island, New York, as the "Sergeant Angel Mendez Post Office". (Jan. 3, 2012; 125 Stat. 1903)

H.R. 2845/P.L. 112–90

Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 (Jan. 3, 2012; 125 Stat. 1904)

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