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FEDERAL REGISTER

Vol. 77 Wednesday,
No. 95 May 16, 2012

Pages 28757–29206

OFFICE OF THE FEDERAL REGISTER

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

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WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, June 12, 2012
9 a.m.–12:30 p.m.

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

RESERVATIONS: (202) 741–6008

Printed on recycled paper.

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Presidential Documents

Title 3—

The President

Memorandum of April 20, 2012

Delegation of Reporting Functions Specified in Section 1235(c) of the National Defense Authorization Act for Fiscal Year 2012

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3 of the United States Code, I hereby delegate to you the reporting functions conferred upon the President by section 1235(c) of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81).

You are authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, April 20, 2012

[FR Doc. 2012–11990
Filed 5–15–12; 8:45 am]
Billing code 4710–10–P

Presidential Documents

Proclamation 8816 of May 11, 2012

Military Spouse Appreciation Day, 2012

By the President of the United States of America

A Proclamation

For more than two centuries, our freedom has been safeguarded by brave patriots who have stepped forward and sworn an oath to defend the principles upon which our Republic was founded. Alongside these selfless heroes, our Nation's military spouses also offer tremendous service and make great sacrifices for our country. On Military Spouse Appreciation Day, we recognize the important role our military families play in keeping our Armed Forces strong and our country safe.

Our military spouses are a vital part of communities across America and around the world. We know them as our neighbors and friends, colleagues and coaches, teachers and nurses. They move from duty station to duty station, picking up their families and careers whenever their country asks. They keep their households running while dealing with the strain of deployment. They support our wounded warriors, preserve the legacies of our fallen, and find ways to give back to our country day after day.

The strength and readiness of America's military depends on the well-being of our military spouses and families, and my Administration remains committed to ensuring they have the support and resources they deserve. Across Federal agencies, we have made major investments in education and childcare for military families, increased the availability of mortgage assistance to military homeowners, and extended new opportunities for veterans and their loved ones under the Post-9/11 GI Bill.

Inspired by the stories of our military spouses' resilience and service, First Lady Michelle Obama and Dr. Jill Biden launched the Joining Forces initiative to encourage all Americans to recognize, honor, and serve our military families. In only 1 year, Joining Forces has rallied American businesses to hire tens of thousands of veterans and military spouses, schools have improved educational opportunities for military children, and the medical community has vowed better care for military families. And from small towns to big cities, Americans have shown their gratitude by pledging hours of service and taking on projects that support military families in their communities. To learn more and get involved, visit www.JoiningForces.gov.

America's service members represent only one percent of our population, but they shoulder the responsibility of protecting our entire Nation and defending the ideals we hold dear. Just as we bear a sacred obligation to serve our men and women in uniform as well as they have served us, we share an equal responsibility to care for their extraordinary spouses who are heroes on the home front. On Military Spouse Appreciation Day, let us honor the unparalleled contributions of our military spouses and reaffirm our commitment to ensuring the priorities of our military families remain the priorities of our Nation.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 11, 2012, as Military Spouse Appreciation Day. I call upon the people of the United States to honor military spouses with appropriate ceremonies and activities.

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

[FR Doc. 2012–11991
Filed 5–15–12; 8:45 am]
Billing code 3295–F2–P

Presidential Documents

Proclamation 8817 of May 11, 2012

Mother's Day, 2012

By the President of the United States of America

A Proclamation

Mothers are cornerstones of our families and our communities. On Mother's Day, we honor the remarkable women who strive and sacrifice every day to ensure their children have every opportunity to pursue their dreams.

Our Nation first came together to celebrate Mother's Day on May 11, 1913, with the introduction of a House Resolution requesting President Woodrow Wilson, Members of Congress, and officials across the Federal Government wear white carnations in honor of America's mothers. Today, we continue to mark Mother's Day by paying tribute to the women who shape our characters and set our families up for success. Through their example, our children learn the principles of hard work, compassion, service, and personal responsibility. Through their encouragement and unconditional support, they instill the confidence and values so vital to our children's success.

Mothers raise children under an array of circumstances, and many work long hours inside and outside the home balancing myriad demands. Mothers are leaders and trailblazers in every part of our society—from classrooms to boardrooms, at home and overseas, on the beat and on the bench. We celebrate the efforts of all our Nation's mothers, and we recognize that when more households are relying on women as primary or co-breadwinners, the success of women in our economy is essential to the success of our families, our communities, and our country. That is why I created the White House Council on Women and Girls as one of my first acts in office—to ensure we integrate the needs of women and girls into every decision we make. I was proud to sign the Lilly Ledbetter Fair Pay Act, which continues to help women secure equal pay for equal work, and my Administration continues to promote workplace flexibility so no mother has to choose between her job and her child. And because of the Affordable Care Act, women finally have more power to make choices about their health care, and they have expanded access to a wide variety of preventive services such as mammograms at no additional cost.

Today, let us pay respect to mothers across America by embracing the women who continue to guide and inspire us, and by holding fast to the memories of those who live on in our hearts.

The Congress, by a joint resolution approved May 8, 1914 (38 Stat. 770), has designated the second Sunday in May each year as ''Mother's Day'' and requested the President to call for its appropriate observance.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim May 13, 2012, as Mother's Day. I urge all Americans to express love and gratitude to mothers everywhere, and I call upon all citizens to observe this day with appropriate programs, ceremonies, and activities.

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

[FR Doc. 2012–11992
Filed 5–15–12; 8:45 am]
Billing code 3295–F2–P

Rules and Regulations

Federal Register

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Wednesday, May 16, 2012

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

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 117, 119, and 121

[Docket No. FAA–2009–1093; Amdt. Nos. 117–1A, 119–16A, 121–357A]

RIN 2120–AJ58

Flightcrew Member Duty and Rest Requirements; Correction

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting the final flightcrew member duty and rest rule published on January 4, 2012. In that rule, the FAA amended its existing flight, duty and rest regulations applicable to certificate holders and their flightcrew members operating certain domestic, flag, and supplemental operations. This document corrects the effective date and several errors in the codified text of the final flightcrew member duty and rest rule.

DATES: The effective date for the rule published January 4, 2012, at 77 FR 330, is corrected to January 4, 2014. The corrections in this document are effective January 4, 2014.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact Dale E. Roberts, Air Transportation Division (AFS–200), Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–5749; email *dale.e.roberts@faa.gov.*

For legal questions concerning this action, contact Alex Zektser, AGC–220, Office of Chief Counsel, Regulations Division, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–3073; email: *alex.zektser@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On January 4, 2012, the FAA published a final rule entitled, ''Flightcrew Member Duty and Rest Requirements'' (77 FR 330). In that rule, the FAA created a new part, part 117, which replaced the then-existing flight, duty, and rest regulations for part 121 passenger operations. As part of this rulemaking, the FAA also applied the new part 117 to certain part 91 operations, and it permitted all-cargo operations operating under part 121 to voluntarily opt into the part 117 flight, duty, and rest regulations.

After the final rule was published, the FAA discovered several errors in the regulatory text of the rule. These errors, and the corresponding corrections, are as follows.

Corrections

1. Effective Date

The final rule has a 2-year effective date. The preamble to the final rule emphasizes that ''[t]he FAA has determined that two years is a substantial period of time, and that a longer effective date is unwarranted'' (77 FR 392). Because the final rule was published on January 4, 2012, the effective date of the rule should be January 4, 2014 and not January 14, 2014. This rule has been corrected accordingly.

2. Definition of Flight Duty Period

The punctuation in the last sentence of this definition has been corrected so that the sentence ends in a period and not a colon.

3. Definition of Theater

The final rule defines theater as ''a geographical area where local time at the flightcrew member's flight duty period departure point and arrival point differ by more than 60 degrees longitude.'' This correction removes the phrase ''local time'' from this regulatory text because degrees longitude is a measure of distance and not time. In addition, to accurately depict the proper geographical area intended by the rule, the distance between departure and arrival points in a theater should differ by ''no more than'' 60 degrees longitude instead of ''more than'' 60 degrees longitude. Accordingly, the definition of theater has been corrected to specify that the distance between arrival and departure points in a single theater cannot exceed 60 degrees longitude.

4. Flight Duty Period Extension Reporting in § 117.19(b)(4)

The preamble to the final rule specifies that a certificate holder is only required to report FDP extensions that exceed the pertinent FDP limits by more than 30 minutes (77 FR 370–71). Accordingly, subsection 117.19(b)(4) has been corrected to clarify that a report for an FDP extension is only necessary if the FDP exceeded the pertinent FDP limit by more than 30 minutes.

5. Cumulative Limitations in § 117.23(b)

The cumulative flight-time limitations in § 117.23(b) have been corrected to clarify that a flightcrew member cannot accept an assignment that would cause that crewmember's total flight time to exceed either 100 hours in any 672 consecutive hours or 1,000 hours in any 365 consecutive calendar day period.

6. Rest Period in § 117.25(b)

Subsection 117.25(b) in the final rule states that ''[b]efore beginning any reserve or flight duty period a flightcrew member must be given at least 30 consecutive hours free from all duty in any 168 consecutive hour period.'' This section has been corrected to clarify that the ''168 consecutive hour period'' is the period that precedes the beginning of the flight duty period.

7. Emergency and Government Sponsored Operations in § 117.29

Section 117.29 applies to certain emergency and government-sponsored operations. The preamble to the final rule explains that, in certain situations, this section allows ''the FDP and the flight time for a particular operation to be extended if deemed necessary by the pilot-in-command'' (77 FR 387). However, the regulatory text of § 117.29 provided for an FDP extension but inadvertently did not apply the extension to flight-time. Accordingly, the regulatory text of this section has been corrected to provide for a flight-time extension in addition to an FDP extension. In addition, subsection 117.29(g) has been corrected so that it cross-references the correct paragraph of § 117.29.

8. Flight attendant duty period limitations and rest requirements in § 121.467(c)

The final rule intended to change this subsection so that it cross-references part 117 instead of subparts Q, R, and S, as the pertinent flight, duty, and rest provisions have been moved out of subparts Q, R, and S and into part 117. However, the regulatory text of the final rule also inadvertently deleted a number of other provisions that were in this subsection. As such, § 121.467(c) has been corrected so that this subsection cross-references part 117, but retains its other provisions. The FAA notes that, pursuant to § 117.13, an unaugmented crew of flight attendants who operate under part 117 would be subject to the flight duty period limits set out in Table B.

Accordingly, in the final rule, FR Doc. 2011–33078, published on January 4, 2012 (77 FR 330), make the following corrections:

Effective Date [Corrected]

■ 1. On page 330, in the first column, the text of **DATES** is corrected to read as follows:

DATES: Effective January 4, 2014.

■ 2. On page 398, in the third column, in § 117.3, the definition of ''flight duty period (FDP)'' is corrected to read as follows:

§ 117.3 Definitions.

* * * * *

Flight duty period (FDP) means a period that begins when a flightcrew member is required to report for duty with the intention of conducting a flight, a series of flights, or positioning or ferrying flights, and ends when the aircraft is parked after the last flight and there is no intention for further aircraft movement by the same flightcrew member. A flight duty period includes the duties performed by the flightcrew member on behalf of the certificate holder that occur before a flight segment or between flight segments without a required intervening rest period. Examples of tasks that are part of the flight duty period include deadhead transportation, training conducted in an aircraft or flight simulator, and airport/standby reserve, if the above tasks occur before a flight segment or between flight segments without an intervening required rest period.

* * * * *

■ 3. On page 399, in the second column, in § 117.3, the definition of ''theater'' is corrected to read as follows:

§ 117.3 Definitions.

* * * * *

Theater means a geographical area in which the distance between the flightcrew member's flight duty period departure point and arrival point differs by no more than 60 degrees longitude.

* * * * *

■ 4. On page 400, in the third column, in § 117.19, paragraph (b)(4) is corrected to read as follows:

§ 117.19 Flight duty period extensions.

* * * * *

(b) * * *

(4) Each certificate holder must report to the Administrator within 10 days any flight duty period that exceeded the maximum flight duty period limits permitted by Tables B or C of this part by more than 30 minutes. The report must contain a description of the circumstances surrounding the affected flight duty period.

■ 5. On page 401, in the first column, in § 117.23, paragraph (b)(1) is corrected to read as follows:

§ 117.23 Cumulative limitations.

* * * * *

(b) * * *

(1) 100 hours in any 672 consecutive hours or

* * * * *

■ 6. On page 401, in the first column, in § 117.25, paragraph (b) is corrected to read as follows:

§ 117.25 Rest Period.

* * * * *

(b) Before beginning any reserve or flight duty period a flightcrew member must be given at least 30 consecutive hours free from all duty within the past 168 consecutive hour period.

* * * * *

■ 7. On the third column of page 401 and the first column of page 402, in § 117.29, paragraphs (b) and (g) are corrected to read as follows:

§ 117.29 Emergency and government sponsored operations.

* * * * *

(b) The pilot-in-command may determine that the maximum applicable flight duty period and/or flight time must be exceeded to the extent necessary to allow the flightcrew to fly to the closest destination where they can safely be relieved from duty by another flightcrew or can receive the requisite amount of rest prior to commencing their next flight duty period.

* * * * *

(g) Each certificate holder must implement the corrective action(s) reported pursuant to paragraph (f)(2) of this section within 30 days from the date of the extended flight duty period and/or the extended flight time.

* * * * *

■ 8. On page 402, in the second and third columns, in § 121.467, correctly revise paragraphs (c) introductory text and (c)(1) to read as follows:

§ 121.467 Flight attendant duty period limitations and rest requirements: Domestic, flag, and supplemental operations.

* * * * *

(c) Notwithstanding paragraph (b) of this section, a certificate holder conducting domestic, flag, or supplemental operations may apply the flightcrew member flight time and duty limitations and rest requirements of part 117 of this chapter to flight attendants for all operations conducted under this part provided that—

(1) The certificate holder establishes written procedures that—

(i) Apply to all flight attendants used in the certificate holder's operation;

(ii) Include the flightcrew member requirements contained in part 117, as appropriate to the operation being conducted, except that rest facilities on board the aircraft are not required;

(iii) Include provisions to add one flight attendant to the minimum flight attendant complement for each flightcrew member who is in excess of the minimum number required in the aircraft type certificate data sheet and who is assigned to the aircraft under the provisions of part 117, as applicable, of this part;

(iv) Are approved by the Administrator and are described or referenced in the certificate holder's operations specifications; and

* * * * *

Issued in Washington, DC, on April 30, 2012.

Rebecca MacPherson,

Assistant Chief Counsel for Regulations, AGC–200.

[FR Doc. 2012–11592 Filed 5–15–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

RIN 1205–AB58

Temporary Non-agricultural Employment of H–2B Aliens in the United States

AGENCY: Employment and Training Administration, Labor.

ACTION: Guidance.

SUMMARY: The Department of Labor (the Department) is providing notice of the judicial order enjoining the Department from implementing and enforcing the Temporary Non-agricultural Employment of H–2B Aliens in the United States, published February 21, 2012 (the 2012 H–2B Final Rule). The 2012 H–2B Final Rule revised the requirements by which employers seeking H–2B workers apply for a temporary labor certification for use in petitioning the Department of Homeland Security (DHS) to employ a nonimmigrant worker in H–2B status. The effective date of the 2012 H–2B Final Rule was April 23, 2012. The operative date of the 2012 H–2B Final Rule was April 27, 2012. This document provides guidance to the regulated community of the injunction, by judicial order, of the 2012 H–2B Final Rule and the continuing effectiveness of the 2008 H–2B Rule until such time as further judicial or other action suspends or otherwise nullifies the order in the *Bayou II* litigation.

DATES: This guidance is effective May 16, 2012.

FOR FURTHER INFORMATION CONTACT: For further information, contact William L. Carlson, Ph.D., Administrator, Office of Foreign Labor Certification, ETA, U.S. Department of Labor, 200 Constitution Avenue NW., Room C–4312, Washington, DC 20210; Telephone (202) 693–3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: On February 21, 2012, the Department published a Final Rule amending the H–2B regulations at 20 CFR part 655, Subpart A. 77 FR 10038, February 21, 2012. On April 23, 2012, the Department published guidance which provided that applications filed under Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes, 73 FR 78020, December 19, 2008 (the 2008 H–2B Rule), must be sent to the Office of Foreign Labor Certification's (OFLC's) Chicago National Processing Center (CNPC) and postmarked no later than midnight April 26, 2012. The guidance also provided that applications postmarked on or after April 27, 2012 will be adjudicated in accordance with the requirements described in the 2012 H–2B Final Rule.

On April 16, several plaintiffs challenged the 2012 H–2B Final Rule in the U.S. District Court for the Northern District of Florida (*Bayou Lawn & Landscape Services, et al.* v. *Hilda L. Solis, et al.,* 3:12–cv–00183–MCR–CJK), seeking to preliminarily enjoin the Department from implementing the rule on the basis that the Department lacked authority to issue the 2012 H–2B Final Rule and that the rule violated both the Administrative Procedure Act and the Regulatory Flexibility Act. *Bayou Lawn & Landscape Services, et al.* v. *Solis,* Case 3:12–cv–00183–MCR–CJK, Complaint at 5 (Apr. 16, 2012). On April 26, 2012, the U.S. District Court for the Northern District of Florida issued an order temporarily enjoining the Department from implementing or enforcing the 2012 H–2B Final Rule pending ''the court's adjudication of the plaintiffs' claims.'' *Bayou Lawn & Landscape Services et al.* v. *Solis,* Case 3:12–cv–00183–MCR–CJK, Order at 8 (Apr. 26, 2012).

Therefore, employers must file H–2B labor certification applications under the 2008 H–2B Rule, using those procedures and forms associated with the 2008 H–2B Rule for which the Department has received an emergency extension under the Paperwork Reduction Act. However, please be aware that this preliminary injunction necessarily calls into doubt the underlying authority of the Department to fulfill its responsibilities under the Immigration and Nationality Act and DHS's regulations to issue the labor certifications that are a necessary predicate for the admission of H–2B workers. OFLC will post additional filing guidance on its Web site at *http://www.foreignlaborcert.doleta.gov/*.

Signed in Washington, DC, this 11th day of May 2012.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2012–11859 Filed 5–15–12; 8:45 am]

BILLING CODE 4510–FP–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 91 and 576

[Docket No. FR–5474–C–02]

RIN 2506–AC31

Homeless Emergency Assistance and Rapid Transition to Housing: Emergency Solutions Grants Program and Consolidated Plan Conforming Amendments; Correction

AGENCY: Office of the General Counsel, HUD.

ACTION: Interim rule; correction.

SUMMARY: The document advises that the interim rule for the Emergency Solutions Grants program, published on December 5, 2011, displayed an incorrect RIN number. This document advises of the correct RIN number, 2506–AC31, as displayed in the heading of this document.

DATES: This correction is effective May 16, 2012.

FOR FURTHER INFORMATION CONTACT: Camille E. Acevedo, Associate General Counsel for Legislation and Regulations, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10282, Washington, DC 20410–0500; telephone number 202 708–1793 (this is not a toll-free number). Hearing- and speech-impaired persons may access this number through TTY by calling the Federal Relay Service at 800–877–8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION: On December 5, 2011, at 76 FR 75954, HUD published its interim rule on the Emergency Solutions Grants program. The heading for this rule displayed a RIN number of 2506–AC29, which was incorrect. RIN number 2506–AC29 is already assigned to another HUD rule, but not yet published, on HUD's Continuum of Care program. The correct RIN number for the Emergency Solutions Grant interim rule is 2506–AC31, and this document advises of the correction.

Dated: May 10, 2012.

Camille E. Acevedo,

Associate General Counsel for Legislation and Regulations.

[FR Doc. 2012–11868 Filed 5–15–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100 and 165

[Docket No. USCG–2011–0286]

RIN 1625–AA00; 1625–AA08

Eighth Coast Guard District Annual Marine Events and Safety Zones

AGENCY: Coast Guard, DHS.

ACTION: Direct final rule; confirmation of effective date; technical amendments.

SUMMARY: On March 1, 2012, the Coast Guard published a direct final rule, amending and updating its special local regulations and safety zones relating to recurring marine parades, regattas, fireworks displays, and other events that take place in the Eighth Coast Guard District area of responsibility. No adverse comment or notice of intent to submit an adverse comment was received. The rule will go into effect as scheduled. The Coast Guard is also correcting two entries in this rule through technical amendment. The first correction changes the event name in one entry and the second reduces the occurrence of an event and resulting safety zone from annually to biannually.

DATES: The May 30, 2012, effective date for the direct final rule published March 1, 2012, at 77 FR 12456, is confirmed. The technical corrections in this document are effective May 30, 2012.

ADDRESSES: Documents mentioned in this preamble are part of docket USCG–2011–0286. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number (USCG–2011–0286) in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Shelley R. Miller, Eighth Coast Guard District Waterways Management Division, (504) 671–2139 or email, *Shelley.R.Miller@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: On March 1, 2012 we published in the **Federal Register** this rule as a direct final rule under 33 CFR 1.05–55 expecting no adverse comment (77 FR 12456). The rule updates the special local regulations and safety zones relating to recurring marine parades, regattas, fireworks displays, and other events that take place in the Eighth Coast Guard District area of responsibility. The rule informs the public of regularly scheduled marine parades, regattas, fireworks displays, and other annual events. When these special local regulations and safety zones are enforced, marine traffic is restricted in specified areas. The purpose of the rule is to reduce administrative costs involved in producing a separate rule for each individual recurring event and to provide notice of the known recurring events requiring a special local regulation or safety zone throughout the year. The rule also helps to protect event participants and the public from the hazards associated with the listed events.

We published the rule as a direct final rule under 33 CFR part 1.05–55 because we considered it noncontroversial and expected no adverse comment regarding the rulemaking. We notified the public that the rule would be effective May 30, 2012 unless adverse comment or notice of intent to submit an adverse comment was received on or before April 2, 2012. No adverse comment or notice of intent to submit an adverse comment was received; therefore, this rule is effective May 30, 2012.

Although we received no adverse comments, the Coast Guard was informed of two required corrections. These corrections are made through technical amendment. The first is an event name change and the second is a change in how often a specific event occurs from annually to biannually. During the comment period, the Coast Guard posted supplemental information to the docket, accessible as guided in the **ADDRESSES** section, explaining the necessary corrections. No comment or notice of intent to comment on these corrections was received. The corrections are as follows:

(1) For entry no. 5 in Table 1 of 100.801, the ''Spirit of Morgantown Triathlon'' is now named the ''Mountaineer Triathlon.'' Therefore, the Event/Sponsor column for entry no. 5 in Table 1 of 100.801 requires correction to read ''Mountaineer Triathlon/Greater Morgantown Convention and Visitors Bureau'' in the final rule. The triathlon event's date, location, and the resulting special local regulation remain the same. The next occurrence for this event is the second Sunday in August, 2012.

(2) For entry no. 151 in Table 1 of 165.801, the air show requiring the safety zone takes place biannually, during odd numbered years only, not every year. Therefore, the ''Date'' column for entry no. 151 in Table 1 of 165.801, requires correction to read ''Biannually occurring during odd numbered years; 2 Days; Mid March to end of April'' in the final rule. This date description properly indicates the resulting safety zone's occurrence every other year rather than every year. The time of year, location, and the resulting safety zone requirements remain the same. The next occurrence for this air show and resulting safety zone will be 2 days during mid-March to the end of April, 2013.

Accordingly, 33 CFR parts 100 and 165, as amended March 1, 2012, at 77 FR 12456, and effective May 30, 2012, are corrected through the following technical amendments:

PART 100—REGATTAS AND MARINE PARADES

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

Authority: 33 U.S.C. 1233.

■ 2. Amend § 100.801 by revising in Table 1 the entry for Table No. 5 to read as follows:

§ 100.801 Annual Marine Events in the Eighth Coast Guard District.

* * * * *

TABLE 1 OF § 100.801—EIGHTH COAST GUARD DISTRICT TABLE OF ANNUAL MARINE EVENTS

Table No.	Sector Ohio Valley	Date	Event/sponsor	Sector Ohio Valley location	Regulated area
*	*	*	*	*	*
5	5	The second Sunday in August.	Mountaineer Triathlon/ Greater Morgantown Convention and Visitors Bureau.	Monongahela River, Morgantown, WV.	Monongahela River, mile marker 101.0 to 102.0, Morgantown, WV.

* * * * *

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 3. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 4. Amend § 165.801 by revising in Table 1, the entry for Table No. 151 to read as follows:

§ 165.801 Annual Fireworks Displays and other events in the Eighth Coast Guard District requiring safety zones.

* * * * *

TABLE 1 OF § 165.801—EIGHTH COAST GUARD DISTRICT TABLE OF ANNUAL SAFETY ZONES

Table No.	Sector Mobile	Date	Sponsor/name	Sector Mobile location	Safety zone
*	*	*	*	*	*
151	10	Biannually occurring during odd numbered years; 2 Days; Mid-March to end of April.	Angels Over the Bay/ Keesler Air Force Base.	Back Bay Biloxi, Biloxi, MS.	Back Bay Biloxi, Bounded by the following coordinates: Eastern boundary; Latitude 30°25′47.6″ N, Longitude 088°54′13.6″ W, to Latitude 30°24′43″ N, Longitude 088°54′13.6″ W. Western Boundary; Latitude 30°25′25.6″ N, Longitude 088°56′9″ W, to Latitude 30°24′55″ N, Longitude 088°56′9″ W.

* * * * *

Dated: April 23, 2012.

Roy A. Nash,

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

[FR Doc. 2012–11809 Filed 5–15–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2012–0074]

RIN 1625–AA09

Drawbridge Operation Regulation; Hood Canal, WA

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is modifying the drawbridge operating regulation for the Hood Canal floating drawbridge near Port Gamble. This modification will relieve heavy rush hour road traffic on State Routes 3 and 104 by allowing the draw of the bridge to remain closed to maritime traffic during afternoon rush hours during summer months. This action will help alleviate heavy rush hour road traffic by reducing bridge openings, thereby reducing traffic queues and delays due to bridge openings.

DATES: This rule is effective May 22, 2012.

ADDRESSES: Comments and related materials received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2012–0074 and are available online by going to *http://www.regulations.gov,* inserting USCG–2012–0074 in the ''Keyword'' box, and then clicking ''Search.'' This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email the Bridge Administrator, Coast Guard Thirteenth District; telephone 206–220–7282 email *randall.d.overton@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On March 1, 2012 we published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulation; Hood Canal, WA in the **Federal Register** (77 FR 12514). We received 17 comments on the proposed

rule. No public meeting was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective in less than 30 days after publication in the **Federal Register** because due to the volume of traffic and congestion in the area around the bridge any further delay would not be in the best interest for public safety. The Coast Guard conducted a test deviation of the bridge operating schedule from May 27, 2011 through September 30, 2011 with comments received through November 30, 2011. The Coast Guard also published an NPRM, which referenced a May 22 start date. The comments received both from the test deviation and the NPRM were overwhelmingly in support of implementing this rule, with no comments opposing the modification.

Basis and Purpose

Senator Phil Rockefeller and Representative Christine Rolfes of the Washington State Legislature requested that the operating regulations of the Hood Canal Bridge be changed to provide some relief to road traffic on State Routes 3 and 104. Traffic queues south of the eastern end of the bridge can be in excess of 45 minutes during and after openings of the draw span. The stopped road traffic on this two-lane highway blocks access to intersecting streets along the queue. The current operating regulations for the bridge are found at 33 CFR 117.1045. Per existing operating regulations, the bridge shall open on signal if at least one hour notice is provided and the draw shall be opened horizontally for three hundred feet unless the maximum opening of 600 feet is requested. The current regulations remain in effect except for the establishment of the restricted period under this rule. Navigation on the waterway consists of commercial tugs with tows, recreational vessels of various sizes, commercial fishing vessels, and U.S. naval vessels with escort vessels including those of the U.S. Coast Guard. This new rule will not affect commercial tug and tow vessels nor will it affect U.S. Naval Vessels or vessels in service to the U.S. Navy or other pubic vessels of the United States because pursuant to this rule, the bridge is required to open for these types of vessels during the restricted period. The Coast Guard conducted a test deviation of the bridge operating schedule from May 27, 2011 through September 30, 2011 during which the bridge was not required to open from 3 p.m. to 6 p.m. except for U.S. Navy Vessels and vessels attending the missions of the U.S. Navy. This test deviation was published in the **Federal Register** under docket number USCG–2010–0314 and comments were received and evaluated during the comment period which ended November 30, 2011.

Comments received, during the test deviation were evaluated and incorporated into a proposed rule which was published in the **Federal Register** on March 1, 2012 under docket number USCG–2012–0074.

Discussion of Comments and Changes

The Coast Guard issued a Notice of Proposed Rulemaking (NPRM) under docket number USCG–2012–0074 and received comments through April 16, 2012. 17 comments were received. The comments received in response to the NPRM were overwhelmingly in favor of instituting this rule. Sixteen of the 17 comments supported the modification. Eight of 16 comments supporting the modification also proposed adding similar restrictions on bridge openings for morning commute hours. The Coast Guard reviewed the bridge opening logs and the vehicle traffic counts for the morning hours and found no definitive benefit of imposing a morning restriction on the drawbridge operation. One comment was received in opposition to the applicability of the rule. The opposing commenter stated that the restriction should be expanded to include naval and commercial vessels. The Coast Guard reviewed the bridge opening logs and found no significant benefit gained by expanding the restrictions to tug and tow vessels which are exempt from this rule. The Coast Guard will not expand the restrictions to vessels of the U.S. Navy or vessels attending the missions of the U.S. Navy because restricting movement of U.S. Navy vessels could compromise national security. This final rule is being issued with no changes from the proposed rule issued under docket USCG–2012–0074.

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under that Order. We have reached this conclusion by the fact that commercial tow vessels and U.S. Naval Vessels are exempt from the restricted openings. Vessels that would be primarily affected are recreational vessels that are not able to pass through the fixed navigational channels of the bridge. Vessels affected by the restricted opening schedule will be able to plan their trips to avoid the restricted period. There are no changes to the regulatory text of this rule from the previously issued NPRM.

Impact on Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule would primarily affect recreational sailboats which have mast heights that preclude them from passing under the fixed navigational openings in the bridge. Vessels which require an opening will be informed of the restricted closure period via the Coast Guard's Local Notice to Mariners which will allow them to plan trips to avoid this time frame.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In

particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction.

Under figure 2–1, paragraph (32)(e), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. Amend § 117.1045 by redesignating paragraphs (b) and (c) as paragraphs (c) and (d) respectively, and adding new paragraph (b) to read as follows:

§ 117.1045 Hood Canal.

* * * * *

(b) The draw of the Hood Canal Bridge, mile 5.0, need not open for vessel traffic from 3 p.m. to 6:15 p.m. daily from 3 p.m. May 22 to 6:16 p.m. September 30, except for commercial tug and tow vessels and vessels of the U.S. Navy or vessels attending the missions of the U.S. Navy and other public vessels of the United States. At all other times the bridge will operate in accordance with paragraph (a) of this section.

* * * * *

Dated: May 3, 2012.

A.T. Ewalt,

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

[FR Doc. 2012–11810 Filed 5–15–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG 2012–0229]

Safety Zone; Fourth of July Fireworks, City of Antioch, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

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

DATES: The regulations in 33 CFR 165.1191 will be enforced from 8 a.m. on through 10 p.m. on July 4, 2012.

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

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce a safety zone in navigable waters around and under the fireworks barge within a radius of 100 feet during the loading, transit, and arrival of the fireworks barge to the display location and until the start of the fireworks display. From 8 a.m. on until 8:45 p.m. on July 4, 2012 the

fireworks barge will be loaded off of Fulton Shipyard Pier in Antioch, CA at position 38°01′03″ N, 121°48′04″ W (NAD 83). From 8:45 p.m. to 9:15 p.m. on July 4, 2012 the loaded barge will transit from Fulton Shipyard Pier to the launch site off the City of Antioch, CA near position 38°01′06″ N, 121°48′32″ W (NAD 83) where it will remain until the commencement of the fireworks display. Upon the commencement of the 30 minute fireworks display, scheduled to take place from 9:20 p.m. to 9:50 p.m. on July 4, 2012, the safety zone will increase in size to encompass the navigable waters around and under the fireworks barge within a radius 1,000 feet near position 38°01′06″ N, 121°48′32″ W (NAD 83) for the City of Antioch Fourth of July Fireworks display in 33 CFR 165.1191. This safety zone will be in effect from 8 a.m. until 10 p.m. on July 4, 2012.

Under the provisions of 33 CFR 165.1191, unauthorized persons or vessels are prohibited from entering into, transiting through, or anchoring in the safety zone during all applicable effective dates and times, unless authorized to do so by the PATCOM. Additionally, each person who receives notice of a lawful order or direction issued by an official patrol vessel shall obey the order or direction. The PATCOM is empowered to forbid entry into and control the regulated area. The PATCOM shall be designated by the Commander, Coast Guard Sector San Francisco. The PATCOM may, upon request, allow the transit of commercial vessels through regulated areas when it is safe to do so. This notice is issued under authority of 33 CFR 165.1191 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register,** the Coast Guard will provide the maritime community with extensive advance notification of the safety zone and its enforcement period via the Local Notice to Mariners.

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

Dated: April 27, 2012.

Cynthia L. Stowe,

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

[FR Doc. 2012–11802 Filed 5–15–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG 2012–0204]

Safety Zone; Red, White, and Tahoe Blue Fireworks, Incline Village, NV

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

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

DATES: The regulations in 33 CFR 165.1191 will be enforced from 7 a.m. on July 1, 2012 through 10:45 p.m. on July 4, 2012.

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

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce a safety zone in navigable waters around and under the fireworks barges within a radius of 100 feet during the loading, transit, and arrival of the fireworks barges to the display location and until the start of the fireworks display. From 7 a.m. on July 1, 2012 until 5 a.m. on July 4, 2012 the fireworks barges will be loaded off of Obexer's Marina in Homewood, CA at position 39°04′55″ N, 120°09′25″ W (NAD 83). From 5 a.m. to 6 p.m. on July 4, 2012 the loaded barges will transit from Obexer's Marina to the launch site off of Incline Village, CA at position 39°14′14″ N, 119°56′56″ W (NAD 83) where it will remain until the commencement of the fireworks display. Upon the commencement of the 20–30 minute fireworks display, scheduled to take place from 9 p.m. to 10:30 p.m. on July 4, 2012, the safety zone will increase in size to encompass the navigable waters around and under the fireworks barges within a radius 1,000 feet at position 39°14′14″ N, 119°56′56″ W (NAD 83) for the Red, White, and Tahoe Blue Fireworks display in 33 CFR 165.1191. This safety zone will be in effect from 7 a.m. on July 1, 2012 until 10:45 p.m. on July 4, 2012.

Under the provisions of 33 CFR 165.1191, unauthorized persons or vessels are prohibited from entering into, transiting through, or anchoring in the safety zone during all applicable effective dates and times, unless authorized to do so by the PATCOM. Additionally, each person who receives notice of a lawful order or direction issued by an official patrol vessel shall obey the order or direction. The PATCOM is empowered to forbid entry into and control the regulated area. The PATCOM shall be designated by the Commander, Coast Guard Sector San Francisco. The PATCOM may, upon request, allow the transit of commercial vessels through regulated areas when it is safe to do so. This notice is issued under authority of 33 CFR 165.1191 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register,** the Coast Guard will provide the maritime community with extensive advance notification of the safety zone and its enforcement period via the Local Notice to Mariners.

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

Dated: April 27, 2012.

Cynthia L. Stowe,

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

[FR Doc. 2012–11803 Filed 5–15–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG 2012–0203]

Safety Zone; Fourth of July Fireworks, City of Eureka, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the safety zone for the City of Eureka Fourth of July Fireworks in the Captain of the Port, San Francisco area of responsibility during the dates and times noted below. This action is necessary to protect life and property of

the maritime public from the hazards associated with the fireworks display. During the enforcement period, unauthorized persons or vessels are prohibited from entering into, transiting through, or anchoring in the safety zone, unless authorized by the Patrol Commander (PATCOM).

DATES: The regulations in 33 CFR 165.1191 will be enforced from 12 p.m. on July 3, 2012 through 10:45 p.m. on July 4, 2012.

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

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce a safety zone in navigable waters around and under the fireworks barge within a radius of 100 feet during the loading, transit, and arrival of the fireworks barge to the display location and until the start of the fireworks display. From 12 p.m. on July 3, 2012 until 3 p.m. on July 4, 2012 the fireworks barge will be loaded off of Schneider Dock in Eureka, CA at position 40°47′50″ N, 124°11′11″ W (NAD 83). From 3 p.m. to 4 p.m. on July 4, 2012 the loaded barge will transit from Schneider Dock to the launch site off of Woodley Island near the City of Eureka, CA at position 40°48′29″ N, 124°10′06″ W (NAD 83) where it will remain until the commencement of the fireworks display. Upon the commencement of the fireworks display, scheduled to take place from 10 p.m. to 10:25 p.m. on July 4, 2012, the safety zone will increase in size to encompass the navigable waters around and under the fireworks barge within a radius 1,000 feet at position 40°48′29″ N, 124°10′06″ W (NAD 83) for the City of Eureka Fourth of July Fireworks in 33 CFR 165.1191. This safety zone will be in effect from 12 p.m. on July 3, 2012 until 10:45 p.m. on July 4, 2012.

Under the provisions of 33 CFR 165.1191, unauthorized persons or vessels are prohibited from entering into, transiting through, or anchoring in the safety zone during all applicable effective dates and times, unless authorized to do so by the PATCOM. Additionally, each person who receives notice of a lawful order or direction issued by an official patrol vessel shall obey the order or direction. The PATCOM is empowered to forbid entry into and control the regulated area. The PATCOM shall be designated by the Commander, Coast Guard Sector San Francisco. The PATCOM may, upon request, allow the transit of commercial vessels through regulated areas when it is safe to do so. This notice is issued under authority of 33 CFR 165.1191 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with extensive advance notification of the safety zone and its enforcement period via the Local Notice to Mariners.

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

Dated: April 27, 2012.

Cynthia L. Stowe,

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

[FR Doc. 2012–11807 Filed 5–15–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG 2012–0106]

Safety Zone; San Francisco Giants Fireworks Display, San Francisco, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

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

DATES: The regulations in 33 CFR 165.1191 will be enforced from 11 a.m. to 10:40 p.m. on July 13, 2012.

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

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce a 100 foot safety zone around the fireworks barge off of Pier 50 in position 37°46′28″ N, 122°23′06″ W (NAD 83) from 11 a.m. until 9 p.m. on July 13, 2012. From 9 p.m. to 9:10 p.m. on July 13, 2012 the loaded barge will transit from Pier 50 to the launch site near Pier 48 in position 37°46′39.9″ N, 122°23′06.78″ W (NAD83). The 100 foot safety zone applies to the navigable waters around and under the fireworks barge within a radius of 100 feet during the loading, transit, and arrival of the fireworks barge to the display location and until the start of the fireworks display. Upon the commencement of the fireworks display, scheduled to take place from 10 p.m. to 10:15 p.m. on July 13, 2012, the safety zone will increase in size and encompass the navigable waters around and under the fireworks barge within a radius 1,000 feet around the launch site near Pier 48 in position 37°46′39.9″ N, 122°23′06.78″ W (NAD83) for the San Francisco Giants Fireworks Display in 33 CFR 165.1191. This safety zone will be in effect from 11 a.m. to 10:40 p.m. on July 13, 2012. Under the provisions of 33 CFR 165.1191, unauthorized persons or vessels are prohibited from entering into, transiting through, or anchoring in the safety zone during all applicable effective dates and times, unless authorized to do so by the PATCOM. Additionally, each person who receives notice of a lawful order or direction issued by an official patrol vessel shall obey the order or direction. The PATCOM is empowered to forbid entry into and control the regulated area. The PATCOM shall be designated by the Commander, Coast Guard Sector San Francisco. The PATCOM may, upon request, allow the transit of commercial vessels through regulated areas when it is safe to do so. This notice is issued under authority of 33 CFR 165.1191 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register,** the Coast Guard will provide the maritime community with extensive advance notification of the safety zone and its enforcement period via the Local Notice to Mariners.

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

Dated: February 21, 2012.

Cynthia L. Stowe,

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

[FR Doc. 2012–11808 Filed 5–15–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[EPA–HQ–OAR–2010–1076; FRL–9671–3]

RIN 2060–AQ97

Air Quality: Widespread Use for Onboard Refueling Vapor Recovery and Stage II Waiver

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA has determined that onboard refueling vapor recovery (ORVR) technology is in widespread use throughout the motor vehicle fleet for purposes of controlling motor vehicle refueling emissions, and, therefore, by this action, the EPA is waiving the requirement for states to implement Stage II gasoline vapor recovery systems at gasoline dispensing facilities in nonattainment areas classified as Serious and above for the ozone national ambient air quality standards (NAAQS). This finding will be effective as noted below in the **DATES** section. After the effective date of this notice, a state previously required to implement a Stage II program may take appropriate action to remove the program from its State Implementation Plan (SIP). Phasing out the use of Stage II systems may lead to long-term cost savings for gas station owners and operators while air quality protections are maintained.

DATES: This rule is effective on May 16, 2012.

ADDRESSES: The EPA has established a docket for this rule, identified by Docket ID No. EPA–HQ–OAR–2010–1076. All documents in the docket are listed in *www.regulations.gov.* Although listed in the index, some information is not publicly available, *i.e.,* confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center, EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744.

FOR FURTHER INFORMATION CONTACT: Mr. Lynn Dail, Office of Air Quality Planning and Standards, Air Quality Policy Division, Mail code C539–01, Research Triangle Park, NC 27711, telephone (919) 541–2363; fax number: 919–541–0824; email address: *dail.lynn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Purpose of Regulatory Action

Since 1990, Stage II gasoline vapor recovery systems have been a required emissions control measure in Serious, Severe, and Extreme ozone nonattainment areas. Beginning with model year 1998, ORVR equipment has been phased in for new vehicles, and has been a required control on nearly all new highway vehicles since 2006. Over time, non-ORVR vehicles will continue to be replaced with ORVR vehicles. Stage II and ORVR emission control systems are redundant, and the EPA has determined that emission reductions from ORVR are essentially equal to and will soon surpass the emission reductions achieved by Stage II alone. In this action, the EPA is eliminating the largely redundant Stage II requirement in order to ensure that refueling vapor control regulations are beneficial without being unnecessarily burdensome to American business. This action allows, but does not require, states to discontinue Stage II vapor recovery programs.

II. Summary of the Major Provisions of This Final Rule

Clean Air Act (CAA) section 202(a)(6) provides discretionary authority to the EPA Administrator to, by rule, revise or waive the section 182(b)(3) Stage II requirement for Serious, Severe and Extreme ozone nonattainment areas after the Administrator determines that ORVR is in widespread use throughout the motor vehicle fleet. Based on criteria that the EPA proposed last year (76 FR 41731, July 15, 2011), the EPA is determining that ORVR is in widespread use. As of the effective date of today's action, states that are implementing mandatory Stage II programs under section 182(b)(3) of the CAA may submit revisions to their SIPs to remove this program.

The EPA will also be issuing non-binding guidance on developing and submitting approvable SIP revisions.[1] This guidance will address SIP requirements for states in the Ozone Transport Region (OTR), which are separately required under section 184(b)(2) of the CAA to adopt and implement control measures capable of achieving emissions reductions comparable to those achievable by Stage II. The EPA is updating its guidance for estimating what Stage II comparable emissions reductions could be, in light of the ORVR widespread use determination. The EPA now expects Stage II comparable emissions reductions to be substantially less than what was estimated in the past before ORVR use became widespread. Therefore, the EPA encourages states to consult the updated guidance before submitting a SIP revision removing Stage II controls.

III. Costs and Benefits

The primary purpose of this final rule is to promulgate a determination that ORVR is in widespread use as permitted in section 202(a)(6) of the CAA. In this final rule, EPA is exercising the authority provided by section 202(a)(6) of the CAA to, by rule, revise or waive the section 182(b)(3) Stage II requirement for Serious, Severe, and Extreme ozone nonattainment areas after the Administrator determines that ORVR is in widespread use throughout the motor vehicle fleet. This in turn gives states that were required to implement Stage II vapor recovery under section 182(b)(3) of the CAA the option to submit for the EPA's review and approval revised ozone SIPs that will remove this requirement. The EPA projects that during 2013–2015, gasoline-dispensing facilities (GDFs) in up to 19 states and the District of Columbia could seek to decommission and remove Stage II systems from their dispensers. There are about 30,600 GDFs with Stage II in these 20 areas. If the states submit and EPA approves SIP revisions to remove Stage II systems from these GDFs, the EPA projects savings of about $10.2 million in the first year, $40.5 million in the second year, and $70.9 million in the third year. Long-term savings are projected to be about $91 million per year, compared to the current use of Stage II systems in these areas. No significant emission

[1] "Phasing Out Stage II Gasoline Refueling Vapor Recovery Programs: Guidance on Satisfying Requirements of Clean Air Act Sections 110(ℓ), 193, and 184(b)(2) (tentative title)." U.S. EPA Office of Air and Radiation, forthcoming. This guidance will provide the EPA's recommendations for states to consider when developing SIP revisions following today's rulemaking. Unlike the final rule, the guidance is not final agency action, and is not binding on or enforceable against any person. Consequently, it is subject to possible revision without additional rulemaking. In addition, the approaches suggested in the guidance (or in any changes thereto) will not represent final agency action unless and until the EPA takes a final SIP approval or disapproval action implementing those approaches.

increases or decreases are expected from this action.

IV. General Information

A. Does this action apply to me?

Entities directly affected by this action include states (typically state air pollution control agencies) and, in some cases, local governments that develop air pollution control rules that apply to areas classified as Serious and above for nonattainment of the ozone NAAQS. Individuals and companies that operate gasoline dispensing facilities may be indirectly affected by virtue of state action in SIPs that implement provisions resulting from final rulemaking on this action; many of these sources are in the following groups:

Industry group	SIC [a]	NAICS [b]
Gasoline stations	5541	447110, 447190

[a] Standard Industrial Classification.
[b] North American Industry Classification System.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this notice will be posted at *http://www.epa.gov/air/ozonepollution/actions.html#impl* under ''recent actions.''

C. How is this notice organized?

The information presented in this preamble is organized as follows.

I. Purpose of Regulatory Action
II. Summary of the Major Provisions of This Final Rule
III. Costs and Benefits
IV. General Information
A. Does this action apply to me?
B. Where can I get a copy of this document and other related information?
C. How is this notice organized?
V. Background
A. What requirements for Stage II gasoline vapor recovery apply for ozone nonattainment areas?
B. Stage II Vapor Recovery Systems
C. Onboard Refueling Vapor Recovery (ORVR) Systems
D. Compatibility Between Some Vapor Recovery Systems
E. Proposed Rule to Determine Widespread Use of ORVR
VI. This Action
A. Analytical Rationale for Final Rule
B. Updated Analysis of Widespread Use
C. Widespread Use Date
D. Implementation of the Rule Provisions
E. Implementation of Rule Revisions in the Ozone Transport Region
F. Comments on Other Waiver Implementation Issues
VII. Estimated Cost
VIII. Statutory and Executive Order Reviews
A. Executive Orders 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Congressional Review Act
IX. Statutory Authority

V. Background

A. What requirements for Stage II gasoline vapor recovery apply in ozone nonattainment areas?

The requirements in the 1990 CAA Amendments regarding Stage II vapor recovery are contained in Title I: Provisions for Attainment and Maintenance of National Ambient Air Quality Standards. Under CAA section 182(b)(3), Stage II gasoline vapor recovery systems are required to be used at higher throughput GDFs located in Serious, Severe, and Extreme nonattainment areas for ozone.[2] States were required to adopt a Stage II program into their SIPs, and the controls were to be installed according to specified deadlines following state rule adoption.[3] Since the early 1990s, Stage 2 gasoline vapor controls have provided substantial emissions reductions and have contributed to improved air quality over time.

B. Stage II Vapor Recovery Systems

When a gasoline-powered automobile or other vehicle is brought into a GDF to be refueled, the empty portion of the fuel tank on the vehicle contains gasoline vapors. When liquid gasoline is pumped into the partially empty gas tank, gasoline vapors are forced out of the tank and fill pipe as the tank fills with liquid gasoline. Where air pollution control technology is not used, these vapors are emitted into the ambient air. In the atmosphere, these vapors can react with sunlight, nitrogen oxides and other volatile organic compounds to form ozone.

There are two basic technical approaches to Stage II vapor recovery: A ''balance'' system, and a vacuum assist system. A balance type Stage II control system has a rubber boot around the gasoline nozzle spout that fits snugly up to a vehicle's gasoline fill pipe during refueling of the vehicle. With a balance system, when gasoline in the underground storage tank (UST) is pumped into a vehicle, a positive pressure differential is created between the vehicle tank and the UST. This pressure differential draws the gasoline vapors from the vehicle fill pipe through the rubber boot and the concentric hoses and underground piping into the UST. This is known as a balance system because gasoline vapors from the vehicle tank flow into the UST tank to balance pressures. About 30 percent of Stage II GDFs nationwide use the balance type Stage II system.

The vacuum assist system is the other primary type of Stage II system currently in operation. This type of Stage II system uses a vacuum pump on the vapor return line to help draw vapors from the vehicle fill pipe into the UST. An advantage of this type of system is that the rubber boot around the nozzle can be smaller and lighter (or not used at all) and still draw the vapors into the vapor return hose. This makes for an easier-to-handle nozzle, which is popular with customers. About 70 percent of Stage II GDFs nationwide use the vacuum assist approach.

New Stage II equipment is normally required to achieve 95 percent control effectiveness at certification. However, studies have shown that in-use control efficiency depends on the proper installation, operation, and maintenance of the control equipment at the GDF.[4]

[2] Originally, the section 182(b)(3) Stage II requirement also applied in all Moderate ozone nonattainment areas. However, under section 202(a)(6) of the CAA, 42 U.S.C. 7521(a)(6), the requirements of section 182(b)(3) no longer apply in Moderate ozone nonattainment areas after the EPA promulgated ORVR standards on April 6, 1994, 59 FR 16262, codified at 40 CFR parts 86 (including 86.098–8), 88 and 600. Under implementation rules issued in 2002 for the 1997 8-hour ozone standard, the EPA retained the Stage II-related requirements under section 182(b)(3) as they applied for the now-revoked 1-hour ozone standard. 40 CFR 51.900(f)(5) and 40 CFR 51.916(a).

[3] This requirement only applies to facilities that sell more than a specified number of gallons per month and is set forth in sections 182(b)(3)(A)–(C) and 324(a)–(c). Section 182(b)(3)(B) has the following effective date requirements for implementation of Stage II after the adoption date by a state of a Stage II rule: 6 months after adoption of the state rule, for GDFs built after the enactment date (which for newly designated areas would be the designation date); 1 year after adoption date, for gas stations pumping at least 100,000 gal/month based on average monthly sales over 2-year period before adoption date; 2 years after adoption, for all others.

[4] The Petroleum Equipment Institute has published recommended installation practices (PEI/

Continued

Damaged, missing, or improperly operating components or systems can significantly degrade the control effectiveness of a Stage II system.

In-use effectiveness ultimately depends on the consistency of inspections, follow-up review by state agencies, and actions by operators to perform inspections and field tests and conduct maintenance in a correct and timely manner. The EPA's early guidance for Stage II discussed expected training, inspection, and testing criteria, and most states have adopted and supplemented these criteria as deemed necessary for balance and vacuum assist systems.[5] In some cases, states have strictly followed the EPA guidance but other states have required a lesser level of inspection and enforcement efforts. Past EPA studies have estimated Stage II in-use efficiencies of 92 percent with semi-annual inspections, 86 percent with annual inspections and 62 percent with minimal or less frequent state inspections.[6] The in-use effectiveness of Stage II control systems may vary from state to state, and may vary over time within any state or nonattainment area because the in-use efficiency of Stage II vapor recovery systems depends heavily on the ongoing maintenance and oversight by GDF owners/operators and the state/local agencies.

C. Onboard Refueling Vapor Recovery (ORVR) Systems

In addition to Stage II controls, the 1990 CAA Amendments required another method of controlling emissions from dispensing gasoline. Section 202(a)(6) of the CAA requires an onboard system of capturing vehicle-refueling emissions, commonly referred to as an ORVR system.[7] ORVR consists of an activated carbon canister installed on the vehicle into which vapors are routed from the vehicle fuel tank during refueling. There the vapors are captured by the activated carbon in the canister. To prevent the vapors from escaping through the fill pipe opening, the vehicle employs a seal in the fill pipe which allows liquid gasoline to enter but blocks vapor escape. In most cases, these are ''liquid seals'' created by the incoming liquid gasoline slightly backing near the bottom of the fill pipe. When the engine is started, the vapors are purged from the activated carbon and into the engine where they are burned as fuel.

The EPA promulgated ORVR standards on April 6, 1994 (59 FR 16262). Section 202(a)(6) of the CAA required that the EPA's ORVR standards apply to light-duty vehicles manufactured beginning in the fourth model year after the model year in which the standards were promulgated, and that ORVR systems provide a minimum evaporative emission capture efficiency of 95 percent.

Automobile manufacturers began installing ORVR on new passenger cars in 1998 when 40 percent of new cars were required to have ORVR. The regulation required the percentage of new cars with ORVR increase to 80 percent in 1999 and 100 percent in 2000. The regulation also required that ORVR for light duty trucks and vans (<6000 pounds (lbs) gross vehicle weight rating (GVWR)) was to be phased-in during 2001 with 40 percent of such new vehicles required to have ORVR in 2001, 80 percent in 2002 and 100 percent in 2003. New heavier light-duty trucks (6001–8500 lbs GVWR) were required to have 40 percent with ORVR by 2004, 80 percent by 2005 and 100 percent by 2006. New trucks up to 10,000 lbs GVWR manufactured as a complete chassis were all required to have ORVR by 2006.[8] Complete vehicle chassis for heavy-duty gasoline vehicles between 10,001 and 14,000 lbs GVWR (Class 3) are very similar to those between 8,501 and 10,000 lbs GVWR. For model consistency purposes, manufacturers began installing ORVR on Class 3 complete chassis in 2006 as well. So, after 2006, essentially all new gasoline-powered vehicles less than 14,000 lbs GVWR are ORVR-equipped.

ORVR does not apply to all vehicles, but those not covered by the ORVR requirement comprise a small percentage of the gasoline-powered highway vehicle fleet (approximately 1.5 percent of gasoline consumption). The EPA estimates that by the end of 2012, more than 71percent of vehicles currently on the road will have ORVR.[9] This percentage will increase over time as older cars and trucks are replaced by new models. However, under the current regulatory construct, motorcycles and heavy-duty gasoline vehicles not manufactured as a complete chassis are not required to install ORVR, so it is likely that there will be some very small percentage of gasoline refueling emissions not captured by ORVR controls.

Even prior to the EPA's adoption of ORVR requirements, in 1993 EPA adopted Onboard Diagnostic (OBD) System requirements for passenger cars and light trucks, and eventually did so for heavy-duty gasoline vehicles up to 14,000 lbs GVWR.[10] These systems are designed to monitor the in-use performance of various vehicle emission control systems and components, including protocols for finding problems in the purge systems and large and small vapor leaks in ORVR/evaporative emission controls.[11] OBD II systems were phased in for these vehicle classes over the period from 1994–1996 for lighter vehicles and 2005–2007 for heavy-duty gasoline vehicles, so, during the same time frame that manufacturers were implementing ORVR into their vehicles, they already had implemented or were implementing OBD II systems.

In 2000, the EPA published a report addressing the effectiveness of OBD II control systems.[12] This study concluded that enhanced evaporative and ORVR emission control systems are durable and low emitting relative to the FTP (Federal Test Procedure) enhanced evaporative emission standards, and that OBD II evaporative emissions checks are a suitable replacement for functional evaporative emission tests in state inspection and maintenance (I/M) programs. OBD system codes are interrogated and evaluated in a 30-vehicle emission I/M program. A recent EPA review of OBD data gathered from I/M programs from five states[13] indicated relatively few vehicles had any evaporative system-related OBD codes that would indicate a potential

RP300–93) and most states require inspection, testing, and evaluation before a system is commissioned for use.

[5] ''Enforcement Guidance for Stage II Vehicle Refueling Control Programs,'' U.S. EPA, Office of Air and Radiation, Office of Mobile Sources, December 1991.

[6] ''Technical Guidance—Stage II Vapor Recovery Systems for Control of Vehicle Refueling at Gasoline Dispensing Facilities Volume I: Chapters,'' EPA–450/3–91–022a, November 1991. This study is a composite of multiple studies.

[7] Unlike Stage II, which is a requirement only in ozone nonattainment areas, ORVR requirements apply to vehicles everywhere. More detail on ORVR is available at *http://www.epa.gov/otaq/orvr.htm.*

[8] The EPA promulgated ORVR standards for light duty vehicles and trucks on April 6, 1994, 59 FR 16262, codified at 40CFR parts 86 (including 86.098–8), 88 and 600.

[9] *See* EPA Memorandum ''Onboard Refueling Vapor Recovery Widespread Use Assessment.'' A copy of this memorandum is located in the docket for this action EPA–HQ–OAR–2010–1076.

[10] *See* **Federal Register** at 58 FR 9468 published February 19, 1993, and subsequent amendments and the latest OBD regulations at 40 CFR part 86.1806–05 for program requirements in various years.

[11] ORVR systems are basically a subset of evaporative emission systems because they share the same vapor lines, purge valves, purge lines, and activated carbon canister.

[12] ''Effectiveness of OBD II Evaporative Emission Monitors—30 Vehicle Study,'' EPA 420–R–00–018, October 2000.

[13] *See* EPA Memorandum, ''Review of Frequency of Evaporative System Related OBD Codes for Five State I/M Programs.'' A copy of this memorandum is located in the docket for this action EPA–HQ–OAR–2010–1076.

problem with the vapor management system.

Based on emissions tests of over 1,100 in-use ORVR-equipped vehicles, EPA concluded that the average in-use efficiency of ORVR is 98 percent. The legal requirement for ORVR is 95 percent efficiency. Thus, the actual reported control achieved in practice is greater than the statutorily required level of control.

D. Compatibility Between Some Vapor Recovery Systems

Even though the per-vehicle vapor recovery efficiency of ORVR exceeds that of Stage II, Stage II vapor recovery systems have provided valuable reductions in ozone precursors and air toxics as ORVR has been phased into the motor vehicle fleet. In fact, overall refueling emissions from vehicle fuel tanks are minimized by having both ORVR and Stage II in place, but the incremental gain from retaining Stage II decreases relatively quickly as ORVR penetration surpasses 75 percent of dispensed gasoline. Please see Table 2 below. This occurs not only because of a decreasing amount of gasoline being dispensed to non-ORVR equipped vehicles, but also because differences in operational design characteristics between ORVR and vacuum assist Stage II systems may in some cases cause a reduction in the overall control system efficiency compared to what could have been achieved relative to the individual control efficiencies of either ORVR or Stage II emissions from the vehicle fuel tank. The problem arises because the ORVR canister captures the gasoline vapor emissions from the motor vehicle fuel tank rather than the vapors being drawn off by the vacuum assist Stage II system. This occurs because the fill pipe seal blocks the vapor from reaching the Stage II nozzle. Thus, instead of drawing vapor-laden air from the vehicle fuel tank into the underground storage tank (UST), the vacuum pump of the Stage II system draws mostly fresh air into the UST. This fresh air causes gasoline in the UST to evaporate inside the UST and creates an internal increase in UST pressure. As the proportion of ORVR vehicles increases, the amount of fresh air, void of gasoline vapors, pumped into the UST also increases. Even with pressure/vacuum valves in place this eventually leads to gasoline vapors being forced out of the UST vent pipe into the ambient air. These new UST vent-stack emissions detract from the overall recovery efficiency at the GDF. As discussed in the proposed rule, the level of these UST vent stack emissions varies based on several factors but can result in a net 1 to 10 percent decrease in overall control efficiency of vehicle fuel tank emissions at any given GDF.[14] The decrease in efficiency varies depending on the vacuum assist technology design (including the use of a mini-boot for the nozzle and the ratio of volume of air drawn into the UST compared to the volume of gasoline dispensed (A/L) ratio), the gasoline Reid vapor pressure, the air and gasoline temperatures, and the fraction of throughput dispensed to ORVR vehicles. There are various technologies that address these UST vent-stack emissions and can extend the utility of Stage II to further minimize the overall control of gasoline vapor emissions at the GDF. These technologies include nozzles that sense when fresh air is being drawn into the UST and stop or reduce the air flow. These ORVR-compatible nozzles are now required in California and Texas. Another solution is the addition of processors on the UST vent pipe that capture or destroy the gasoline vapor emissions from the vent pipe. A number of these systems were presented in comments on the proposed rule. While they may have merit, installing these technologies adds to the expense of the control systems.

E. Proposed Rule To Determine Widespread Use of ORVR

Section 202(a)(6) of the CAA provides discretionary authority to the EPA Administrator to, by rule, revise or waive the section 182(b)(3) Stage II requirement for Serious, Severe, and Extreme ozone nonattainment areas after the Administrator determines that ORVR is in widespread use throughout the motor vehicle fleet. The percentage of non-ORVR vehicles and the percentage of gasoline dispensed to those vehicles grow smaller each year as these older vehicles wear out and are replaced by new ORVR-equipped models. Given the predictable nature of this trend, the EPA proposed a date for ORVR widespread use.

In the Notice of Proposed Rulemaking (NPRM) (76 FR 41731, July 15, 2011), the EPA proposed that ORVR widespread use will occur at the mid-point in the 2013 calendar year, relying upon certain criteria outlined in the proposed rule. This date was also proposed as the effective date for the waiver of the CAA section 182(b)(3) Stage II requirements for Serious, Severe and Extreme ozone nonattainment areas.

The EPA used two basic approaches in determining when ORVR would be in widespread use in the motor vehicle fleet. Both approaches focused on the penetration of ORVR-equipped vehicles in the gasoline-powered highway motor vehicle fleet. The first proposed approach focused on the volume of gasoline that is dispensed into vehicles equipped with ORVR, and compared the emissions reductions achieved by ORVR alone to the reductions that can be achieved by Stage II controls alone. The second approach focused on the fraction of highway motor gasoline dispensed to ORVR-equipped vehicles.

In the proposal, the EPA included Table 1 (republished below). This work was based on outputs from EPA's MOVES 2010 motor vehicle emissions model, which showed information related to the penetration of ORVR in the national motor vehicle fleet projected to 2020. These model outputs have been updated for the final rule to be consistent with the latest public release of the model (MOVES 2010a) since that is the version of the model states would use in any future inventory assessment work related to refueling emissions control. Overall, ORVR efficiency was shown in column 5 of Table 1 and was determined by multiplying the fraction of gasoline dispensed into ORVR-equipped vehicles by ORVR's 98 percent in-use control efficiency.

[14] *See* EPA Memorandum ''Onboard Refueling Vapor Recovery Widespread Use Assessment.'' A copy of this memorandum is located in the docket for this action EPA–HQ–OAR–2010–1076. The level of these UST vent stack emissions varies based on several factors; EPA estimates a 5.4 to 6.4 percentage point decrease in Stage II control efficiency in the 2011–2015 time frame at GDFs employing non-ORVR compatible vacuum assist Stage II nozzles. The decrease in efficiency varies depending on the vacuum assist technology design (including the use of a mini-boot for the nozzle and the ratio of volume of air drawn into the UST compared to the volume of gasoline dispensed (A/L) ratio), the gasoline Reid vapor pressure, the air and gasoline temperatures, and the fraction of throughput dispensed to ORVR vehicles. The values will increase over time as the fraction of total gasoline dispensed to ORVR vehicles at Stage II GDFs increases.

TABLE 1—PROJECTED PENETRATION OF ORVR IN THE NATIONAL VEHICLE FLEET BY YEAR—BASED ON MOVES 2010

Calendar year	Vehicle population percentage	VMT Percentage	Gasoline dispensed percentage	ORVR Efficiency percentage
1	2	3	4	5
2006	39.5	48.7	46.2	45.3
2007	45.3	54.9	52.5	51.5
2008	50.1	60.0	57.6	56.4
2009	54.3	64.5	62.1	60.9
2010	59.0	69.3	66.9	65.6
2011	63.6	73.9	71.5	70.1
2012	67.9	78.0	75.6	74.1
2013	71.7	81.6	79.3	77.7
2014	75.2	84.6	82.6	80.9
2015	78.4	87.2	85.3	83.6
2016	81.2	89.4	87.7	85.9
2017	83.6	91.2	89.7	87.9
2018	85.6	92.7	91.3	89.5
2019	87.5	93.9	92.7	90.8
2020	89.0	94.9	93.9	92.0

See EPA Memorandum ''Onboard Refueling Vapor Recovery Widespread Use Assessment'' in the docket (number EPA–HQ–OAR–2010–1076) addressing details on issues related to values in this table.

Note: In this table, the columns have the following meaning.

1. Calendar year that corresponds to the percentages in the row associated with the year.
2. Percentage of the gasoline-powered highway vehicle fleet that have ORVR.
3. Percentage of vehicle miles traveled (VMT) by vehicles equipped with ORVR.
4. Amount of gasoline dispensed into ORVR-equipped vehicles as a percentage of all gasoline dispensed to highway motor vehicles.
5. Percentage from the same row in column 4 multiplied by 0.98.

In the proposal, the EPA estimated that ORVR would need to achieve in-use emission reductions of about 77.4 percent to be equivalent to the amount of control Stage II alone would achieve. This estimate was based on the in-use control efficiency of Stage II systems and exemptions for Stage II for lower throughput GDFs. In the NPRM, the EPA assumed that in areas where basic Stage II systems are used the control efficiency of Stage II gasoline vapor control systems is 86 percent. The use of this value depends on the assumption that daily and annual inspections, periodic testing, and appropriate maintenance are conducted in a correct and timely manner. In addressing comments, we have stated that this efficiency could be nearer to 60% if inspections testing and maintenance are not conducted and there is minimal enforcement.[15]

In the NPRM, the EPA estimated that the percentage of gasoline dispensed in an area that is covered by Stage II controls is 90 percent. Multiplying the estimated efficiency of Stage II systems (86 percent) by the estimated fraction of gasoline dispensed in nonattainment areas from Stage II-equipped gasoline pumps yielded an estimate of the area-wide control efficiency of Stage II programs of 77.4 percent ($0.90 \times 0.86 = 0.774$ or 77.4 percent) for emissions displaced from vehicle fuel tanks.[16] [17] Table 1 indicated this level of ORVR control efficiency is expected to be achieved during calendar year 2013.

In the second approach for estimating when ORVR is in widespread use, we also observed from Table 1 that by the end of calendar year 2012 more than 75 percent of gasoline will be dispensed into ORVR-equipped vehicles. As discussed in the NPRM, the EPA believed that this percentage of ORVR coverage (≥75 percent) is substantial enough to inherently be viewed as ''widespread'' under any ordinary understanding of that term. Furthermore, in Table 1, the percentage of VMT by ORVR-equipped vehicles (column 3) and the amount of gasoline dispensed into ORVR-equipped vehicles (column 4) reached or exceeded 75 percent between the end of year 2011 and end of 2012. The EPA believed this provided further support for establishing a widespread use date after the end of calendar year 2012. Based on the dates derived from these two basic approaches, the EPA proposed to determine that ORVR will be in widespread use by June 30, 2013, or the midpoint of calendar year 2013.

VI. This Action

A. Analytical Rationale for Final Rule

Section 202(a)(6) of the CAA provides discretionary authority to the EPA Administrator to, by rule, revise or waive the section 182(b)(3) Stage II requirement after the Administrator determines that ORVR is in widespread use throughout the motor vehicle fleet. As discussed in the NPRM, the EPA has broad discretion in how it defines widespread use and the manner in which any final determination is implemented. In our review of the public comments received on the proposal, no commenter indicated that a widespread use determination was inappropriate or took issue with the EPA's two-pronged analytical approach. We have integrated responses to many comments throughout the preamble to

[15] *See,* ''Determination of Widespread Use of Onboard Refueling Vapor Recovery (ORVR) and Waiver of Stage II Vapor Recovery Requirements: Summary of Public Comments and Responses.'' March 2012. Document contained in docket EPA–HQ–OAR–2010–1076.

[16] *See* section 4.4.3 (especially Figure 4–14 and Table 4–4) in ''Technical Guidance—Stage II Vapor Recovery Systems for Control of Vehicle Refueling Emissions at Gasoline Dispensing Facilities, Volume I: Chapters,'' EPA–450/3–91–022a, November 1991. A copy of this document is located in the docket for this action EPA–HQ–OAR–2010–1076. This is based on annual enforcement inspections and on allowable exemptions of 10,000/50,000 gallons per month as described in section 324(a) of the CAA. The EPA recognizes that these two values vary by state and that in some cases actual in-use efficiencies, prescribed exemption levels, or both may be either higher or lower.

[17] AP–42, The EPA's emission factors document, identifies three sources of refueling emissions: Displacement, spillage, and breathing losses. In the EPA Memorandum ''Onboard Refueling Vapor Recovery Widespread Use Assessment'' (available in the public docket), the EPA determined that for separate Stage II and ORVR refueling events, spillage and breathing loss emission rates are similar. Thus, this analysis focuses on differences in controlled displacement emissions. Compatibility effects related to ORVR and Stage II vacuum assist systems are addressed separately.

this final rule. A more detailed set of responses is in a document titled, ''Determination of Widespread Use of Onboard Refueling Vapor Recovery (ORVR) and Waiver of Stage II Vapor Recovery, Summary of Public Comments and Responses'' that can be found in the docket, EPA–HQ–OAR–2010–1076.

The analytical approaches used by the EPA to determine the widespread use date are influenced by several key input parameters that affect the estimates of the emission reduction benefits of Stage II alone versus the benefits of ORVR alone and the phase-in of ORVR-equipped vehicles. We received several comments on the assumptions and parameters used by the EPA in the NPRM, and in some cases we have updated the information used in calculations that support the final rule, as discussed in the following paragraphs.

1. ORVR Parameters

• *ORVR efficiency.* The EPA used an in-use control efficiency of ORVR of 98 percent in the proposal. This was based on the testing of 1,160 vehicles drawn from the field. EPA has updated its analysis to include an additional 478 refueling emission test results for ORVR-equipped vehicles that were conducted in calendar years 2010 and 2011. The data set, which now includes over 1,600 vehicle tests for vehicles from model years 2000–2010 with mileages ranging from 10,000 to over 100,000, continues to support the conclusion that the 98 percent in-use efficiency values remain appropriate.[18]

• *Modeling program inputs.* The NPRM relied on EPA's MOVES 2010 model for estimating ORVR vehicle fleet penetration, VMT by ORVR vehicles, and gallons of gasoline dispensed to ORVR vehicles. Since the development of the NPRM, the EPA has publicly released MOVES 2010a. The updated model incorporates many improvements. Those relevant here include updates in ORVR vehicle sales, sales projections, scrappage, fleet mix, annual VMT, and fuel efficiency. The EPA believes that the modeling undertaken to determine the widespread use date for the final rule should employ the EPA's latest MOVES modeling program because it contains updated information that bears on the subject of this rulemaking, and because the EPA expects states to also use it in any state-specific demonstrations supporting future SIP revisions, including revisions that seek to remove Stage II programs.

2. Stage II Parameters

• *Stage II efficiency.* The EPA used an in-use control efficiency of 86 percent for Stage II in the proposal. As discussed above, Stage II control efficiency depends on inspection, testing, and maintenance by GDF owner/operators, and inspection and enforcement by state/local agencies. Typical values range from 62 percent to 86 percent. The public comments referred the EPA to additional reported information directly related to in-use effectiveness of Stage II vapor recovery.[19] The reports indicate that for balance and vacuum-assist type Stage II systems in use in many states today, the in-use effectiveness of Stage II is typically near 70 percent. Nonetheless, the EPA has elected to retain the use of an 86 percent efficiency value in the analyses supporting the final rule. This is because many state programs have included the maintenance and inspection provisions recommended by EPA to achieve this level of efficiency in their initial SIPs that originally incorporated Stage II controls.[20] Current in-use efficiency values may well be lower based on the performance of the Stage II technology itself or for other reasons related to maintenance and enforcement. We are not rejecting the additional information from commenters or the possibility that Stage II efficiency may be lower in some states or nonattainment areas. However, the EPA believes these issues are best examined in the SIP review process. If real in-use efficiency across all existing Stage II programs is, in fact, lower than 86 percent, the EPA's final analysis overestimates the length of time required for emissions reductions from ORVR alone to eclipse the reductions that can be achieved by Stage II alone.

• *Stage II exemption rate.* In sections 182(b)(3) and 324 of the CAA, Congress permitted exemptions from Stage II controls for GDFs of less than 10,000 gallons/month (privates) and 50,000 gallons/month (independent small business marketers). The EPA analysis indicated that these GDF throughput values exempted about 10 percent of annual throughput in any given area. Some states included more strict exemption rates, most commonly 10,000 gallons per month (3 percent of throughput) for both privates and independent small business marketers. A few other states' exemption provisions used values that fell within or outside this range.[21] Of the 21 states and the District of Columbia with areas classified as Serious, Severe, or Extreme for ozone and/or within the Ozone Transport Region, the plurality incorporated exemption provisions in their state regulations, which exempted about 10 percent of throughput.[22] Therefore, we believe it remains reasonable to use that value within this analysis.

• *Compatibility factor for vacuum assist Stage II systems.* The EPA discussed the compatibility factor at length in the NPRM and provided relevant materials in the docket. Several commenters asked that the EPA provide guidance on how the compatibility factor should be incorporated into any similar analysis conducted by a state for purposes of future SIP revisions involving Stage II programs. The magnitude of the compatibility factor for any given area varies depending on ORVR penetration, fraction of vacuum assist nozzles relative to balance nozzles, and excess A/L for vacuum assist nozzles. Two states have adopted measures to reduce this effect through the use of ORVR-compatible nozzles and one state prohibits vacuum assist nozzles completely. Due to these significant variables, the EPA is electing not to include the compatibility factor in the widespread use date determination analysis, but will provide the guidance requested by the commenters for use in making future SIP revisions. To the extent that compatibility emissions across all existing Stage II programs as a whole are significant, the EPA's final analysis overestimates the length of time required for emissions reductions from ORVR alone to eclipse the reductions that can be achieved by Stage II alone.

B. Updated Analysis of Widespread Use

As discussed previously, the EPA has used two approaches for determining

[18] *See* the EPA memorandum ''Updated ORVR In-Use Efficiency.'' A copy of this memorandum is located in the docket for this action EPA–HQ–OAR–2010–1076.

[19] *See* ''Draft Vapor Recovery Test Report,'' April 1999 by CARB and CAPCOA (now cleared for public use), and ''Performance of Balance Vapor Recovery Systems at Gasoline Dispensing Facilities'', prepared by the San Diego Air Pollution Control District, May 18, 2000. Both reports are available in the public docket.

[20] The EPA report, ''Enforcement Guidance for Stage II Vehicle Refueling Control Programs,'' U.S. EPA, Office of Air and Radiation, Office of Mobile Sources, December 1991, provides basic EPA guidance on what a state SIP and accompanying regulations should include to achieve high efficiency.

[21] There are a few states that limit Stage II exemptions to only GDFs with less than 10,000 gpm throughput, which would exempt about three to five percent of area-wide throughput.

[22] *See* the EPA memorandum ''Summary of Stage II Exemption Program Values.'' A copy of this memorandum is located in the docket for this action in EPA–HQ–OAR–2010–1076.

when ORVR is in widespread use on a nationwide basis. After reviewing our methodology and reviewing the related comments on the NPRM, we are retaining three of the four basic analytical input parameters and updating one. The in-use ORVR efficiency, the in-use Stage II efficiency, and the Stage II exemption rate parameters are the same as in the NPRM. However, we have updated the modeling program inputs as discussed previously, and the results are reflected in Table 2.

TABLE 2—PROJECTED PENETRATION OF ORVR IN THE NATIONAL VEHICLE FLEET BY YEAR—BASED ON MOVES 2010(a)

End of calendar year	Vehicle population percentage	VMT Percentage	Gasoline dispensed percentage	ORVR Efficiency percentage
1	2	3	4	5
2006	42.6	51.2	49.2	48.2
2007	48.4	57.3	55.5	54.4
2008	53.3	62.3	60.5	59.2
2009	57.7	66.8	64.8	63.5
2010	62.4	71.6	69.5	68.1
2011	67.1	76.0	73.9	72.4
2012	71.4	80.0	77.7	76.1
2013	75.3	83.4	81.0	79.4
2014	78.7	86.3	84.0	82.3
2015	81.8	88.8	86.5	84.8
2016	84.5	90.9	88.6	86.8
2017	86.8	92.5	90.3	88.5
2018	88.8	93.9	91.9	90.0
2019	90.5	95.0	93.2	91.3
2020	92.0	95.9	94.3	92.4

See EPA Memorandum ''Onboard Refueling Vapor Recovery Widespread Use Assessment'' in the docket (number EPA–HQ–OAR–2010–1076) addressing details on issues related to values in this table.

Note: In this table, the columns have the following meaning.

1. Calendar year that corresponds to the percentages in the row associated with the year.
2. Percentage of the gasoline-powered highway vehicle fleet that have ORVR.
3. Percentage of vehicle miles traveled (VMT) by vehicles equipped with ORVR.
4. Amount of gasoline dispensed into ORVR-equipped vehicles as a percentage of all gasoline dispensed to highway motor vehicles.
5. Percentage from the same row in column 4 multiplied by 0.98.

The results in Table 2 are applied in the context of the two basic analytical approaches used in the NPRM for supporting the final date associated with the EPA's widespread use determination. First, using the analysis based on equal reductions for Stage II and ORVR, the 77.4 percent in-use emission reduction efficiency for ORVR will occur in May 2013 (See column 5 of Table 2). Second, 75 percent of gasoline will be dispensed to ORVR-equipped vehicles by April 2012 (See column 4 of Table 2).

C. Widespread Use Date

The updated analysis indicates that the two benchmarks will occur about a year apart, and that one benchmark of April 2012 has already passed. At the time of the NPRM, both of the benchmark dates for the ORVR widespread use determination were in the future, many months after the EPA's expected final action. Thus, given the basic merits of both approaches, the EPA believed it was reasonable to propose a date between the dates associated with the two analytical approaches.

The EPA's updated analysis presents a somewhat different picture. The April 2012 benchmark date has already passed, and the May 2013 benchmark date is less than 1 year away. We believe it is reasonable for the EPA Administrator to determine that ORVR is in widespread use in the motor vehicle fleet as of the date this final action is published in the **Federal Register** because this final rule is being promulgated within the window bounded by the two benchmark dates derived from the updated analyses.

As discussed previously in this notice and in the NPRM, the EPA has discretion in setting the widespread use date. It is evident from the public comments on the NPRM from states and members of the regulated industry, and from recent state actions, that there is a desire to curtail Stage II installations at newly constructed GDFs, and to initiate an orderly phase-out of Stage II controls at existing GDFs.[23] Since one of the two analytical benchmark dates (April 2012) has passed, and we expect in most cases the second analytical benchmark date (May 2013) will have passed by the time the EPA is able to complete approvals of SIP revisions removing Stage II programs and pass any revised regulations, then in response to comments asking us to expedite the ORVR widespread use finding, the EPA Administrator is determining that ORVR is in widespread use in the motor vehicle fleet as of May 16, 2012. Accordingly, as of May 16, 2012 the requirement to implement a Stage II emissions control program under section 182(b)(3) of the CAA is waived.

D. Implementation of the Rule Provisions

In this final action, the ORVR widespread use determination and waiver of the section 182(b)(3) requirement applies to the entire country. This includes areas that are now classified as Serious or above for ozone nonattainment, as well as those that may be classified or reclassified as Serious or above in the future.

In the NPRM, we indicated that states could potentially demonstrate that ORVR was in widespread use in specific areas sooner than the general, national date. Such a provision is no longer

[23] For example, in November 2011, New Hampshire put new regulations in place that eliminate the need for new GDFs to install Stage II, allows current GDFs with Stage II to decommission the systems, and requires all systems to be decommissioned by December 22, 2015. In May of 2011, New York issued an enforcement discretion directive which curtailed the need for new stations to install Stage II and permitted current installations to be decommissioned. These actions remain under review of EPA.

needed because today's action provides for a nationwide determination of widespread use effective on May 16, 2012.

As stated in this final action and as pointed out by several commenters, the ORVR widespread use determination and section 182(b)(3) waiver determination does not obligate states to remove any existing Stage II vapor recovery requirements. It is possible that a state would determine it beneficial to continue implementation of a Stage II program. For example, in an area where ORVR-equipped fleet penetration is considerably less than the national average, or where Stage II exemptions are significantly more restrictive than the national assumptions used in this analysis, a state may determine that it would not be appropriate to modify its program immediately, but that it would be more appropriate to do so at a later date. In assessing whether and how to phase out Stage II requirements, states are encouraged to review, and as needed revise the area-specific assumptions about taking into consideration their inspection and enforcement resource commitments as well as ORVR/vacuum-assist Stage II compatibility.

A state that chooses to remove the program must submit a SIP revision requesting EPA to approve such action and provide, as appropriate, a demonstration that the SIP revision is consistent with CAA section 110(1), and in some cases consistent with CAA section 193. The EPA will provide additional guidance on conducting assessments to support Stage II-related SIP revisions.[24] The EPA encourages states to review this guidance and consult with the EPA Regional Offices on developing SIP revisions seeking EPA approval for phasing out existing Stage II programs in a manner that ensures air quality protections are maintained.

Section 110(l) precludes the Administrator from approving a SIP revision if it would interfere with applicable CAA requirements (including, but not limited to, attainment and maintenance of the ozone NAAQS and achieving reasonable further progress). A state may demonstrate through analysis that removing a Stage II program in an area as of a specific date will not result in an emissions increase in the area, or that the small and ever-declining increase is offset by other simultaneous changes in the implementation plan. However, a state may find that by removing Stage II requirements, they are reducing the overall level of emissions reductions they have previously applied toward meeting CAA rate of progress (ROP) or reasonable further progress (RFP) requirements, or demonstrating attainment. If so, the state should explain how removing Stage II controls in the area would not interfere with attaining and maintaining the ozone NAAQS in the area. In such circumstances, it is possible that additional emissions reductions from other measures may be needed to offset the removal of Stage II.

If EPA has approved a state's adoption of Stage II requirements into a SIP before November 15, 1990, section 193 would also apply. Section 193 provides that removal of an emissions control program cannot result in any emissions increase unless the increase is offset. Section 193 only applies if an area is nonattainment for the standard.

State and local agencies should also consider any transportation conformity impacts related to removing Stage II if emissions reductions from Stage II are included in a SIP-approved on-road motor vehicle emissions budget. States may need to adjust conformity budgets or the components of the budget if removing Stage II requirements would alter expected air quality benefits.

In previous memoranda, the EPA provided guidance to states on removing Stage II at refueling facilities dedicated to certain segments of the motor vehicle fleet (e.g., new automobile assembly plants, rental car facilities, E85 dispensing pumps, and corporate fleet facilities). In these specific cases where all or nearly all of the vehicles being refueled are ORVR-equipped, the EPA could conservatively conclude that widespread use of ORVR had occurred in these fleets.[25]

E. Implementation of Rule Provisions in the Ozone Transport Region

States and the District of Columbia in the OTR in the northeastern U.S. are also subject to a separate Stage II-related requirement. Under section 184(b)(2) of the CAA (42 U.S.C. 7511c(b)(2)), all areas in the OTR, both attainment and nonattainment areas, must implement control measures capable of achieving emissions reductions comparable to those achievable through Stage II controls. The CAA does not contain specific provisions giving authority to the EPA Administrator to waive this independent requirement. The section 184(b)(2) requirement does not impose Stage II *per se,* but rather is a requirement that OTR states achieve an amount of emissions reductions comparable to the amount that Stage II would achieve. Moreover, section 202(a)(6), in allowing for a waiver of the section 182(b)(3) Stage II requirement for nonattainment areas, does not refer to the independent section 184(b)(2) requirements. Therefore, the section 184(b)(2) Stage II-related requirement for the OTR will continue to remain in place even after the ORVR widespread use determination and section 182(b)(3) waiver effective date.

In the mid-1990s, the EPA issued guidance on estimating what levels of emissions reductions would be ''comparable'' to those reductions achieved by Stage II.[26] In response, most OTR states simply adopted Stage II programs rather than identify other measures that got the same degree of emissions reductions. Given the continued penetration of ORVR-equipped vehicles into the overall vehicle fleet, Stage II-comparable emissions are significantly less than in the past, and continue to decline. Accordingly, the EPA is issuing updated guidance on determining ''comparable measures.'' States in the OTR should refer to that guidance if preparing a SIP revision to remove Stage II programs in areas of the OTR.[27]

Commenters on the NPRM urged the EPA to revise its previous interpretation of section 184(b)(2) to permit ORVR to be recognized as a Stage II comparable emission reduction measure. This issue is not within the scope of this rulemaking, and EPS is not taking final agency action implementing section 184(b)(2) or an interpretation thereof. However, for informational purposes, we point out that simply treating the ORVR requirements under section 202(a)(6) as a comparable measure that an OTR SIP must additionally contain would arguably render the 184(b)(2) requirement a nullity, which could be an impermissible statutory interpretation. If commenters wish to further address this issue, we ask that they raise their concerns in any future SIP actions under section 184(b)(2) regarding OTR states that may affect them. In addition, we note that the expected level of emissions reductions

[24] ''Phasing Out Stage II Gasoline Refueling Vapor Recovery Programs: Guidance on Satisfying Requirements of Clean Air Act Sections 110(*l*), 193, and 184(b)(2) (tentative title).'' U.S. EPA Office of Air and Radiation, forthcoming.

[25] ''Removal of Stage II Vapor Recovery in Situation where Widespread Use of Onboard Refueling Vapor Recovery is Demonstrated,'' from Stephen D. Page and Margo Tsirigotis Oge, EPA, December 12, 2006.

[26] ''Stage II Comparability Study for the Northeast Ozone Transport Region,'' (EPA–452/R–94–011; January 1995).

[27] ''Phasing Out Stage II Gasoline Refueling Vapor Recovery Programs: Guidance on Satisfying Requirements of Clean Air Act Sections 110(*l*), 193, and 184(b)(2) (tentative title).'' U.S. EPA Office of Air and Radiation, forthcoming.

that Stage II programs can obtain has changed significantly in the past 15 years with ORVR-equipped vehicles phasing in at the rate of 3–4 percent of the fleet each calendar year. Therefore, the EPA is issuing updated guidance on estimating the emissions reductions needed to be comparable to those achievable through Stage II controls. Theoretically, comparable measures could in some areas mean no additional control beyond ORVR is required if Stage II is achieving no additional emission reduction benefit in the area, or has reached a point of providing only a declining *de minimis* benefit.

F. Comments on Other Waiver Implementation Issues

Numerous commenters on the NPRM urged the EPA to adopt provisions in the final rule that would exempt new gasoline dispensing facilities with construction occurring between the final rule publication and the effective Stage II waiver date from installing Stage II equipment. The timing issue is now largely moot since widespread use is deemed to have occurred on the effective date of this action. However, under the CAA, states adopt state-specific or area-specific rules, which are then submitted to the EPA for approval into the SIP. These rules are independently enforceable under state law, and also become federally enforceable when the EPA approves them into the SIP. The EPA cannot unilaterally change legally-adopted state statutes or rules or otherwise revise an approved SIP that was not erroneously approved. The EPA's only authority to establish requirements that would apply in lieu of approved SIPs is its authority under CAA section 110(c) to promulgate a Federal Implementation Plan (FIP). To trigger FIP authority, the EPA must first determine that a state has failed to submit a required SIP or that the state's SIP must be disapproved. The circumstances of this ORVR widespread use finding and waiver of the section 182(b)(3) Stage II requirement to do not present either of those situations. According to requirements established by the CAA that are applicable here, states will need to develop and submit SIP revisions to the EPA in order to change or eliminate SIP-approved state rules that set forth the compliance dates for newly constructed GDFs.

Commenters also urged EPA to simply allow states to eliminate all active Stage II programs from certain nonattainment areas after the widespread use date, without requiring SIP revisions from states. While the EPA has discretion to determine the widespread use date, the EPA cannot simply nullify states' rules that are binding and enforceable under state law. In order to change the federal enforceability of SIPs, states must go through the SIP revision process, and the EPA can approve the SIP revision only if the provisions of section 110(l) and any other applicable requirements, such as the requirements of section 193 and the comparable measures requirement for OTR states, are satisfied. Today's final rule takes no action in implementing CAA sections 110(l), 193, or 184(b)(2), and any future final actions regarding ''comparable measures'' SIPs will be fact-specific in response to individual state submissions. Also, subsequent to the effective waiver date of the section 182(b)(3) Stage II requirements, areas currently implementing the EPA-approved Stage II programs in their SIPs as a result of obligations under the 1-hour or 1997 8-hour ozone NAAQS, would be required to continue implementing these programs until the EPA approves a SIP revision adopted under state law removing the requirement from the state's ozone implementation plan.

VII. Estimated Cost

As part of the NPRM, the EPA conducted an initial assessment of the costs and savings to gasoline dispensing facility owners related to this proposed action. The report titled, ''Draft Regulatory Support Document, Decommissioning Stage II Vapor Recovery, Financial Benefits and Costs,'' is available in the public docket for this action. The report examines the initial costs and savings to facility owners incurred in the decommissioning of Stage II vapor recovery systems, as well as changes in recurring costs associated with above ground hardware maintenance, operations, and administrative tasks. The EPA received no substantive comment on the draft report, other than a concern that the savings identified therein may not come to pass as quickly as envisioned in the draft report if the EPA does not provide updated guidance on comparable measures for the OTR states. We intend to address this concern by issuing separate guidance for the states.[28] EPA will post this action at the following web site address: *http://www.epa.gov/glo/actions.html*.

As part of the re-analysis following the NPRM, the EPA reviewed the input values used for the proposal draft. Most input values were confirmed as reasonable and representative but it was concluded that two of the values should be updated. These include: (1) The pre-tax price of gasoline used in the foregone vapor recovery savings calculation, which increased from $2.30 in 2010 to $3.04 in 2011 (average price per gallon), and (2) the number of Stage II facilities potentially affected by SIP revisions removing Stage II requirements in non-California Serious, Severe and Extreme ozone nonattainment areas which increased from 26,900 to 30,600 in 19 states and the District of Columbia. As discussed in our final regulatory support document, the EPA estimates recurring cost savings of about $3,000 per year for a typical gasoline dispensing facility, and an annual nationwide savings of up to $91 million if Stage II is phased out of the approximately 30,600 dispensing facilities outside of California that are required to have Stage II vapor recovery systems under section 182(b)(3) of the CAA.[29] This analysis assumes that Stage II is removed from GDFs over a three year time frame in an equal number each year. What actually occurs will depend on actions by the individual states. If the states submit and EPA approves SIP revisions to remove Stage II systems from these GDFs, the EPA projects savings of about $10.2 million in the first year, $40.5 million in the second year, and $70.9 million in the third year. Long term savings are projected to be about $91 million per year, compared to the current use of Stage II systems in these areas.

VIII. Statutory and Executive Order Reviews

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

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it raises novel legal or policy issues arising out of legal mandates. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

[28] ''Phasing Out Stage II Gasoline Refueling Vapor Recovery Programs: Guidance on Satisfying Requirements of Clean Air Act Sections 110(*l*), 193, and 184(b)(2) (tentative title).'' U.S. EPA Office of Air and Radiation, forthcoming.

[29] *See* ''Final Regulatory Support Document, Decommissioning Stage II Vapor Recovery, Financial Benefits and Costs,'' available in public docket, EPA–HQ–OAR–2010–1076.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Burden is defined at 5 CFR 1320.3(b). It does not contain any recordkeeping or reporting requirements.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this action on small entities, small entity is defined as: (1) A small business as defined in the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This rule will not impose any new requirements on small entities. Rather, it provides criteria for reducing existing regulatory requirements on gasoline dispensing facilities, some of which may qualify as small businesses.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. The action imposes no enforceable duty on any state, local or tribal governments, or the private sector. Therefore, this action is not subject to the requirements of sections 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action addresses the removal of a requirement regarding gasoline vapor recovery equipment, but does not impose any obligations to remove these programs.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action does not impose any new mandates on state or local governments. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

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

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It does not impose additional costs on gasoline distribution, but rather promises to lower operating and maintenance costs for gasoline dispensing facilities by facilitating removal of redundant gasoline refueling vapor controls.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d), (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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

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

The EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not directly affect the level of protection provided to human health or the environment under the EPA's NAAQS for ozone. This action proposes to waive the requirement for states to adopt largely redundant Stage II programs, based on a determination of widespread use of ORVR in the motor vehicle fleet.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the

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

IX. Statutory Authority

The statutory authority for this action is provided by the CAA, as amended (42 U.S.C. 7401, et seq.); relevant provisions of the CAA include, but are not limited to sections 182(b)(3), 202(a)(6), 301(a)(1), and 307(b), and 307(d)(42 U.S.C. 7511a(b)(3), 7521(a)(6), 7601(a)(1), 7607(b), and 7607(d)).

List of Subjects in 40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control, Ozone, Particulate matter, Volatile organic compounds.

Dated: May 9, 2012.

Lisa P. Jackson,

Administrator.

For reasons set forth in the preamble, part 51 of chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS.

■ 1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

Subpart G—[Amended]

■ 2. Section 51.126 is added to read as follows:

§ 51.126 Determination of widespread use of ORVR and waiver of CAA section 182(b)(3) Stage II gasoline vapor recovery requirements.

(a) Pursuant to section 202(a)(6) of the Clean Air Act, the Administrator has determined that, effective May 16, 2012, onboard refueling vapor recovery (ORVR) systems are in widespread use in the motor vehicle fleet within the United States.

(b) Effective May 16, 2012, the Administrator waives the requirement of Clean Air Act section 182(b)(3) for Stage II vapor recovery systems in ozone nonattainment areas regardless of classification. States must submit and receive EPA approval of a revision to their approved State Implementation Plans before removing Stage II requirements that are contained therein.

[FR Doc. 2012–11846 Filed 5–15–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2011–0714; FRL–9670–3]

Approval and Promulgation of Air Quality Implementation Plans; Delaware, New Jersey, and Pennsylvania; Determinations of Attainment of the 1997 Annual Fine Particulate Standard for the Philadelphia-Wilmington Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is making two determinations regarding the Philadelphia-Wilmington, PA-NJ-DE fine particulate ($PM_{2.5}$) nonattainment area (the Philadelphia Area). First, EPA is making a determination that the Philadelphia Area has attained the 1997 annual $PM_{2.5}$ national ambient air quality standard (NAAQS) by its attainment date of April 5, 2010. This determination is based upon quality assured and certified ambient air monitoring data that show the area monitored attainment of the 1997 annual $PM_{2.5}$ NAAQS for the 2007–2009 monitoring period. Second, EPA is making a clean data determination, finding that the Philadelphia Area has attained the 1997 $PM_{2.5}$ NAAQS, based on quality assured and certified ambient air monitoring data for the 2007–2009 and 2008–2010 monitoring periods. In accordance with EPA's applicable $PM_{2.5}$ implementation rule, this determination suspends the requirement for the Philadelphia Area to submit an attainment demonstration, reasonably available control measures/reasonably available control technology (RACM/RACT), a reasonable further progress (RFP) plan, and contingency measures related to attainment of the 1997 annual $PM_{2.5}$ NAAQS for so long as the area continues to attain the 1997 annual $PM_{2.5}$ NAAQS. These actions are being taken under the Clean Air Act (CAA).

DATES: This rule is effective on June 15, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2011–0714. 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.

FOR FURTHER INFORMATION CONTACT: If you have questions concerning EPA's action related to Delaware or Pennsylvania, please contact Maria A. Pino, (215) 814–2181, or by email at *pino.maria@epa.gov.* If you have questions concerning EPA's action related to New Jersey, please contact Henry Feingersh, (212) 637–3382, or by email at *feingersh.henry@epa.gov.*

SUPPLEMENTARY INFORMATION: The following outline is provided to aid in locating information in this action.

I. Background
II. Summary of Actions
III. Summary of Public Comments and EPA Responses
IV. Final Actions
V. Statutory and Executive Order Reviews

I. Background

On January 23, 2012, EPA published a direct final rulemaking (77 FR 3147) and companion notice of proposed rulemaking (NPR) (77 FR 3223) for the States of Delaware and New Jersey and the Commonwealth of Pennsylvania (the States). In the January 23, 2012 rulemaking action, EPA proposed to determine that the Philadelphia Area attained the 1997 $PM_{2.5}$ NAAQS by its attainment date, April 5, 2010. EPA also proposed to make a clean data determination, finding that the Philadelphia Area has attained the 1997 $PM_{2.5}$ NAAQS.

Because EPA received adverse comment, EPA withdrew the direct final rule on March 13, 2012 (77 FR14697), and the direct final rule was converted to a proposed rule.

II. Summary of Actions

These actions do not constitute a redesignation to attainment under section 107(d)(3) of the CAA. The designation status of the Philadelphia Area will remain nonattainment for the 1997 annual $PM_{2.5}$ NAAQS until such

time as EPA determines that the Philadelphia area meets the CAA requirements for redesignation to attainment, including an approved maintenance plan.

A. Determination of Attainment by the Attainment Date

EPA is making a determination that the Philadelphia Area has attained the 1997 annual $PM_{2.5}$ NAAQS by its applicable attainment date of April 5, 2010. This determination is based upon quality assured and certified ambient air monitoring data for the 2007–2009 monitoring period that shows the area has monitored attainment of the 1997 $PM_{2.5}$ NAAQS during this monitoring period. Therefore, EPA has met its requirement pursuant to CAA section 179(c) to determine, based on the area's air quality as of the attainment date, whether the area attained the standard by that date. The effect of a final determination of attainment by the area's attainment date will be to discharge EPA's obligation under CAA section 179(c).

B. Clean Data Determination

EPA is making a determination that the Philadelphia Area is attaining the 1997 annual $PM_{2.5}$ NAAQS. This determination is based upon quality assured and certified ambient air monitoring data that show the area has monitored attainment of the 1997 $PM_{2.5}$ NAAQS for the 2007–2009 and 2008–2010 monitoring periods. This determination of attainment suspends the CAA requirements for the Philadelphia Area to submit an attainment demonstration and the associated RFP plan, contingency measures, RACM/RACT analysis, and any other planning requirements related to attainment of the 1997 annual $PM_{2.5}$ NAAQS. These requirements remain suspended for so long as the area continues to attain the 1997 annual $PM_{2.5}$ NAAQS.

The clean data determination suspends the requirement for the Philadelphia Area to submit an attainment demonstration, RACM/RACT, RFP plan, contingency measures, and any other planning requirements related to attainment of the 1997 annual $PM_{2.5}$ NAAQS. This suspension remains in effect until such time, if any, that EPA (i) redesignates the area to attainment at which time those requirements no longer apply, or (ii) subsequently determines that the area has violated the 1997 annual $PM_{2.5}$ NAAQS. This determination is separate from, and does not influence or otherwise affect, any future designation determination or requirements for the Philadelphia Area based on any new or revised $PM_{2.5}$ NAAQS. It remains in effect regardless of whether EPA designates the Philadelphia Area as a nonattainment area for purposes of any new or revised $PM_{2.5}$ NAAQS. Although these requirements are suspended, EPA is not precluded from acting upon these elements. The States of Delaware and New Jersey, and the Commonwealth of Pennsylvania have submitted state implementation plan (SIP) revisions for their portions of the Philadelphia Area to EPA for review and approval.

C. Ambient Air Quality Monitoring Data

Consistent with the requirements contained in 40 CFR part 50, EPA has reviewed the $PM_{2.5}$ ambient air monitoring data for the monitoring periods 2007–2009 and 2008–2010 for the Philadelphia Area, as recorded in the EPA Air Quality System database. On the basis of that review, EPA has concluded that the Philadelphia Area attained the 1997 annual $PM_{2.5}$ NAAQS based on data for the 2007–2009 and 2008–2010 monitoring periods. In the Technical Support Document (TSD) prepared for this action, EPA evaluates the air quality data for the Philadelphia Area. For details, please refer to EPA's TSD, which can be viewed at *http://www.regulations.gov.*

III. Summary of Public Comments and EPA Responses

On January 24, 2012, EPA received adverse comments on the direct final rule from Mr. Robert Ukeiley. A summary of the comments submitted and EPA's response is provided below.

Comment: The commenter alleges that the determination of attainment here (''clean data determination'') violates CAA section 110(l) because EPA has not completed its review of the $PM_{2.5}$ NAAQS. The commenter asserts that the clean data determination should not be finalized until after EPA promulgates a new $PM_{2.5}$ NAAQS.

Response: EPA's rulemaking action here addresses only the 1997 annual $PM_{2.5}$ NAAQS, and has no bearing on any other NAAQS, including any future revised NAAQS. Therefore, this comment is not relevant to this rulemaking action.

Comment: The commenter states that this clean data determination violates CAA section 110(l) because all other NAAQS would benefit from the Philadelphia Area fully implementing the 1997 annual $PM_{2.5}$ NAAQS, including implementation of RACT. The commenter alleged that EPA failed to conduct an analysis of the impacts of the clean data determination, and this will interfere with other NAAQS attainment.

Response: CAA section 110(l) applies explicitly and only to a ''revision to an implementation plan.'' As set forth in the response to comment above, EPA's rulemaking here is restricted to EPA's determination, based on ambient air quality, that the Philadelphia Area is attaining the 1997 annual $PM_{2.5}$ standard. It is not a SIP revision, and thus section 110(l) is by its own terms is not applicable to this rulemaking. It is not this determination of attainment, but rather EPA's $PM_{2.5}$ implementation rule, 40 CFR 51.1004(c), that specifies the consequence of the determination as suspension of the area's obligations to submit an attainment demonstration, a RFP plan, contingency measures and other planning requirements related to attainment as SIP revisions for as long as the area continues to attain. In any case, the requirements that are suspended by the regulation are related solely to attainment for the 1997 annual $PM_{2.5}$ standard. EPA is determining, and the commenter does not contest, that the area is attaining the 1997 annual $PM_{2.5}$ standard, and that the suspension of attainment planning SIP submissions lasts only as long as the area is meeting that standard. No other requirements are suspended and no control measures in the SIP are being relaxed. This action has no effect on control measures, or air quality, in the area. In sum, no evaluation under section 110(l) is required by law, and even if such an evaluation were required, EPA would conclude that this determination of attainment would not interfere with attainment, reasonable further progress towards attainment, or any other applicable requirement of the CAA. EPA notes that this same individual submitted similar comments on determinations of attainment (''clean data determinations'') for the 1997 8-hour ozone NAAQS for the Pittsburgh-Beaver Valley nonattainment area in Pennsylvania (Pittsburgh Area) and the Charlotte-Gastonia-Rock Hill nonattainment area in North Carolina and South Carolina (Charlotte Area), and for the 1997 annual $PM_{2.5}$ NAAQS for the Kentucky Portion of the Cincinnati-Hamilton nonattainment area (Cincinnati-Hamilton Area). EPA responded to those comments in final rulemaking actions for the Pittsburgh, Charlotte, and Cincinnati-Hamilton Areas, at 76 FR 31237, 76 FR 70656, and 76 FR 77903, respectively.

IV. Final Actions

EPA is making two determinations regarding the Philadelphia Area. First, EPA is making a clean data

determination, finding that the Philadelphia Area has attained the 1997 annual $PM_{2.5}$ NAAQS. This clean data determination is based upon quality assured, and certified ambient air monitoring data that show the area has monitored attainment of the 1997 annual $PM_{2.5}$ NAAQS for the 2007–2009 and 2008–2010 monitoring periods. This clean data determination suspends the requirements for the Philadelphia Area to submit an attainment demonstration and associated RACM/RACT, RFP plan, contingency measures, and any other planning requirements related to attainment of the 1997 annual $PM_{2.5}$ NAAQS, as provided in 40 CFR 51.1004(c), so long as the area continues to attain the 1997 annual $PM_{2.5}$ NAAQS. Second, pursuant to section 179(c) of the CAA, EPA is making a determination that the Philadelphia Area has attained the 1997 annual $PM_{2.5}$ NAAQS by its attainment date, April 5, 2010. This determination is based upon quality assured, and certified ambient air monitoring data for the 2007–2009 monitoring period.

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 July 16, 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 determination that the Philadelphia Area has attained the 1997 annual $PM_{2.5}$ NAAQS may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: March 28, 2012.

W.C. Early,

Acting Regional Administrator, Region III.

Dated: April 24, 2012.

Judith A. Enck,

Regional Administrator, Region II.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart I—Delaware

■ 2. In § 52.425 the existing paragraph is designated as paragraph (a), and paragraph (b) is added to read as follows:

§ 52.425 Determinations of attainment.

* * * * *

(b) Based upon EPA's review of the air quality data for the 3-year period 2007 to 2009, EPA determined that the Philadelphia-Wilmington, PA-NJ-DE fine particle ($PM_{2.5}$) nonattainment area attained the 1997 annual $PM_{2.5}$ National Ambient Air Quality Standard (NAAQS) by the applicable attainment date of April 5, 2010. Therefore, EPA has met the requirement pursuant to CAA section 179(c) to determine, based on the area's air quality as of the attainment date, whether the area attained the standard. EPA also determined that the Philadelphia-Wilmington, PA-NJ-DE $PM_{2.5}$ nonattainment area is not subject to the consequences of failing to attain pursuant to section 179(d).

■ 3. Section 52.427 is added to read as follows:

§ 52.427 Control strategy: Particulate matter.

Determination of attainment. EPA has determined, as of *May 16, 2012,* that based on 2007 to 2009 and 2008 to 2010 ambient air quality data, the Philadelphia-Wilmington, PA-NJ-DE nonattainment area has attained the 1997 annual $PM_{2.5}$ NAAQS. This determination, in accordance with 40

CFR 51.1004(c), suspends the requirements for this area to submit an attainment demonstration, associated reasonably available control measures, a reasonable further progress plan, contingency measures, and other planning SIPs related to attainment of the standard for as long as this area continues to meet the 1997 annual $PM_{2.5}$ NAAQS.

Subpart FF—New Jersey

■ 4. In § 52.1576 the existing paragraph is designated as paragraph (a), and paragraph (b) is added to read as follows:

§ 52.1576 Determinations of attainment.

* * * * *

(b) Based upon EPA's review of the air quality data for the 3-year period 2007 to 2009, EPA determined that the Philadelphia-Wilmington, PA-NJ-DE fine particle ($PM_{2.5}$) nonattainment area attained the 1997 annual $PM_{2.5}$ National Ambient Air Quality Standard (NAAQS) by the applicable attainment date of April 5, 2010. Therefore, EPA has met the requirement pursuant to CAA section 179(c) to determine, based on the area's air quality as of the attainment date, whether the area attained the standard. EPA also determined that the Philadelphia-Wilmington, PA-NJ-DE $PM_{2.5}$ nonattainment area is not subject to the consequences of failing to attain pursuant to section 179(d).

■ 5. Section 52.1602 is amended by adding new paragraph (d) to read as follows:

§ 52.1602 Control strategy and regulations: $PM_{2.5}$.

* * * * *

(d) Determination of Attainment. EPA has determined, as of *May 16, 2012,* that the Philadelphia-Wilmington, PA-NJ-DE fine particle ($PM_{2.5}$) nonattainment area has attained the 1997 $PM_{2.5}$ National Ambient Air Quality Standard. This determination, in accordance with 40 CFR 51.1004(c), suspends the requirements for this area to submit an attainment demonstration, associated reasonably available control measures, a reasonable further progress plan, contingency measures, and other planning SIPs related to attainment of the standard for as long as the area continues to attain the 1997 $PM_{2.5}$ NAAQS.

Subpart NN—Pennsylvania

■ 6. Section 52.2056 is amended by adding paragraph (g) to read as follows:

§ 52.2056 Determinations of attainment.

* * * * *

(g) Based upon EPA's review of the air quality data for the 3-year period 2007 to 2009, EPA determined that the Philadelphia-Wilmington, PA-NJ-DE fine particle ($PM_{2.5}$) nonattainment area attained the 1997 annual $PM_{2.5}$ National Ambient Air Quality Standard (NAAQS) by the applicable attainment date of April 5, 2010. Therefore, EPA has met the requirement pursuant to CAA section 179(c) to determine, based on the area's air quality as of the attainment date, whether the area attained the standard. EPA also determined that the Philadelphia-Wilmington, PA-NJ-DE $PM_{2.5}$ nonattainment area is not subject to the consequences of failing to attain pursuant to section 179(d).

■ 7. Section 52.2059 is amended by adding paragraph (f) to read as follows:

§ 52.2059 Control strategy: Particulate matter.

* * * * *

(f) *Determination of Attainment.* EPA has determined, as of May 16, 2012, that based on 2007 to 2009 and 2008 to 2010 ambient air quality data, the Philadelphia-Wilmington, PA-NJ-DE nonattainment area has attained the 1997 annual $PM_{2.5}$ NAAQS. This determination, in accordance with 40 CFR 51.1004(c), suspends the requirements for this area to submit an attainment demonstration, associated reasonably available control measures, a reasonable further progress plan, contingency measures, and other planning SIPs related to attainment of the standard for as long as this area continues to meet the 1997 annual $PM_{2.5}$ NAAQS.

[FR Doc. 2012–11651 Filed 5–15–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 97

[EPA–HQ–OAR–2009–0491; FRL–9671–4]

RIN 2060–AR35

Revisions to Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: The EPA issued ''Revisions to Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone'' as a direct final rule on February 21, 2012. Because the EPA received adverse comments on this action, we are withdrawing the direct final rule.

DATES: As of May 16, 2012, the EPA withdraws the direct final rule revisions published on February 21, 2012, at 77 FR 10342.

FOR FURTHER INFORMATION CONTACT: Jeremy Mark, U.S. Environmental Protection Agency, Clean Air Markets Division, MC 6204J, Ariel Rios Building, 1200 Pennsylvania Ave. NW., Washington, DC 20460, telephone (202) 343–9087, email at *mark.jeremy@epa.gov.* Electronic copies of this document can be accessed through the EPA Web site at: *http://epa.gov/airmarkets.*

SUPPLEMENTARY INFORMATION: The EPA issued ''Revisions to Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone'' as a direct final rule on February 21, 2012. *See* 77 FR 10342. The direct final rule would have amended the preamble and rule text to the ''Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals'' (Transport Rule), published August 8, 2011, to revise certain state emission budgets, variability limits, and new unit set-asides. Specifically, this direct final rule would have revised 2012 and/or 2014 state budgets and variability limits in Arkansas, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, New York, Nebraska, Ohio, Oklahoma, South Carolina, and Texas, and revised new unit set-asides in Arkansas, Louisiana, and Missouri. *See* 77 FR 10342.

The EPA also issued a parallel proposal on February 21, 2012, that proposed to make the same revisions outlined in the direct final rule. *See* 77 FR 10350. The EPA stated in the direct final rule revisions that if we received significant adverse comment by February 21, 2012, we would publish a timely notice of withdrawal of the direct final rule in the **Federal Register**.

The EPA received several comments on the direct final rule and the parallel proposal. Many of the comments support the specific revisions made in the direct final rule, but some are adverse or adverse in part. Generally, where the comments are adverse, they support the revisions that would have been made by the direct final rule but argue the revisions should have gone further. In addition, a number of the comments duplicate comments to which EPA has previously responded.

Because EPA received adverse comments, we are withdrawing the direct final rule, ''Revisions to Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone.'' 77 FR 10342. The EPA intends to act on the parallel

proposal as expeditiously as possible and will address relevant comments in that final action. As stated in the parallel proposal, the EPA will not institute a second comment period on this action.

List of Subjects in 40 CFR Part 97

Administrative practice and procedure, Air pollution control, Electric utilities, Nitrogen oxides, Reporting and recordkeeping requirements, Sulfur dioxide.

Dated: May 10, 2012.

Lisa P. Jackson,

Administrator.

PART 97—[AMENDED]

■ Accordingly, the revisions to the rule published in the **Federal Register** on February 21, 2012 (77 FR 10342) on pages 10342–10349 are withdrawn as of May 16, 2012.

[FR Doc. 2012–11845 Filed 5–15–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 206

[Docket ID FEMA–2010–0064]

RIN 1660–AA23

Disaster Assistance; Crisis Counseling Regular Program; Amendment to Regulation

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: Under the authority of Section 416 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, the Federal Emergency Management Agency (FEMA) provides grants for crisis counseling and treatment assistance to individuals after a Presidentially-declared major disaster. This rule finalizes, without change, current interim regulations which establish the requirements and procedures for FEMA's Crisis Counseling Assistance and Training Program.

DATES: This rule is effective June 15, 2012.

FOR FURTHER INFORMATION CONTACT: Randall Kinder, Individual Assistance Division, Recovery Directorate, Department of Homeland Security, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472–3100, 202–212–1000; (email) *fema-ia-regulations@dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Crisis Counseling Assistance and Training Program (CCP) is funded by FEMA under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. 5121–5207. The Stafford Act was designed to supplement the efforts and available resources of State, Tribal and local governments in alleviating the damage, loss, hardship, or suffering caused by a Presidentially-declared disaster. Specifically, section 416 of the Stafford Act (42 U.S.C. 5183) authorizes FEMA to provide supplemental funding for short-term mental health assistance and training activities for eligible victims of a Presidentially-declared major disaster.

Three entities are eligible to apply for and receive CCP funding: States, U.S. Territories, and Federally-recognized Indian Tribes. There are two separate grant programs that can be funded: The Immediate Services Program (ISP), which provides eligible costs for up to 60 days after the date of the disaster declaration; and the Regular Services Program (RSP) which provides 9 months of crisis counseling, community outreach and consultation and education services. FEMA may extend the period of the RSP beyond 9 months in limited circumstances for major disasters with catastrophic impact.

On March 21, 1989, FEMA published an interim rule (54 FR 11610) which reorganized its crisis counseling regulations for the reader's convenience, and made three substantive changes to the program. The first of those changes established a 60-day period for the State to appeal FEMA's decision regarding reconsiderations and termination of assistance for both the ISP and RSP portions of the crisis counseling program. Second, the rule clarified that an application for the ISP must be submitted within 14 days of the declaration date. Finally, the rule allowed documented eligible expenses to be reimbursable from the incident date, rather than the declaration date, as specified in section 424 of the Stafford Act.

On March 3, 2003, FEMA published another interim rule (68 FR 9899) which amended the 1989 interim rule to allow FEMA greater flexibility to extend the program period for the RSP. Prior to the 2003 interim rule, the program period for the RSP was 9 months, and could be extended by FEMA for an additional 90 days. Under the 2003 interim rule, FEMA may extend the program period beyond the initial 9 months, and the additional 90 days, in limited circumstances for major disasters with catastrophic impact. This change was made retroactive to apply to the major disasters declared in New York and Virginia as a result of the events of September 11, 2001.

II. Discussion of the Public Comments Received

FEMA solicited public comment on both the 1989 and 2003 interim regulations, and received one comment. The commenter wrote in response to the 2003 interim rule and requested that the benefits of this program be extended to the ''War on Terror'' so that all Americans could receive counseling or support. The commenter specifically requested assistance for families of soldiers in Iraq.

FEMA's authority to provide crisis counseling assistance is limited in duration and limited in scope to only those areas in which the President has declared a major disaster. FEMA is unable to grant the commenter's request. However, there are many other counseling and assistance programs that are available to individuals who are grieving or troubled. Individuals may choose to contact the Department of Health and Human Services Substance Abuse and Mental Health Services Administration (SAMHSA) treatment locater service, which offers assistance in finding local mental health and substance abuse treatment. They are available at *http://samhsa.gov/treatment/index.aspx* or by calling 1–800–662–HELP (4357), 24 hours a day, 7 days a week. Other services may be provided by Mental Health America at *www.mentalhealthamerica.net.* In many areas of the country, referrals to essential service providers can be made through the local 2–1–1 hotline; more information about that program is available at: *http://211us.org.* In addition, the individuals can call the National Suicide Prevention Lifeline at 1–800–273–TALK or via the Web at *http://www.suicidepreventionlifeline.org.* Callers are routed to a suicide prevention call center near them based on the area code from which they are calling. Lastly, States often have additional crisis hotlines that are listed in the Blue Pages.

For those who are in or who have family in the military, The Army Family Assistance Hotline is 1–800–833–6622. The Marine Corps Community Service Centers may be contacted at 1–800–253–1624 (west of the Mississippi) and 1–800–336–4663 (east of the Mississippi). Information for Air Force families may be found at *http://ra.defense.gov/documents/toolkit/*

familyReadinessEdge.pdf. The Coast Guard's Work-Life branch may be found at *www.uscg.mil/worklife/default.asp.* Information about the Navy's Fleet and Family Support Services may be found at *www.cnic.navy.mil/CNIC_HQ_Site/WhatWeDo/FleetAndFamilySupportServices/index.htm.* The U.S. Department of Veteran Affairs Web site also contains information that may also be of use for grieving families. Their Web site may be found at *www.va.gov.* Additionally, the National Military Family Association provides information at *www.militaryfamily.org.*

III. Statutory and Regulatory Review

A. Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Orders 13563 and 12866 direct agencies to assess the 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 not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget.

This rule finalizes two interim rules without change and merely codifies current practice since 2003. Under the first interim rule (54 FR 11610) in 1989, eligible expenses are reimbursable from the incident date, rather than the declaration date. This change increased the CCP assistance amounts because the incident date starts before the declaration date for almost all disasters. Under the second interim rule (68 FR 9899) in 2003, FEMA may extend the program period for the RSP beyond the initial 9 months and the additional 90 days, in limited circumstances for major disasters with catastrophic impact. This provision increased the CCP assistance amounts because grantees (State mental health authorities) are provided more funding for the extended program period. However, this provision has been used only on rare occasions. The second interim rule stated that this provision applied retroactively to the major disasters declared in New York and Virginia as a result of the events of September 11, 2001. From 2005 to 2009, the only disasters that exceeded the initial nine-month and the additional 90-day period were Hurricane Gustav in Louisiana, Hurricane Rita in Louisiana, and Hurricane Katrina in Georgia, Missouri, Mississippi, and Louisiana.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. This rule merely codifies current practice since 2003 and is not expected to impose any direct compliance cost on small entities. FEMA certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act of 1995

As required by the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13 (44 U.S.C. 3501 *et seq.*), as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Although this final rule will not result in a new collection of information affected by the PRA, the collection of information for the Crisis Counseling Assistance and Training Program—Immediate Services Program has been assigned OMB control number 1660–0085, and is approved through March 31, 2013.

D. Executive Order 13132, Federalism

A rule has implications for federalism under Executive Order 13132, Federalism (64 FR 43255, Aug. 10, 1999), if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. FEMA has analyzed this rule under that Order and determined that it does not have implications for federalism.

E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995) (2 U.S.C. 1501 *et seq.*), requires Federal agencies to assess the effects of their discretionary regulatory actions that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. The Unfunded Mandates Reform Act, however, does not apply to regulations that provide for emergency assistance or relief at the request of any State, local, or Tribal government or any official of a State, local, or Tribal government (2 U.S.C. 1503). Because the crisis counseling program provides emergency assistance grants from FEMA at the request of a State, Tribe or territory, the requirements of this Act do not apply.

F. Executive Order 12630, Taking of Private Property

This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights (53 FR 8859, Mar. 18, 1988).

G. Executive Order 12898, Environmental Justice

Under Executive Order 12898, as amended, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (59 FR 7629, Feb. 16, 1994), FEMA has undertaken to incorporate environmental justice into its policies and programs. Executive Order 12898 requires each Federal agency to conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that those programs, policies, and activities do not have the effect of excluding persons from participation in, denying persons the benefit of, or subjecting persons to discrimination because of their race, color, or national origin or income level.

No action that FEMA can anticipate under this rule will have a disproportionately high and adverse human health or environmental effect on any segment of the population. Accordingly, the requirements of Executive Order 12898 do not apply to this final rule.

H. Executive Order 12988, Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform (61 FR 4729, Feb. 7, 1996), to minimize litigation, eliminate ambiguity, and reduce burden.

I. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (65 FR

67249, Nov. 9, 2000), because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

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

This rule will not create environmental health risks or safety risks for children under Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks (62 FR 19885, Apr. 23, 1997).

K. National Environmental Policy Act

This rule is not a major agency action, nor will it affect the quality of the environment. This rule will not require the preparation of either an environmental assessment or an environmental impact statement as defined by the National Environmental Policy Act of 1969, Public Law 91–190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 *et seq.*), as amended.

L. Congressional Review of Agency Rulemaking

FEMA has sent this final rule to the Congress and to the Government Accountability Office under the Congressional Review of Agency Rulemaking Act, (''Congressional Review Act''), Public Law 104–121, 110 Stat. 873 (Mar. 29, 1996) (5 U.S.C. 804). This rule is not a ''major rule'' within the meaning of the Congressional Review Act.

List of Subjects in 44 CFR Part 206

Administrative practice and procedure, Coastal zone, Community facilities, Disaster assistance, Fire prevention, Grant programs—housing and community development, Housing, Insurance, Intergovernmental relations, Loan programs—housing and community development, Natural resources, Penalties, Reporting and recordkeeping requirements.

PART 206—FEDERAL DISASTER ASSISTANCE

■ Accordingly, 44 CFR 206.171 of the interim rule published on March 21, 1989 (54 FR 11610), with the amendment to 206.171(g)(4)(i) published on March 3, 2003 (68 FR 9899), is adopted as a final rule without change.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–11669 Filed 5–15–12; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 158

[CMS–9998–IFC3]

Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Under the Patient Protection and Affordable Care Act; Correcting Amendment

AGENCY: Center for Medicare and Medicaid Services (CMS), Department of Health and Human Services.

ACTION: Interim final rule; correcting amendment.

SUMMARY: This document corrects technical errors that appeared in the interim final rule published in the **Federal Register** on December 1, 2010, entitled ''Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements under the Patient Protection and Affordable Care Act'' and in the correction notice published in the **Federal Register** on December 30, 2010, entitled ''Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements Under the Patient Protection and Affordable Care Act; Corrections to the Medical Loss Ratio Interim Final Rule With Request for Comments.''

DATES: *Effective date:* This document is effective on May 16, 2012.

Applicability date: The corrections are applicable on January 1, 2011.

FOR FURTHER INFORMATION CONTACT: Carol Jimenez, (301) 492–4457, *MLRQuestions@cms.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. 2010–29596 of December 1, 2010 (75 FR 74864) and FR Doc. 2010–32466 of December 30, 2010 (75 FR 82277), there were a number of technical errors that are identified and corrected in the ''Correction of Errors'' section below.

A. Regulatory Overview

On December 1, 2010, we published an interim final rule in the **Federal Register** (75 FR 74864) (hereinafter referred to as the ''2010 MLR rule'') to implement medical loss ratio (MLR) requirements for health insurance issuers under section 2718 of the Public Health Service Act, as added by the Patient Protection and Affordable Care Act. The regulations in the 2010 MLR rule became effective January 1, 2011.

On December 30, 2010, we published a correction notice in the **Federal Register** (75 FR 82277) (hereinafter referred to as the ''2010 MLR correction notice'') to correct several regulations set forth in the 2010 MLR rule. The regulations in the 2010 MLR correction notice became effective January 1, 2011, as if they had been included in the 2010 MLR interim final rule.

The provisions in this correcting amendment are also effective as if they had been included in the 2010 MLR interim final rule. Accordingly, the corrections are effective January 1, 2011.

B. Overview of the Deadline for Issuers To Report Their Annual Experience

The 2010 MLR rule established details regarding an issuer's obligation under section 2718 to report information (for the prior calendar year) to the Department of Health and Human Services (HHS) by June 1st of each year on how it used its premium revenue. The first such report is due on June 1, 2012. This information is used by HHS to determine the issuer's MLR for the year in question, which reflects the percentage of premium revenue expended on medical claims and health care quality improvement. Section 2718 establishes MLR standards for the percentage that must be spent on such costs: 80 percent for the individual and small group insurance markets and 85 percent for the large group market. An issuer that fails to meet the applicable MLR standard must pay a premium rebate to policyholders. To assist the issuer with reporting its experience, HHS developed and published an MLR Annual Reporting Form, with instructions, that the issuer must complete and submit. This correcting amendment makes minor revisions to the regulations to help clarify how an issuer will capture and report its 2011 experience. Because these corrections merely clarify the terms of the 2010 MLR interim final rule that took effect on January 1, 2011, the changes in this correcting amendment are applicable on January 1, 2011.

II. Summary of Errors

A. Corrections of Errors in the 2010 MLR Rule Preamble

We are making several technical and clarifying changes to the 2010 MLR rule. On page 74868, in the section regarding small group market and large group

market, the 2010 MLR rule described how the PHS Act defined ''small group'' before the enactment of the Affordable Care Act, without explicitly addressing how to determine the number of employees for purposes of that definition. Therefore, we are revising the preamble language to reflect the fact that the PHS Act defined a group in terms of the number of employees on the last day of the calendar year with ''2 to 50 employees in a small group and 51 or more employees in a large group.'' This change will eliminate any ambiguity resulting from the fact that Federal and State law may differ on how an issuer determines the number of employees an employer has, and accurately reflects that the Employee Retirement Income Security Act (ERISA) of 1974 governs this issue and ERISA instructs an issuer or employer to use the last day of the year to determine the number of employees.

On page 74884, in the section regarding *de minimis* rebates, the 2010 MLR rule stated that issuers must aggregate the *de minimis* rebates and distribute them in equal amounts to all then-current enrollees who receive a premium credit. We are revising the preamble language by removing the words ''then current'' before ''enrollees'' because these words are technically inaccurate and conflict with language elsewhere in the preamble, as there are circumstances when those receiving rebates are no longer enrollees at the time of the rebate. In addition, we are deleting the words ''premium credit'' and replacing them with the word ''rebate.'' This change reflects the fact that, as made clear elsewhere in the rule, the rebate may be provided in one of several ways and not just by a premium credit.

B. Corrections of Errors in the Regulations Text

1. Errors in the 2010 MLR Rule

On page 74922, in § 158.103 ''Definitions,'' for clarity we are renaming ''Multi State Blended rate'' to read as ''Blended Rate.'' This change corrects an inadvertent error in this section that qualifies ''blended rate'' by the words ''multi-State.'' As clear from other parts of the 2010 MLR rule, an issuer can take advantage of this provision even if the employer's employees are in the same State as long as the coverage meets the remaining elements of the definition and the rate is blended.

On pages 74922 through 74923, we are revising § 158.120(d)(1) to make explicit that where the individual market business is sold through an association or a trust, the experience of the issuer must be included in the State report for the issue State of the certificate of coverage. As made clear elsewhere in the 2010 MLR rule, an individual policy may also be issued to a trustee who is the policyholder, and thus the word ''trust'' should be added to § 158.120(d)(1). We are also revising § 158.120(d)(2) to state that for employer business issued through a group trust or multiple employer welfare association (MEWA), the experience of the issuer must be included in the State report for the State where the employer (if sold through a trust) or the MEWA (if the MEWA is the policyholder) has its principal place of business. These changes reflect in the text of § 158.120(d)(2) when it is appropriate to report the policy's experience based on the situs of the employer versus that of the MEWA.

On page 74923, we are revising § 158.130(b)(3) to specify that earned premium must include adjustments to account for any experience rating refund when it is incurred, rather than when it is paid, and revising § 158.140(a), General requirements, to specify that the report required in § 158.110, which includes reserves for contingent benefits, include any incurred experience rating refunds (rather than just those that are paid or received). These changes are necessary in order to make the language in § 158.130(b)(3) consistent with the National Association of Insurance Commissioners (NAIC's) recommendations, which in the preamble we stated that we were adopting.

On page 74923, we are also revising § 158.140(a), General requirements, to make our intent explicit that the report required in § 158.110 only include the medical claim portion of the total amount claimed in lawsuits, and not claims for pain and suffering damages, legal fees, court costs, punitive damages or anything other than the underlying medical claim. We are also adding language to § 158.140(a) referencing a 3-month run out period for incurred claims, which was inadvertently omitted. This correction is needed to make this provision consistent with the NAIC's recommendations to the Secretary, dated October 27, 2010, which contain a 3-month run-out for incurred claims, and with our statements in the 2010 MLR rule that we were following the NAIC's recommendations to the Secretary. For the same reason, we are further clarifying that although there is a 3-month run-out period for incurred and paid claims, contract reserves should still be determined as of the last day of the reporting year as there is no parallel 3-month extension for calculating contract reserves.

On page 74923, in § 158.140(a)(5), we inadvertently used the word ''paid'' and omitted the word ''incurred'' before the words ''exclude rebates paid as required''. Therefore, we are correcting this typographical error.

On page 74924, in § 158.150(b)(2)(i)(A)(1), we mistakenly made an incorrect reference to ''section 3606 of the Affordable Care Act'' when it is clear from context that the reference was to ''section 3502 of the Affordable Care Act''. Therefore, we are correcting this error.

On page 74925, in § 158.150(c)(14), we mistakenly made an incorrect cross reference to ''paragraph (c)'' instead of referencing ''paragraphs (a) or (b).'' The correction makes clear that items not included as activities to improve health care quality are exclusions.

On page 74928, in § 158.232(c)(1)(i), we are revising the calculation of the per-person deductible for a policy that covers a subscriber and the subscriber's dependents to mirror the NAIC's recommendations, which we indicated in the 2010 MLR rule.

2. Error in the 2010 MLR Correction Notice

The 2010 MLR rule established § 158.120(d)(1), describing exceptions. This section was amended by the 2010 MLR correction notice (see 75 FR 82278) and currently reads: ''For individual market business sold through an association, the experience of the issuer must be included in the State report for the issue State of the certificate of coverage.'' In this correcting amendment, we further amend § 158.120(d)(1) by adding the words ''or trust'' after the word ''association'' to reflect the fact that under the 2010 MLR rule the exception also applies to individual market business sold through a trust.

III. Correction of Errors in the Preamble

In FR Doc 2010–29596 of December 1, 2010, make the following corrections:

1. On page 74868, third column, second full paragraph—

A. In line 21, insert the phrase ''the number of employees on the last day of the calendar year, with'' before ''2 to 50 employees.''

B. In lines 21 and 22, insert the phrase ''in a small group and 51 or more employees'' before ''and a large group.'' Remove the word ''and'' before ''a large group'' and the words ''in terms of 51 or more employees'' after the words ''a large group.''

2. On page 74884, third column, fifth full paragraph—

A. In line 14, remove the words ''then current.''

B. In line 15, revise the phrase ''premium credit'' to read ''rebate.''

IV. Waiver of Proposed Rulemaking and Delay in Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of a rule take effect in accordance with section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)), and section 553(d) of the APA ordinarily requires a 30-day delay in effective date of final rules after the date of their publication in the **Federal Register**. These requirements may be waived, however, if an agency finds for good cause that the delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued.

In this case, we believe that it is unnecessary to provide for a public comment period or to delay implementing these corrections, as they clarify provisions of a final rule that has been subjected to notice and comment procedures and do not make any substantive changes to it.

List of Subjects in 45 CFR Part 158

Administrative practice and procedure, Claims, Health care, Health insurance, Health plans, Penalties, Reporting and recordkeeping requirements.

Accordingly, 45 CFR part 158 is corrected by making the following correcting amendments:

PART 158—ISSUER USE OF PREMIUM REVENUE: REPORTING AND REBATE REQUIREMENTS

■ 1. The authority citation for part 158 continues to read as follows:

Authority: Sec. 2718 of the Public Health Service Act (42 U.S.C. 300gg–18, as amended).

■ 2. Amend § 158.103 as follows:

■ A. Remove the definition for ''Multi-State blended rate.''

■ B. Add a new definition for ''Blended rate'' in alphabetical order.

The addition reads as follows:

§ 158.103 Definitions.

* * * * *

Blended rate means a single rate charged for health insurance coverage provided to a single employer through two or more of an issuer's affiliated companies for employees in one or more States.

* * * * *

■ 3. Amend § 158.120 by revising paragraphs (d)(1) and (d)(2) to read as follows:

§ 158.120 Aggregate reporting.

* * * * *

(d) * * *

(1) For individual market business sold through an association or trust, the experience of the issuer must be included in the State report for the issue State of the certificate of coverage.

(2) For employer business issued through a group trust or multiple employer welfare association (MEWA), the experience of the issuer must be included in the State report for the State where the employer (if sold through a trust) or the MEWA (if the MEWA is the policyholder) has its principal place of business.

* * * * *

§ 158.130 [Amended]

■ 4. In § 158.130(b)(3) remove the words ''paid or received'' and add the word ''incurred'' in their place.

■ 5. Amend § 158.140 by revising paragraph (a) introductory text and paragraph (a)(5) to read as follows:

§ 158.140 Reimbursement for clinical services provided to enrollees.

(a) *General requirements.* The report required in § 158.110 must include direct claims paid to or received by providers, including under capitation contracts with physicians, whose services are covered by the policy for clinical services or supplies covered by the policy. In addition, the report must include claim reserves associated with claims incurred during the MLR reporting year, the change in contract reserves, reserves for contingent benefits and the medical claim portion of lawsuits, and any incurred experience rating refunds. Reimbursement for clinical services, as defined in this section, is referred to as ''incurred claims.'' All components of and adjustments to incurred claims, with the exception of contract reserves, must be calculated based on claims incurred only during the MLR reporting year and paid through March 31st of the following year. Contract reserves must be calculated as of December 31st of the applicable year.

* * * * *

(5) Incurred claims must include incurred experience rating refunds and exclude rebates paid as required by § 158.240 based upon prior MLR reporting year experience.

* * * * *

§ 158.150 [Amended]

■ 6. Amend § 158.150 as follows:

■ A. In paragraph (b)(2)(i)(A)(1), remove ''section 3606'' and add in its place ''section 3502.''

■ B. In paragraph (c)(14), remove the reference ''paragraph (c) of this section'' and add in its place the reference ''paragraph (a) or (b) of this section.''

■ 7. Amend § 158.232 by revising paragraph (c)(1)(i) to read as follows:

§ 158.232 Calculating the credibility adjustment.

* * * * *

(c) * * *

(1) * * *

(i) The per person deductible for a policy that covers a subscriber and the subscriber's dependents shall be the lesser of: The sum of the deductible applicable to each of the individual family members; or the overall family deductible for the subscriber and subscriber's family, divided by two (regardless of the total number of individuals covered through the subscriber).

* * * * *

Dated: May 10, 2012.

Jennifer Cannistra,

Executive Secretary to the Department.

[FR Doc. 2012–11773 Filed 5–15–12; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 158

[CMS–9998–F]

RIN 0938–AR41

Medical Loss Ratio Requirements Under the Patient Protection and Affordable Care Act

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule amends the regulations implementing medical loss ratio (MLR) standards for health insurance issuers under the Public Health Service Act in order to establish notice requirements for issuers in the group and individual markets that meet or exceed the applicable MLR standard in the 2011 MLR reporting year.

DATES: *Effective date.* This rule is effective on June 15, 2012.

Applicability date. The amendments to part 158 generally apply beginning

July 1, 2012, to health insurance issuers offering group or individual health insurance coverage.

FOR FURTHER INFORMATION CONTACT: Carol Jimenez, (301) 492–4457.

SUPPLEMENTARY INFORMATION:

I. Background

The Patient Protection and Affordable Care Act (Pub. L. 111–148) was enacted on March 23, 2010; the Health Care and Education Reconciliation Act (Pub. L. 111–152) was enacted on March 30, 2010. In this preamble, we refer to the two statutes collectively as the Affordable Care Act. The Affordable Care Act reorganizes, amends, and adds to the provisions of Part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets.

A request for information relating to the medical loss ratio (MLR) provisions of section 2718 of the PHS Act was published in the **Federal Register** on April 14, 2010 (75 FR 19297). On December 1, 2010, the Department of Health and Human Services (HHS) published an interim final rule (75 FR 74864) with a 60-day public comment period, entitled ''Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements Under the Patient Protection and Affordable Care Act,'' that added a new 45 CFR part 158. A technical correction to the interim final rule was issued on December 30, 2010 (75 FR 82277).

On December 7, 2011, the Centers for Medicare & Medicaid Services (CMS) published an interim final rule (76 FR 76596) with a 60-day public comment period entitled, ''Medical Loss Ratio Rebate Requirements for Non-Federal Governmental Plans,'' establishing rules governing the distribution of rebates by health insurance issuers in group markets for non-Federal governmental plans. Also on December 7, 2011, CMS published a final rule (76 FR 76574) with a 30-day public comment period, entitled ''Medical Loss Ratio Requirements Under the Patient Protection and Affordable Care Act,'' that addressed the treatment of ''mini-med'' and expatriate policies under the MLR regulations for years after 2011; modified the way the regulations treat International Statistical Classification of Diseases and Related Health Problems, 10th Revision (ICD–10) conversion costs; changed the rules on deducting community benefit expenditures; and revised the rules governing the distribution of rebates by issuers in group markets.

In the December 7, 2011 final rule with comment period, we noted that the notice requirements finalized in the rule only applied to issuers that owed rebates as a result of not meeting the applicable MLR standard. Consequently, policyholders and subscribers of issuers meeting or exceeding the MLR standard would not receive MLR information, an important tool to increase transparency to consumers. In the rule, we noted that extending a notice requirement to such cases would serve the policy goal of greater transparency in how premium dollars are used, and provide an additional incentive for issuers that already met the minimum standard to achieve the highest MLR possible. We therefore solicited comments on whether an issuer that meets or exceeds the MLR standard for the applicable MLR reporting year should send a notice to policyholders and subscribers with information about the MLR standard and its own MLR, as a measurement of issuer performance. We also solicited comments on whether it would be useful to include information in the notices about the issuer's prior year MLR in addition to the current year MLR. We noted that this approach would allow enrollees to determine if the issuer was doing a better or worse job of efficiently using premium revenue than in the prior year.

Based on the comments received and weighing consumer transparency and competition gains with burden on issuers, this final rule establishes a simple, straightforward notice requirement for health insurance issuers that meet or exceed the MLR standards established by the Affordable Care Act, but only requires the notice for the 2011 MLR reporting year, the first year that the MLR rules are in effect, and does not require issuers to include information about the current or prior year MLR. The notice will direct enrollees to the HHS Web site for specific information about issuers' MLRs.

II. Analysis of and Responses to Public Comments

We received 56 public comments on the December 7, 2011 final rule with comment period. Commenters included consumer and patient advocacy organizations, insurance regulators, health insurance issuers, business advocacy organizations, provider groups, an actuarial professional group, and others. In addition, we received 11 public comments in response to the draft MLR Notices and Instructions contained in the MLR Paperwork Reduction Act (PRA) package (CMS–10418) posted on February 16, 2012. Commenters consisted of consumer groups, health insurance issuers, an issuer trade association, and a business trade association. Several of these commenters recommended technical corrections to the draft notices and instructions. We note that their comments will be addressed through the PRA process. In addition, commenters recommended several amendments to the December 1, 2010 interim final rule that were beyond the scope of this final rulemaking; therefore, we are not making changes in this final rule based on these comments. In this final rule, we only address the public comments received on the following issues: (1) Whether a notice requirement should apply to issuers that meet or exceed the applicable MLR standards in a particular MLR reporting year; and (2) whether MLR notices should include information on an issuer's prior year MLR. The comments received are summarized below with our responses.

Comments: We received comments that both support and oppose expanding the notice to issuers that do not owe rebates because they meet or exceed the MLR standards. Commenters who opposed expanding the notice rules generally claimed that requiring issuers that do not owe rebates to provide an MLR notice would impose a burden on issuers that meet the MLR requirement and provide little value to consumers. Specifically, issuers, an issuer trade association, and a business advocacy organization stated that MLR data would confuse or mislead consumers who may misinterpret the information or who may mistakenly believe they are owed a rebate. Commenters in support of expanding the notice rules, such as consumer and patient advocacy organizations, stated that expanding the notice rules would increase health plan transparency and ensure that every enrollee receives information about the meaning of the MLR, rather than only those owed a rebate.

We also received several comments on the question of whether all MLR notices should include the issuer's MLR from the prior MLR reporting year. Issuers and trade associations opposed this requirement, noting that an issuer's MLR from the prior MLR reporting year is not necessarily a reliable indicator of health plan performance. These commenters stated that numerous factors other than health plan efficiency, such as variation in incurred claims, premium revenue, and adjustments, affect issuers' year-to-year MLRs and that consumers may be misled when comparing MLRs for multiple years. Several commenters noted that MLR information will be publicly available on the HHS Web site and suggested that CMS maintain historical data so that consumers may monitor changes in

issuers' MLR over time. In contrast, consumer and patient advocacy organizations expressed support for including an issuer's prior year MLR, noting that it would help consumers to better use the MLR information when making plan selections and better understand how premium dollars are spent by health insurers. They indicated that consumers could benefit from more detailed information and that the notice should include specific information that explains how premium dollars are being spent, not just whether the MLR was being met.

Response: Expanding the notice of MLR information to all issuers would further the goals of improving transparency of health insurance markets, supporting more informed purchase decisions, and promoting competition and efficiency. At the same time, we appreciate the concerns about administrative costs. Further, we recognize that under the Affordable Care Act, issuers' MLR information will be available on the HHS Web site, HealthCare.gov, providing an efficient method of public disclosure.[1]

In light of these considerations and after further review and consideration of the costs and benefits of different notice alternatives, we are adding a new 45 CFR 158.251 that establishes a basic notice requirement for issuers in the group and individual markets that meet or exceed the applicable MLR standard. This new notice will use standard language to inform policyholders and subscribers of group health plans, and subscribers in the individual market, that the issuer has met the minimum MLR standards established by the Affordable Care Act, but it will not include the issuer's MLR for the current or prior reporting year or other specific measures of issuer performance. Instead, the notice will help educate consumers about the MLR measures and direct them to the HHS Web site, HealthCare.gov, for information about issuers' actual MLRs. Additionally, under this final rule, issuers will only need to produce this notice for the 2011 MLR reporting year, when consumer knowledge of the MLR is low and the greatest benefit can be achieved by providing enrollees with educational information. By leveraging existing Federal information resources while ensuring adequate notice to enrollees in the first year of applicability, we believe this new notice requirement balances issuers' interest in administrative efficiency and consumers' interest in health plan transparency.

This notice rule will ensure that all consumers, not just those owed a rebate, are informed whether their issuer meets the minimum MLR standards established by the Affordable Care Act. It will provide greater transparency to consumers regarding how their premium dollars are used, promote informed decision-making in the purchase of health insurance, and ensure that efficiency in the use of premium dollars is properly valued by consumers. Notifying consumers of the MLR standards will also reduce confusion as to why certain individuals receive rebates, while others, such as coworkers or family members with different insurance plans, do not. Finally, the distribution of MLR notices to consumers with the HHS Web site, HealthCare.gov, will promote a more competitive market by creating an incentive for issuers to spend as high a percentage of premium dollars on health care and quality improvement as possible, rather than spending just enough to avoid paying rebates.

III. Provisions of the Final Rule

In paragraph (a)(1) of new § 158.251 of this final rule, we set forth the general requirement that an issuer whose MLR meets or exceeds the applicable MLR standard required by § 158.210 or § 158.211 must provide each policyholder and subscriber of a group health plan, and each subscriber in the individual market, a notice of MLR information. The required language for the notice is specified in paragraph (a)(4). This notice requirement applies only for the 2011 MLR reporting year.

In paragraph (a)(2), we generally align the timing of this new notice with the timing specified in § 158.240(d) for providing any rebates that are due and the accompanying notice of rebates. We specify that the MLR notice must be provided with the first plan document (for example, open enrollment materials) that is provided to enrollees on or after July 1, 2012.

In paragraph (a)(3), we direct that the notice be prominently displayed in clear, conspicuous 14-point bold type on the front of the plan document, insurance policy or certificate, or as a separate notice. The MLR notice may be included in the same mailing as other mailed notices. Further, we specify that the notice may be provided electronically, consistent with the policy for providing the summary of benefits and coverage under section 2715 of the PHS Act.

In paragraph (b), we specify certain exceptions to the MLR notice requirement. We are not requiring health insurance issuers that sell plans with total annual benefit limits of $250,000 or less (''mini-med'' plans) or expatriate policies, as described in § 158.120(d)(3) and (d)(4), respectively, to provide MLR notices to policyholders and subscribers if they meet or exceed the applicable MLR standard. As discussed in the preamble to the December 7, 2011 final rule with comment period, issuers of mini-med and expatriate policies will use a separate methodology for calculating the MLR numerator for reporting and rebate purposes and are subject to separate notice rules. We note that issuers of mini-med and expatriate plans must continue to provide notice of rebates, if any, to current group health plan policyholders and subscribers, and to subscribers in the individual market, as provided under § 158.250.

In addition, we are not requiring issuers whose experience is non-credible, as defined in § 158.230(c)(3) and determined in accordance with § 158.231, to provide MLR notices to policyholders and subscribers. An issuer that has fewer than 1,000 covered life-years does not have sufficiently credible data to determine whether the MLR standard has been met and thus, under § 158.230(d), is presumed to meet or exceed the applicable minimum MLR standard. Because non-credible issuers do not have an MLR to report, the MLR notice requirement in this final rule does not apply.

Finally, we note that issuers of student health insurance coverage are not required to provide the MLR notices under this final rule, because the MLR reporting and rebate requirements of 45 CFR part 158 generally apply for such experience beginning January 1, 2013.

IV. Collection of Information Requirements

This final rule establishes a notification requirement. Although third-party disclosures (for example, notification requirements) are generally subject to the Paperwork Reduction Act of 1995 (PRA), the implementing regulations at 5 CFR 1320.3(c)(2) include an exclusion for ''information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public.'' Because the notification will be

[1] Section 2718(a) of the PHS Act provides that ''The Secretary shall make reports [concerning an issuer's MLR and its components] received under this section available to the public on the Internet Web site of the Department of Health and Human Services.'' In addition, section 1103(b) of the Affordable Care Act provides that the Federal health care reform insurance Web portal created by the Secretary under section 1103 to present information relating to affordable coverage options shall, among other things, ''require the inclusion of information on the percentage of total premium revenue expended on nonclinical costs (as reported under section 2718(a) of the Public Health Service Act).''

provided by the Federal government, and does not contain text that must be customized, this exclusion applies.

V. Regulatory Impact Analysis

A. Summary

This final rule amends the regulations implementing MLR standards for health insurance issuers under section 2718 of the Public Health Service Act in order to establish notice requirements for issuers in the group and individual markets that meet or exceed the applicable MLR standard in the 2011 MLR reporting year.

CMS developed this rule to accomplish its intended benefits in the most economically efficient manner possible. We have examined the effects of this rule as required by Executive Order 13563 (76 FR 3821, January 21, 2011), Executive Order 12866 (58 FR 51735, September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism, and the Congressional Review Act (5 U.S.C. 804(2)). In accordance with the Office of Management and Budget (OMB) Circular A–4, CMS has quantified the benefits, costs, and transfers where possible and provided a qualitative discussion of some of the benefits, costs, and transfers that may stem from this final rule.

B. Executive Orders 13563 and 12866

Executive Order 12866 (58 FR 51735) directs 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 (76 FR 3821, January 21, 2011) is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866.

Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a final rule—(1) having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year), and a ''significant'' regulatory action is subject to review by OMB. As discussed below, CMS has concluded that this rule is not likely to have an economic impact of $100 million or more in any 1 year, and therefore does not meet the definition of a ''significant rule'' under Executive Order 12866. Nevertheless, CMS has provided an assessment of the potential costs, benefits, and transfers associated with this final rule. Accordingly, OMB has reviewed this final rule pursuant to the Executive Order.

1. Need for Regulatory Action

On December 7, 2011, CMS published a final rule (76 FR 76574) that invited comment on whether the MLR notice requirement finalized in that rule should apply not only to issuers that owe rebates but also to issuers that meet or exceed the applicable MLR standard and therefore do not owe rebates. For the reasons discussed above and in section V.B.3.a. below, and based on public comments we received, this final rule establishes a basic, one-time notice requirement for issuers in the group and individual markets that meet or exceed the applicable MLR standard in the 2011 MLR reporting year. This approach is consistent with Executive Order 13563, which directs agencies to ''identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include * * * disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.''

2. Summary of Impacts

In accordance with OMB Circular A–4, Table 1 below depicts an accounting statement summarizing CMS's assessment of the benefits, costs, and transfers associated with this regulatory action. The RIA is limited to 2012 when the notice for the 2011 MLR reporting year will be provided.

CMS anticipates that the provisions of this final rule will help ensure greater transparency for consumers regarding how their premium dollars are used, educate consumers about the MLR standards established by the Affordable Care Act, and provide an incentive for issuers to maximize the percentage of premium dollars they spend on health care and activities that improve health care quality, promoting greater efficiency in health insurance markets. Issuers that meet or exceed the applicable MLR standards will incur administrative costs related to providing the notices to policyholders and subscribers. In accordance with Executive Order 12866, CMS believes that the benefits of this regulatory action justify the costs.

TABLE 1—ACCOUNTING TABLE

Benefits					
Qualitative: * Greater transparency regarding how premium dollars are used by issuers. * Incentive for issuers to maximize the percentage of premium dollars they spend on health care and activities that improve health care quality. * Improved information to assist consumers in making plan choices.					
Costs and transfers	Low estimate	Medium estimate	High estimate	Year dollar	Period covered
Annualized Monetized ($millions/year)	$2.8	$2.9	$3.0	2012	2012

3. Anticipated Benefits, Costs, and Transfers

This final rule extends a notice requirement to issuers in the group and individual markets that meet or exceed the applicable MLR standard in the 2011 MLR reporting year. The notice must use standard language specified in this final rule. Issuers may provide the notice with other plan documents or through electronic transmittal, as permitted for the summary of benefits and coverage under section 2715 of the PHS Act.

a. Benefits

The MLR notices will ensure that consumers are informed whether their issuer's coverage meets or exceeds the applicable minimum MLR thresholds established by the Affordable Care Act. Accordingly, the notices will provide greater transparency to consumers and may help to reduce consumers' confusion regarding why they did not receive a rebate. The MLR notices will also provide consumers with educational information in the first year of applicability when consumer knowledge of the MLR is low. Additionally, the notices will inform enrollees of the HHS Web site where they can find issuers' actual MLRs and compare MLR information across issuers and over years. This will provide an incentive to issuers to spend as high a percentage of premium dollars on health care and quality improvement as possible, rather than just enough to avoid paying rebates. Finally, notice of MLR information will assist individuals in comparing plans and making plan choices. We believe that such information disclosure will result in a more efficient, competitive market.

b. Costs and Transfers

Issuers that meet or exceed the applicable MLR standard will incur the administrative cost of preparing and mailing the notices. It is estimated that these costs will total approximately $3 million in 2012.

4. Overview of Data Sources, Methods, and Limitations

On December 1, 2010, we published an interim final rule (75 FR 74864) with a 60-day public comment period. In that rule, we indicated that the most complete source of data on the number of licensed entities offering fully insured, private comprehensive major medical coverage in the individual and group markets is the National Association of Insurance Commissioners' (NAIC) Annual Financial Statements and Policy Experience Exhibits database. These data contain multiple years of information on issuers' revenues, expenses, and enrollment, collected on various NAIC financial exhibits (commonly referred to as ''Blanks'') including Supplemental Health Care Exhibits (SHCEs) that issuers submit to State insurance regulators through the NAIC. The NAIC has four different Blanks for different types of issuers: Health; Life; Property & Casualty; and Fraternal issuers.[2]

In the December 1, 2010 interim final rule, our analysis relied on 2009 data from the NAIC database. A total of 618 issuers offering comprehensive major medical coverage filed annual financial statements in 2009, with the Health and Life Blank filers accounting for approximately 99 percent of all comprehensive major medical premiums earned. For this reason, we restricted our analysis to Health and Life Blank companies. Comprehensive major medical coverage[3]—including coverage offered in the individual and group markets subject to this final rule—accounted for approximately 47.8 percent of all Accident and Health (A&H) premiums in 2009. Although the NAIC data represent the best available data source with which to estimate impacts of the MLR rule, the data contain certain limitations; we developed imputation methods to account for these limitations, and we made several additional data edits that led us to exclude 176 companies from the analysis. We used the remaining 442 companies to estimate the regulatory impacts that were discussed in the December 1, 2010 interim final rule, as well as the regulatory impacts that are discussed below. We refer readers to the regulatory impact analysis of the December 1, 2010 interim final rule (75 FR 74892) for additional methodological information.

5. Estimated Number of Affected Entities

Given the combination of data limitations and behavioral uncertainties, the December 1, 2010 interim final rule provided a range of estimates, based on a various assumptions. For the analysis in this final rule, the high range estimates correspond to the low rebate estimates in the December 1, 2010 interim final rule, while the medium range estimates correspond to the medium rebate estimates, and the low range estimates correspond to the high rebate estimates.

As discussed above in the preamble, health insurance issuers that sell plans with total annual benefit limits of $250,000 or less (''mini-med'' plans) or expatriate policies, as described in § 158.120(d)(3) and (d)(4), respectively, are not required to provide notice of MLR information to policyholders and subscribers. The 2009 NAIC data does not allow us to identify these types of policies separately. Under the December 1, 2010 interim final rule, for the 2011 MLR reporting year, issuers of mini-med and expatriate policies were required to report MLR data on a quarterly schedule under § 158.110(b). Based on the quarterly reports, it was estimated that, in 2011, there were 25 issuers of mini-med policies with approximately 1 million enrollees and 8 issuers of expatriate policies with approximately 300,000 enrollees.[4] To the extent that enrollees in mini-med and expatriate plans were included in the 2009 NAIC data, this analysis overestimates the number of entities affected by these requirements, the number of notices to be sent by issuers of such policies, and the administrative costs of providing notices.

In addition, issuers whose experience is non-credible, as defined in § 158.230(c)(3) and determined in accordance with § 158.231, are not required to provide notice of MLR information to policyholders and subscribers. As discussed in the December 1, 2010 interim final rule, based on 2009 NAIC data, it was estimated that approximately 68 percent of licensed entities (State/company combinations) had less than 1,000 enrollees in at least one State in 2011 and accounted for approximately 1 percent of enrollees. The number of issuers with less than 1,000 enrollees in all market/State combinations is estimated to be 45 in 2011.

Further, issuers of student health insurance coverage are not required to provide the MLR notice since the MLR requirements apply beginning January 1, 2013 for such experience. In the Student

[2] If a company's premiums and reserve ratios for its health insurance products equals 95 percent or more of their total business for both the current and prior reporting years, a company files its annual statement using the Health Blank. Otherwise, a company files the annual statement associated with the type of license held in its domiciliary State, for example, the Life, Property & Casualty, or Fraternal Blank.

[3] Comprehensive major medical coverage sold to associations and trusts has been included in individual comprehensive major medical coverage for purposes of the RIA. CMS's estimates exclude Medigap coverage, which in the NAIC data is reported separately from comprehensive major medical coverage offered in the individual and group markets, and which is not subject to the MLR requirements under 45 CFR part 158.

[4] For details, see final rule with comment period, entitled ''Medical Loss Ratio Requirements Under the Patient Protection and Affordable Care Act, published on December 7, 2011 (76 FR 76574).

Health Insurance Coverage Final Rule (77 FR 16453) published on March 21, 2012, we estimated that there are 75 issuers of student health insurance plans with approximately 1.1 million to 1.5 million enrollees. To the extent that enrollees in student health insurance plans were included in the 2009 NAIC data, this analysis overestimates the number of entities affected by these requirements, the number of notices to be provided by issuers of such policies, and the administrative costs of providing notices.

Table 2 includes estimates of the number of issuers that will need to provide MLR notices pursuant to this final rule. Issuers are required to provide notices to group policyholders and each of their subscribers, and to subscribers in the individual market. If there are multiple enrollees in the same household enrolled in the same health plan, issuers would need to provide only one notice to the subscriber. It is estimated that in the 2011 MLR reporting year, between 278 and 337 issuers with 65.8 million to 72.2 million enrollees will meet or exceed the applicable MLR standard. According to a large issuer, there are 2.2 covered lives per family. Therefore, it is estimated that in 2012, between 278 and 337 issuers will send MLR notices for the 2011 MLR reporting year to 29.9 million to 32.7 million individual market and group market subscribers.

In addition, issuers are required to provide MLR notices to group policyholders. In the regulatory impact analysis for the Interim Final Rule for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act (75 FR 34538) published on June 17, 2010, it was estimated that there are approximately 3 million large and small group plans, which include self-insured plans (self-insured experience is not subject to the MLR requirements). According to Medical Expenditure Panel Survey data, in 2010, 35.8 percent of all private sector employers that offered health insurance self-insured at least one plan.[5] In the December 1, 2010 MLR interim final rule, it was estimated that between 1 percent and 3 percent of enrollees in fully insured group health plans would receive rebates during the 2011 MLR reporting year. In the absence of data on the number of group health plans in the NAIC database used for this analysis, we use the percentages of enrollees not receiving rebates and employers offering self-insured plans to estimate the number of fully insured group health plans whose enrollees would not receive rebates for the 2011 MLR reporting year. Therefore, it is estimated that approximately 1.9 million fully insured group policyholders would receive MLR notices, pursuant to this final rule, for the 2011 MLR reporting year.

6. Estimated Costs Related to Notice Requirement

CMS specifies in this rule standard language to be used for the notices, which will minimize the burden for issuers. Issuers have the option of providing the notices with other plan documents or, if the requirements for electronic disclosure under section 2715 of the PHS Act are satisfied, by using electronic methods. In the Summary of Benefits and Coverage and Uniform Glossary Final Rule (77 FR 8668) published on February 14, 2012, we estimated that electronic distribution would account for 38 percent of all disclosures in the group market.[6] In addition, according to a report by the Department of Commerce, 71 percent of homes in the U.S. had home Internet access in 2010.[7] We therefore estimate that 38 percent of notices to subscribers in the group market and 71 percent of notices to subscribers in the individual market will be sent electronically, and the remaining notices will be sent by mail. Further, we assume that all notices to group policyholders or employers will be sent electronically. We assume that issuers will use clerical staff to prepare the notices that are distributed with other plan materials by mail and will need approximately 0.25 minutes (or 0.004 hours) to prepare each notice. The cost of supplies is assumed to be $0.03 per notice, and labor costs are assumed to be $30.67 per hour (or $0.13 per notice). Since the notice may be included with other plan documents, we assume there will be no additional mailing costs.

Table 2 includes the estimated total and average administrative costs to issuers of preparing and sending the notices by mail. We estimate that in 2012, issuers will incur total annual costs of about $3 million and average costs between $9,000 and $10,000 per issuer to provide notices for the 2011 MLR reporting year. The average cost of preparing and sending a notice by mail is about $0.16 (including labor and supply costs).

TABLE 2—ESTIMATED ADMINISTRATIVE COST OF MLR NOTICES IN 2012

MLR reporting year	Estimated number of affected issuers	Estimated number of notices distributed by mail	Estimated total hours for preparing notices distributed by mail	Estimated supplies cost per notice distributed by mail	Estimated total cost of distributing notices by mail	Estimated average cost per affected issuer
High Range Estimate						
2011	337	19,000,000	79,000	$0.03	$3,002,919	$8,911
Medium Range Estimate						
2011	305	18,700,000	78,000	$0.03	$2,946,544	$9,661
Low Range Estimate						
2011	278	17,700,000	74,000	$0.03	$2,800,587	$10,074

[5] Source: Agency for Healthcare Research and Quality, Center for Financing, Access and Cost Trends, 2010 Medical Expenditures Panel Survey-Insurance Component, Table I.A.2.a, ''Percent of private-sector establishments that offer health insurance that self-insure at least one plan by firm size and selected characteristics: United States, 2010'', available at *http://meps.ahrq.gov/mepsweb/data_stats/summ_tables/insr/national/series_1/2010/tia2a.pdf.*

[6] The estimate was based on the methodology used to analyze the cost burden for the Department of Labor's claims procedure regulation (OMB Control Number 1210–0053), and refers to the ERISA e-disclosure rule at 29 CFR 2520.104b–1.

[7] U.S. Department of Commerce, Exploring the Digital Nation—Computer and Internet Use at Home (November, 2011), available at *http://www.ntia.doc.gov/report/2011/exploring-digital-nation-computer-and-internet-use-home.*

C. Regulatory Alternatives

Under the Executive Order, CMS is required to consider alternatives to issuing rules and alternative regulatory approaches. CMS considered the regulatory alternative of not requiring issuers that meet or exceed the applicable MLR standard to provide notices with MLR information to policyholders and subscribers. However, that would result in reduced transparency for consumers regarding the MLR of their issuer for their State and market, and how it compares to the applicable standard. CMS also considered the regulatory alternatives of requiring issuers that meet or exceed the applicable MLR standard to provide notices that include the issuer's MLR from the current and prior MLR reporting years and of making the notice an ongoing annual requirement. However, this would result in increased burden for issuers, particularly since their MLR information will be available on the HHS Web site and consumer knowledge of MLR is expected to increase after rebates and MLR notices are provided in 2012. As discussed earlier, we believe that the greatest benefit can be achieved by providing consumers with educational information in the first year of applicability, when consumer knowledge of the MLR is low, and helping to reduce consumers' confusion regarding why they did not receive a rebate. CMS believes that the option adopted in this final rule strikes the best balance of providing valuable information to consumers while providing an incentive for issuers to maximize the percentage of premium dollars they spend on health care and quality improving activities.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires agencies that issue a rule to analyze options for regulatory relief of small businesses if a rule has a significant impact on a substantial number of small entities. The RFA generally defines a ''small entity'' as—(1) A proprietary firm meeting the size standards of the Small Business Administration (SBA), (2) a nonprofit organization that is not dominant in its field, or (3) a small government jurisdiction with a population of less than 50,000 (States and individuals are not included in the definition of ''small entity''). CMS uses as its measure of significant economic impact on a substantial number of small entities a change in revenue of more than 3 to 5 percent.

As discussed in the interim final rule with comment period published on May 5, 2010 (75 FR 24470) relating to the Federal health care reform insurance Web Portal requirements, CMS examined the health insurance industry in depth in the Regulatory Impact Analysis prepared for the proposed rule on establishment of the Medicare Advantage program (69 FR 46866, August 3, 2004). In that analysis, it was determined that there were few, if any, insurance firms underwriting comprehensive health insurance policies (in contrast, for example, to travel insurance policies or dental discount policies) that fell below the size thresholds for ''small'' business established by the SBA (currently $7 million in annual receipts for health issuers).[8]

For the December 1, 2010 interim final rule (75 FR 74892), we used the data set created from the 2009 NAIC Health and Life Blank annual financial statement data to develop an updated estimate of the number of small entities that offer comprehensive major medical coverage in the individual and small group markets, and are therefore subject to the MLR reporting requirements. For purposes of this analysis, we used total Accident and Health (A&H) earned premiums as a proxy for annual receipts. These estimates may overstate the actual number of small health insurance issuers that would be affected, since they do not include receipts from these companies' other lines of business.

In the December 1, 2010 interim final rule, it was estimated that there are 28 small entities with less than $7 million in A&H earned premiums that offer individual or group comprehensive major medical coverage, and would therefore be subject to the requirements of this final rule. These small entities accounted for 6 percent of the estimated 442 total issuers that would be affected by the MLR requirements. It was estimated that 86 percent of these small issuers are subsidiaries of larger issuers, 75 percent only offer coverage in a single State, 68 percent only offer individual or group comprehensive coverage in a single market, 46 percent also offer other types of A&H coverage, and 29 percent are Life Blank filers.

CMS estimates that in 2012, of the 28 small entities discussed above, 8 are subject to the requirements of this final rule and will incur approximately $100 per issuer in administrative costs related to providing notices for the 2011 MLR reporting year (accounting for less than 0.002 percent of their total A&H premiums).

CMS believes that these estimates overstate the number of small entities that will be affected by the requirements in this final rule, as well as the relative impact of these requirements on these entities, because CMS has based its analysis on issuers' total A&H earned premiums (rather than their total annual receipts). Therefore, the Secretary certifies that this final rule will not have significant impact on a substantial number of small entities.

In addition, section 1102(b) of the Social Security Act requires us to prepare a regulatory impact analysis if a final rule may have a significant economic impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. This final rule would not affect small rural hospitals. Therefore, the Secretary has determined that this final rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

E. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act (UMRA) of 1995 requires that agencies assess anticipated costs and benefits before issuing any final rule that includes a Federal mandate that could result in expenditures in any 1 year by State, local or tribal governments, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2012, that threshold level is approximately $139 million.

UMRA does not address the total cost of a final rule. Rather, it focuses on certain categories of cost, mainly those ''Federal mandate'' costs resulting from—(1) Imposing enforceable duties on State, local, or tribal governments, or on the private sector; or (2) increasing the stringency of conditions in, or decreasing the funding of, State, local, or tribal governments under entitlement programs.

Consistent with policy embodied in UMRA, this final rule has been designed to be the least burdensome alternative for State, local and tribal governments, and the private sector, while achieving the objectives of the Affordable Care Act.

This final rule contains MLR notice requirements for private sector firms (for example, health insurance issuers providing coverage in the individual and group markets), but it is estimated that these requirements will not cost

[8] ''Table of Small Business Size Standards Matched to North American Industry Classification System Codes,'' effective March 26, 2012, U.S. Small Business Administration, available at *www.sba.gov.*

issuers more than approximately $3 million dollars in administrative costs in 2012. The rule contains no mandates on State, local or tribal governments. Thus, this final rule does not impose an unfunded mandate on State, local or tribal governments.

F. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. The requirements specified in this final rule would not impose substantial direct costs on State and local governments.

Throughout the process of developing this final rule, CMS has attempted to balance States' interests in regulating health insurance issuers and the Congress' intent to provide uniform protections to consumers in every State. By doing so, it is CMS' view that it has complied with the requirements of Executive Order 13132. Under the requirements set forth in section 8(a) of Executive Order 13132, and by the signatures affixed to this rule, HHS certifies that CMS has complied with the requirements of Executive Order 13132 for the attached final rule in a meaningful and timely manner.

G. Congressional Review Act

This final rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.), which specifies that before a rule can take effect, the Federal agency promulgating the rule shall submit to each House of the Congress and to the Comptroller General a report containing a copy of the rule along with other specified information, and has been transmitted to the Congress and the Comptroller General for review.

List of Subjects in 45 CFR Part 158

Administrative practice and procedure, Claims, Health care, Health insurance, Health plans, Penalties, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Department of Health and Human Services amends 45 CFR part 158 as set forth below:

PART 158—ISSUER USE OF PREMIUM REVENUE: REPORTING AND REBATE REQUIREMENTS

■ 1. The authority citation for part 158 continues to read as follows:

Authority: Section 2718 of the Public Health Service Act (42 U.S.C. 300gg–18), as amended.

■ 2. Section 158.251 is added to read as follows:

§ 158.251 Notice of MLR information.

(a) *Notice of MLR information when the MLR standard is met or exceeded.*—(1) *General requirement.* Except as provided in paragraph (b) of this section, for the 2011 MLR reporting year, an issuer whose MLR meets or exceeds the applicable MLR standard required by § 158.210 or § 158.211 must provide each policyholder and subscriber of a group health plan, and each subscriber in the individual market, a notice in accordance with the requirements of this section.

(2) *Timing.* An issuer must provide the notice required in this paragraph (a) with the first plan document that the issuer provides to enrollees on or after July 1, 2012.

(3) *Form and appearance.* The notice must be prominently displayed in clear, conspicuous 14-point bold type on the front of the plan document or as a separate notice. The notice may be provided electronically, if the requirements for electronic disclosure under section 2715 of the Public Health Service Act are met.

(4) *Language.* The following language must be used to satisfy the notice requirement of this paragraph (a):

Medical Loss Ratio Information—The Affordable Care Act requires health insurers in the individual and small group markets to spend at least 80 percent of the premiums they receive on health care services and activities to improve health care quality (in the large group market, this amount is 85 percent). This is referred to as the Medical Loss Ratio (MLR) rule or the 80/20 rule. If a health insurer does not spend at least 80 percent of the premiums it receives on health care services and activities to improve health care quality, the insurer must rebate the difference.

A health insurer's Medical Loss Ratio is determined separately for each State's individual, small group and large group markets in which the health insurer offers health insurance. In some States, health insurers must meet a higher or lower Medical Loss Ratio. No later than August 1, 2012, health insurers must send any rebates due for 2011 and information to employers and individuals regarding any rebates due for 2011.

You are receiving this notice because your health insurer had a Medical Loss Ratio for 2011 that met or exceeded the required Medical Loss Ratio. For more information on Medical Loss Ratio and your health insurer's Medical Loss Ratio, visit *www.HealthCare.gov.*''

(b) *Exceptions.* The requirements of paragraph (a) of this section do not apply to an issuer that reports its experience separately under § 158.120(d)(3) or (d)(4), or to an issuer whose experience is non-credible as defined in § 158.230(c)(3) and determined in accordance with § 158.231.

Dated: March 8, 2012.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: May 10, 2012.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2012–11753 Filed 5–11–12; 11:15 am]

BILLING CODE 4120–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 12 and 90

[DA 11–1838]

Redundancy of Communications Systems: Backup Power Private Land Mobile Radio Services: Selection and Assignment of Frequencies, and Transition of the Upper 200 Channels in the 800 MHz Band to EA Licensing

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document the Federal Communications Commission's (Commission) Public Safety and Homeland Security Bureau (Bureau) and Office of Managing Director (OMD) make nonsubstantive, editorial revisions to the Commission's rules. The Bureau and OMD make these revisions to delete certain rule provisions that are without current legal effect and obsolete. These nonsubstantive revisions are part of the Commission's ongoing examination and improvement of its processes and procedures. The revisions and the specific reasons for each one are set forth below.

DATES: Effective May 16, 2012.

FOR FURTHER INFORMATION CONTACT: Eric Ehrenreich, Policy and Licensing Division, Public Safety and Homeland Security Bureau, at (202) 418–1726, or by email at *Eric.Ehrenreich@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Bureau and OMD's *Order,* DA 11–1838, adopted and released on November 1, 2011. The full

text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room, CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov.*

1. This *Order* deletes a rule setting forth backup power requirements for communications providers. This rule never took effect and ultimately was vacated in its entirety by the U.S. Court of Appeals for the District of Columbia (DC Circuit). The rule, 47 CFR 12.2, is therefore without current legal effect and is deleted as obsolete.

2. This *Order* also deletes a rule providing that UHF television translators on Channels 70 to 83 must operate on a secondary basis to land mobile operations in the 800 MHz band and will not be protected from such operations. There are no UHF television translators operating on Channels 70 to 83, and the Commission has eliminated the TV allocation from these channels. Accordingly, this rule provision, 47 CFR 90.621(d), is without current legal effect and is deleted as obsolete.

3. This *Order* also deletes a provision that allocates specified channels for Basic Exchange Telecommunication Radio Service (BETRS) but expressly cautions that a pending FCC proposal could remove this allocation from these channels. The Commission removed the allocation in 2005. Accordingly, this provision, 47 CFR 90.621(h), is without current legal effect and is deleted as obsolete.

4. This *Order* also deletes rule provisions that provided a framework for the relocation of incumbent site-based licensees in the upper 200 channels of the 800 MHz Band by incoming geographically-based (EA) licensees. These provisions were a component of the 1995 reconfiguration of the 800 MHz band from site-based to geographic-based service that has since been completed. Accordingly, these provisions, 47 CFR 90.699(a)–(c), (e)–(f), are without current legal effect and are deleted as obsolete.

I. Procedural Matters

A. Accessible Formats

5. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

B. Paperwork Reduction Act Analysis

6. The rules contained herein have been analyzed with respect to the Paperwork Reduction Act of 1995 and found to contain no new or modified form, information collection, and/or recordkeeping, labeling, disclosure, or record retention requirements, and will not increase or decrease burden hours imposed on the public. In addition, therefore, this *Order* does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198.

C. Congressional Review Act

7. The Commission will send a copy of this *Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act (''CRA''), *see* 5 U.S.C. 801(a)(1)(A).

D. Effective Date of Rule

8. The rule amendments adopted in this *Order* and set forth in the attached Appendix are ministerial, nonsubstantive, editorial revisions of the rules under 47 CFR 0.231(b) and 0.392(e). The revisions adopted in this *Order* merely delete obsolete rule provisions and the Bureau and OMD find good cause to conclude that notice and comment procedures are unnecessary and would not serve any useful purpose. *See* 5 U.S.C. 553(b)(3)(B). Because the rules being deleted are obsolete and without current legal effect, the Bureau and OMD also find good cause to make these nonsubstantive, editorial revisions of the rules effective upon publication in the **Federal Register**. *See* 5 U.S.C. 553(d)(3).

II. Final Regulatory Flexibility Analysis

9. Because this *Order* is being adopted without notice and comment, the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* does not apply.

III. Ordering Clauses

10. Accordingly, *it is ordered that,* effective upon publication in the **Federal Register**, Parts 12 and 90 of the Commission's rules are amended, as set forth, pursuant to the authority contained in sections 4(i), 5(c) and 303(r) of the Communications Act, 47 U.S.C. 154(i), 155(c) and 303(r), and §§ 0.231(b) and 0.392(e) of the Commission's regulations, 47 CFR 0.231(b) and 0.392(e).

11. *It is further ordered* that the Secretary shall cause a copy of this *Order* to be published in the **Federal Register**.

List of Subjects in 47 CFR Parts 12 and 90

Communications, Communications common carriers, Communications equipment, Radio, Telecommunications, Telephone, Television.

Federal Communications Commission.

Thomas J. Beers,

Division Chief.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 12 and 90 to read as follows:

PART 12—REDUNDANCY OF COMMUNICATIONS SYSTEMS

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

Authority: Sections 1, 4(i), 4(j), 4(o), 5(c), 218, 219, 301, 303(g), 303(j), 303(r), 332, 403, 621(b)(3), and 621(d) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 154(o), 155(c), 218, 219, 301, 303(g), 303(j), 303(r), 332, 403, 621(b)(3), and 621(d), unless otherwise noted.

§ 12.2 [Removed]

■ 2. Remove § 12.2.

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ 3. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), and 332(c)(7).

§ 90.621 [Amended]

■ 4. In § 90.621, remove and reserve paragraphs (d) and (h).

§ 90.699 [Amended]

■ 5. In § 90.699, remove and reserve paragraphs (a) through (c), (e) and (f).

[FR Doc. 2012–11781 Filed 5–15–12; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 77, No. 95
Wednesday, May 16, 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 AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 1 and 2

[Docket No. APHIS–2011–0003]

RIN 0579–AD57

Animal Welfare; Retail Pet Stores and Licensing Exemptions

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to revise the definition of *retail pet store* and related regulations to bring more pet animals sold at retail under the protection of the Animal Welfare Act (AWA). Specifically, we would narrow the definition of *retail pet store* so that it means a place of business or residence that each buyer physically enters in order to personally observe the animals available for sale prior to purchase and/or to take custody of the animals after purchase, and where only certain animals are sold or offered for sale, at retail, for use as pets. Retail pet stores are not required to be licensed and inspected under the AWA. We are also proposing to increase from three to four the number of breeding female dogs, cats, and/or small exotic or wild mammals that a person may maintain on his or her premises and be exempt from the licensing and inspection requirements if he or she sells only the offspring of those animals born and raised on his or her premises, for pets or exhibition. This exemption would apply regardless of whether those animals are sold at retail or wholesale. This proposed rule is necessary to ensure that animals sold at retail are monitored for their health and humane treatment and to concentrate our regulatory efforts on those facilities that present the greatest risk of noncompliance with the regulations.

DATES: We will consider all comments that we receive on or before July 16, 2012.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2011-0003-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2011–0003, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!x0docketDetail;D=APHIS-2011-0003* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. Gerald Rushin, Veterinary Medical Officer, Animal Care, APHIS, 4700 River Road Unit 84, Riverdale, MD 20737–1231; (301) 851–3740.

SUPPLEMENTARY INFORMATION:

Executive Summary

I. Purpose of Regulatory Action

The U.S. Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS) is taking this action pursuant to its authority under the Animal Welfare Act (AWA or the Act, 7 U.S.C. 2131 *et seq.*). The Secretary of Agriculture is authorized to promulgate standards and other requirements governing the humane handling, care, treatment, and transportation of certain animals by dealers, research facilities, exhibitors, operators of auction sales, and carriers and intermediate handlers. The Secretary has delegated responsibility for administering the AWA to the Administrator of APHIS. Regulations and standards established under the AWA are contained in the Code of Federal Regulations (CFR) in 9 CFR parts 1, 2, and 3. APHIS is undertaking this action to ensure that animals sold at retail are monitored for their health and humane treatment.

II. Summary of Major Provisions

''Retail pet stores'' are not required to obtain a license under the AWA or comply with the AWA regulations and standards. Currently, anyone selling, at retail, the following animals for use as pets are considered retail pet stores: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchilla, domestic ferrets, domestic farm animals, birds, and cold-blooded species.

This proposed rule would rescind the ''retail pet store'' status of anyone selling, at retail for use as pets, the animals listed above to buyers who do not physically enter his or her place of business or residence in order to personally observe the animals available for sale prior to purchase and/or to take custody of the animals after purchase. Unless otherwise exempt under the regulations, these entities would be required to obtain a license from APHIS and would become subject to the requirements of the AWA, which include identification of animals and recordkeeping requirements, as well as the following standards: Facilities and operations (including space, structure and construction, waste disposal, heating, ventilation, lighting, and interior surface requirements for indoor and outdoor primary enclosures and housing facilities); animal health and husbandry (including requirements for veterinary care, sanitation and feeding, watering, and separation of animals); and transportation (including specifications for primary enclosures, primary conveyances, terminal facilities, and feeding, watering, care, and handling of animals in transit).

In addition to retail pet stores, the proposed rule would exempt from regulation anyone who sells or negotiates the sale or purchase of any animal, except wild or exotic animals, dogs, or cats, and who derives no more than $500 gross income from the sale of such animals. In addition, the proposed rule would increase from three to four the number of breeding female dogs, cats, and/or small exotic or wild mammals that a person may maintain on his or her premises and be exempt from licensing and inspection if he or she sells only the offspring of those animals born and raised on his or her premises for use as pets or exhibition, regardless of whether those animals are sold at retail or wholesale.

III. Costs and Benefits

The benefits of the rule, primarily expected improvements in animal welfare, are expected to justify the costs. These benefits are not quantified. As detailed in the RIA, total costs are expected to total from $2.2 million to $5.5 million, while total cost savings could range from about $45,000 to about $150,000 per year. An estimate of the primary costs that may be incurred by entities in connection with this proposed rule is provided below:

Area of possible non-compliance	Unit cost [1]	Number of affected facilities [2]	Total cost range ($1,000)	
Licensing fees	$10 application fee; $30–$750 licensing fee (assume $70 to $235) [3].	1,500	$105	$353
Identification	$1.12–$2.50 for collars & tags (246 dogs per facility need identification) [4].	1,500	413	923
Recordkeeping	10 hrs annually * $13.07/hour (BLS 43–9061)	1,500	196	196
Facility Maintenance	8–10 hrs (preliminary) *; $9.38/hr (BLS 39–2021)	248	19	23
	$50 to $100 (materials)		12	25
	2–8 hrs per week (ongoing) *; $9.38/hr (BLS 39–2021)		242	968
Veterinary care	$50 to $150 (site visit)	237	12	36
	$75 to $300 (1 to 3 veterinary care issues)		18	213
	$16 to $35 for puppy vaccinations		531	1,161
Shelter Construction	$80–$120 for a commercial igloo style dog house (1 to 20 new shelters).	65	5	156
Primary Enclosures	$220–$260 for a commercial 3′ x 6′ kennel (1 to 30 new enclosures).	21	5	164
Daily Sanitation & Cleaning per Year	1–2 hrs daily * $9.38/hr (BLS 39–2021)	194	664	1,328
Total			2,222	5,545

[1] These costs may be overestimated. In general, they do not account for volume discounts, do-it-yourself labor or construction out of inexpensive materials that may be more likely in some cases.

[2] We estimate that there may be about 1,500 dog breeders that could be affected by this rule. The number of facilities for each area of possible non-compliance is based on 1,500 multiplied by the percentage of wholesale breeders found to be non-compliant for that category in pre-licensing inspections in 2010.

[3] In 2010, more than 85 percent of Class A licensees had gross income associated with license fees of between $70 and $235. Therefore, we assume that newly regulated entities would fall in this range.

[4] In 2010, there were an average of 106 adults and 93 puppies at licensed wholesale breeders at one time. We assume, based on litter sizes, frequency of litters, and puppy sales, that there would be about 1.5 times this number of puppies at the average facility over the course of a year.

Background

Under the Animal Welfare Act (AWA or the Act, 7 U.S.C. 2131 *et seq.*), the Secretary of Agriculture is authorized to promulgate standards and other requirements governing the humane handling, care, treatment, and transportation of certain animals by dealers, research facilities, exhibitors, operators of auction sales, and carriers and intermediate handlers. The Secretary has delegated responsibility for administering the AWA to the Administrator of U.S. Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS). Within APHIS, the responsibility for administering the AWA has been delegated to the Deputy Administrator for Animal Care. Regulations and standards established under the AWA are contained in the Code of Federal Regulations (CFR) in 9 CFR parts 1, 2, and 3 (referred to below as the regulations). Part 1 contains definitions for terms used in parts 2 and 3; part 2 provides administrative requirements and sets forth institutional responsibilities for regulated parties; and part 3 contains specifications for the humane handling, care, treatment, and transportation of animals covered by the AWA.

The AWA seeks to ensure the humane handling, care, treatment, and transportation of certain animals that are sold at wholesale and retail for use in research facilities, for exhibition purposes, or for use as pets. Dealers of animals must obtain licenses, they must comply with the AWA regulations and standards, and their facilities may be inspected for compliance. The Act defines the term *dealer* to exclude ''a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer.'' However, the Act does not define the term ''retail pet store.''

Pursuant to its rulemaking authority, the USDA amended the AWA regulations in 1971 by adding a definition of *retail pet store.* A *retail pet store* is defined in § 1.1 of the regulations to mean ''any outlet where only the following animals are sold or offered for sale, at retail, for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchilla, domestic ferrets, domestic farm animals, birds, and cold-blooded species.'' The definition of *retail pet store* goes on to describe certain establishments that do not qualify as retail pet stores, even if they sell animals at retail. Those establishments that do not qualify as retail pet stores are:

- Establishments or persons who deal in dogs used for hunting, security, or breeding purposes;
- Establishments or persons exhibiting, selling, or offering to exhibit or sell any wild or exotic or other nonpet species of warmblooded animals (except birds), such as skunks, raccoons, nonhuman primates, squirrels, ocelots, foxes, coyotes, etc.;
- Establishments or persons selling warmblooded animals (except birds, and laboratory rats and mice) for research or exhibition purposes;
- Establishments wholesaling any animals (except birds, rats, and mice); and
- Establishments exhibiting pet animals in a room that is separate from or adjacent to the retail pet store, or in an outside area, or anywhere off the retail pet store premises.

In accordance with the AWA, retail pet stores are exempt from the licensing requirements in § 2.1(a)(3) of the regulations. Other retail and wholesale dealers must be licensed, unless

otherwise exempt under the regulations. The exemptions most relevant to this proposed rule are discussed in greater detail later in this document.

The current definition of the term *retail pet store* was established over 40 years ago to ensure that the appropriate retail facilities were exempt from the licensing requirements. At that time, such outlets were primarily hobby breeders, whose small facilities usually pose less risk to the welfare of animals than do large facilities, and traditional ''brick and mortar'' stores that were subject to a degree of oversight by persons who physically entered their place of business to personally observe the animals offered for sale prior to purchase and/or to take custody of the animals after purchase. In this way, animals sold by such traditional retail pet stores can be monitored by the public for their health and humane treatment. However, with the increased use of the Internet in the 1990s, many retailers began to offer their animals for sale remotely over the Internet and to sell and transport their animals nationwide. As a result, today's customers are often unable to enter the retailer's place of business to observe the animals before taking them home. Because the current definition of *retail pet store* includes all retail outlets, with the limited exceptions discussed above, retailers selling animals by any means, including remote sales conducted over the Internet or by mail, telephone, or any other means where the customers do not physically enter a physical premises, qualify as retail pet stores and are exempt from the licensing requirements, even if they lack the public oversight provided by customers entering their place of business.

Without that public oversight or licensing and inspections by APHIS, there is no assurance that animals sold at retail for use as pets are monitored for their health and humane treatment nationwide. In fact, in recent years, APHIS has noted a number of reports and complaints concerning the welfare of such animals. During a program audit that was completed in 2010, the USDA's Office of Inspector General found that some consumers who purchased dogs over the Internet had encountered health problems with their dogs.[1] The report did not discuss whether animals purchased over the Internet suffer from health problems at a greater rate than those sold in traditional, brick-and-mortar retail pet stores. In addition, APHIS has received complaints directly from members of the public concerning the welfare of dogs and other pet animals sold at retail. Members of Congress have also introduced legislation intended to address the issue of dogs raised by high-volume breeders that sell directly to the public, including sales over the Internet.[2]

To address these issues and ensure that animals sold at retail for use as pets are monitored for their health and humane treatment, we are proposing to revise the definition of *retail pet store* in order to bring more pet animal retailers under the AWA licensing requirements. Specifically, we are proposing to amend the definition of *retail pet store* to limit the applicability of the term to only those places of business or residences that each buyer physically enters in order to personally observe the animals available for sale prior to purchase and/or to take custody of the animals after purchase. Because animals sold by such stores can be monitored by the buyers for their health and humane treatment, we have determined that the risk to the welfare of animals posed by these stores does not warrant our inspection or require the issuance of a license.

We are also proposing that the revised definition of *retail pet store* include any person who meets the criteria in § 2.1(a)(3)(iii) of the regulations. That paragraph currently provides an exemption from licensing requirements for persons who maintain a total of three or fewer breeding female dogs, cats, and/or small exotic or wild mammals and who sell only the offspring of these dogs, cats, or small exotic or wild mammals, which were born and raised on his or her premises, for pets or exhibition. This licensing exemption does not include: (1) Any person residing in a household that collectively maintains a total of more than three breeding female dogs, cats, and/or small exotic or wild mammals, regardless of ownership, (2) any person maintaining breeding female dogs, cats, and/or small exotic or wild mammals on premises on which more than three breeding female dogs, cats, and/or small exotic or wild mammals are maintained, or (3) any person acting in concert with others where they collectively maintain a total of more than three breeding female dogs, cats, and/or small exotic or wild mammals regardless of ownership.

In addition to adding persons meeting the criteria in § 2.1(a)(3)(iii) to the definition of *retail pet store,* we are also proposing to increase the number of breeding females found in that exemption from three to four. That proposed change is discussed in the next section.

Licensing Exemptions

The current licensing exemption for retail pet stores is found in two paragraphs in § 2.1 of the regulations:

- Paragraph (a)(3)(i) exempts from licensing ''retail pet stores which sell nondangerous, pet-type animals, such as dogs, cats, birds, rabbits, hamsters, guinea pigs, gophers, domestic ferrets, chinchilla, rats, and mice, for pets, at retail only: Provided, That, Anyone wholesaling any animals, selling any animals for research or exhibition, or selling any wild, exotic, or nonpet animals retail, must have a license;'' and
- Paragraph (a)(3)(vii) exempts from licensing ''any person who breeds and raises domestic pet animals for direct retail sales to another person for the buyer's own use and who buys no animals for resale and who sells no animals to a research facility, an exhibitor, a dealer, or a pet store (e.g., a purebred dog or cat fancier) and is not otherwise required to obtain a license.''

We are proposing to simplify the exemption presented in paragraph (a)(3)(i) so that it states simply that ''retail pet stores as defined in part 1 of this subchapter'' are exempt from the licensing requirements. The definition of *retail pet store* already lists the types of animals sold at such stores and excludes persons who sell animals at wholesale, who sell warmblooded animals for research or exhibition, and who sell wild, exotic, or nonpet animals from the scope of the definition, so the exemption and exclusions detailed in that paragraph are unnecessary. This change would also ensure that the licensing exemption for retail pet stores is consistent with our proposed definition. Similarly, we are proposing to remove paragraph (a)(3)(vii) in its entirety. Retaining the exemption for the entities addressed under that paragraph—essentially all retail breeders—would be inconsistent with our proposed definition of *retail pet store.*

In addition to these proposed changes to the licensing exemptions for retail pet stores, we would also revise the licensing exemption in § 2.1(a)(3)(ii) of the regulations. Paragraph (a)(3)(ii) exempts from licensing ''any person who sells or negotiates the sale or purchase of any animal except wild or exotic animals, dogs, or cats, and who derives no more than $500 gross income from the sale of such animals to a research facility, an exhibitor, a dealer, or a pet store during any calendar year

[1] USDA, Office of Inspector General, ''Animal and Plant Health Inspection Service, Animal Care Program, Inspections of Problematic Dealers'' (Report No: 33002–4–SF, Issued May 2010), p. 37.

[2] See, for example, H.R. 835/S. 707, the Puppy Uniform Protection and Safety (PUPS) Act, *http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.835.*

and is not otherwise required to obtain a license.'' While this exemption is based on a similar provision found in the definition of *dealer* in the AWA and § 1.1 of the regulations, it differs from that provision by limiting the source of gross income to sales to research facilities, exhibitors, dealers, and pet stores only. We believe that this exemption should apply to all animals. Therefore, we are proposing to remove the limitation concerning the source of gross income in § 2.1(a)(3)(ii) of the regulations.

Finally, as noted previously, we are proposing to amend § 2.1(a)(3)(iii) to increase from three to four the number of breeding female dogs, cats, and/or small exotic or wild mammals that a person may maintain on his or her premises and be exempt from licensing and inspection requirements. In proposing to increase this number, we are taking into account the fact that some dealers who currently qualify as retail pet stores would no longer be exempt from licensing and inspection requirements as a result of our proposed change to the definition of *retail pet store.* By increasing the number of breeding females, some dealers with small facilities who would not otherwise qualify as retail pet stores under the revised definition of that term would continue to be exempt from licensing and inspection requirements and some pet wholesalers with small facilities who are currently required to be licensed would no longer have to be licensed. Based on a recent review of compliance among currently regulated facilities, we believe that a facility that maintains four breeding females, one more than the current limit of three, can be considered a low-risk facility, so this proposed change would allow us to continue to concentrate our regulatory resources on those facilities that present the greatest risk of noncompliance and thereby ensure the welfare of animals.

Other Changes

Currently, the definition of *dealer* in § 1.1 of the regulations states that this term does not include ''retail pet stores as defined in this section, unless such store sells any animal to a research facility, an exhibitor, or a dealer (wholesale)''. The phrase ''unless such store sells any animal to a research facility, an exhibitor, or a dealer (wholesale)'' is redundant given the exclusions contained in the definition of *retail pet store.* We are proposing to revise the definition of *dealer* by removing this phrase in order to eliminate this redundancy.

Alternatives Considered

APHIS believes that compliance with the requirements of the AWA is important for these potentially affected entities for the reasons discussed above, but should not be regarded as unreasonably onerous. Entities subject to the AWA must purchase a license, which ranges in cost from $40–$760, depending on the size of the establishment. Further, breeders who sell animals over the Internet will be subject to the other provisions of the AWA, including identification of animals, recordkeeping, facility maintenance, periodic vet care, shelter construction standards, and sanitation requirements. APHIS believes that these requirements are not excessively burdensome, but we also recognize that many of the regulated entities are likely to be small businesses.

Consistent with Executive Orders 12866 and 13563, which emphasize determining the least costly regulatory option, and with the President's January 12, 2011, Memorandum on Small Businesses and Job Creation, APHIS has considered several alternatives to this proposed action. For the reasons discussed below, we believe the changes proposed in this document represented the best alternative option that would satisfactorily accomplish the stated objectives and minimize impacts on small entities. However, we welcome comments from the public on these and other alternative options.

As written, some dealers would no longer qualify as retail pet stores under our proposed definition if they sold covered animals at retail to a buyer who did not physically enter the seller's place of business or residence, unless the dealer is otherwise exempted under the regulations. This would mean that if a person sold some pets to walk-in customers from a physical storefront and some pets via remote sales, including over the Internet or by mail, telephone, or other non-face-to-face means, then that person would be considered a *dealer* under the AWA and subject to regulation under the Act unless otherwise exempted under the regulations.

We recognize that retailers who sell some animals to walk-in customers and some animals remotely may be subject to a certain degree of oversight by the customers who enter their place of business or residence. As a result, we considered establishing a regulatory threshold based on the percentage of such a retailer's remote sales. However, we did not include this alternative in our proposed changes for two reasons. First, we do not have the authority to require that retail pet stores make and retain sales records under the AWA, which are necessary to verify the retailer is operating within the established threshold, whatever that percentage might be. Second, it would also be difficult to confirm that all the animals that the entity sells at retail were available to be observed by its walk-in customers. If the animals sold to walk-ins were kept in one location or part of a location where they could be seen by the public and the animals sold remotely were kept at another location, then those latter animals would not receive the public oversight that forms the basis for the retail pet store exemption. For these reasons, we do not believe that it is possible to craft a threshold based on a percentage of a retailer's remote sales that, if met, would enable a hybrid operation such as we have described to continue to be considered a retail pet store and thus remain exempt from the licensing and requirements under the Act. We are, however, interested in receiving comments from the public on this alternative. Are there currently retailers who sell some animals from a storefront and some animals remotely and, if so, are there specific ways that they do business that provide assurance that all the covered animals they sell at retail are subject to public oversight? Are there alternatives to verifying compliance that we may not have considered? We welcome comments from the public on these questions.

A second alternative we considered in preparing this proposed rule was to add an exception from licensing for retailers that are subject to oversight by State or local agencies or by breed and registry organizations that enforce standards of welfare comparable to those standards established under the AWA. To our knowledge, 27 States and the District of Columbia have enacted laws that establish some form of humane welfare standards for animals kept at pet stores and sold at retail. While the State laws concerning the welfare of animals in retail pet stores vary by State, few States actually address all categories of welfare required under the AWA, including veterinary care, food and water, proper sanitation, and housing. Similarly, few breed and registry organizations have welfare standards that they require their members to meet that are comparable to those required under the AWA, and few of those organizations conduct regular, unannounced inspections or have an adequately sized inspectorate to evaluate compliance with such welfare standards. However, APHIS is continuing to look for ways to better

collaborate with its State counterparts and other organizations. For example, APHIS works with State or local authorities in jurisdictions that have laws regarding animal cruelty. We are also working in collaboration with State regulatory groups to develop better educational tools and requirements for licensure under the AWA. With these considerations in mind, APHIS concluded that it would be premature to consider establishing an exemption from the licensing requirements for retailers that are subject to oversight by State or local agencies or breed and registry organizations. We certainly wish to avoid imposing duplicative regulatory requirements on establishments where the welfare of the animals is being assured through alternative means, so we welcome information or comments from the public regarding the idea of an exemption based on oversight from other agencies or organizations. We request comment on whether any State or local laws establish standards that would assure the humane handling, care, treatment, and transportation of animals sold remotely, such as over the Internet. We also request comment on whether any private organizations have certification programs that verify compliance with animal welfare standards comparable to those promulgated under the AWA. Finally, we request comment on the appropriateness of APHIS providing an exemption for entities that are so regulated at the State or local level, or who are otherwise certified.

A third alternative we considered during the development of this proposed rule was to amend the definition of *retail pet store* so that only high-volume breeders would be subject to the AWA regulations and standards. While an objective standard for what constitutes a high-volume breeder has not been established, we note that the PUPS Act legislation referenced in footnote 2 would amend the AWA to define a ''high volume retail breeder'' as a person who, in commerce, for compensation or profit: (1) Has an ownership interest in or custody of one or more breeding female dogs; and (2) sells or offers for sale, via any means of conveyance (including the Internet, telephone, or newspaper), more than 50 of the offspring of such dogs for use as pets in any 1-year period.

To compare our proposed exemption for persons who maintain four or fewer breeding females to the standard of 50 dogs sold that is provided in the PUPS Act, we note that the number of puppies that could be produced by 3 breeding female dogs is going to vary according to the breed of the dog. For example, as noted in the Fall 2009 edition of the AKC Breeder,[3] Labrador retrievers had a typical range of 5 to 10 puppies per litter, with an average of 7.6, while Yorkshire terriers showed a range of 2 to 5 pups, with an average of 3.3. The number of litters per year varies as well, but we are aware of estimates of an average of 1.5 litters per dog per year. With that, 3 Yorkshire terriers could produce as many as 22 puppies in a year, while 3 Labrador retrievers might produce as many as 45 puppies over the same period. Adding a fourth breeding female as proposed above would bring that average to 30 to 60 puppies in a year, which is a figure that brings our exemption into closer alignment with the standard of 50 dogs sold per year provided in the PUPS Act. We welcome comments regarding the variability of litter size by breed and the impact that variability may have on the setting of size thresholds for the types of entities discussed in this proposed rule.

We have elected in this proposed rule to retain an exemption based on the number of breeding females, and not to propose a different exemption based on the number of animals sold in a given period, largely because of enforceability concerns. When an inspector visits a facility under the current regulations, he or she can quickly ascertain, through direct observation and discussion with the operator of that facility, if the number of breeding female animals that are present falls within the exemption. In contrast, if there were an exemption based on the number of animals sold in a given period, it would be necessary for the inspector to review sales records and/or other documentation, which could create compliance burdens, especially for smaller facilities. Moreover, though, as noted above, we do not have the authority to require retail pet stores to make or retain the records that would be necessary to verify the number of animals sold. We encourage the submission of comments on this topic, however, and will consider all suggestions regarding exemptions based on number of breeding females, number of animals sold, or alternative numerical or other thresholds that we may not have considered.

Finally, we note that the exemption in § 2.1(a)(3)(iii) applies to persons who maintain breeding female dogs, cats, and/or small exotic or wild mammals and who sell only the offspring of these dogs, cats, or small exotic or wild mammals, which were born and raised on his or her premises, for pets or exhibition. Given that our proposed change in the number of breeding females was motivated by primarily dog-specific considerations, we contemplated a fourth alternative, which was to propose to increase the number of breeding females for dogs only and to leave the threshold for cats and small exotic or wild mammals at three breeding females. We ultimately decided that as a matter of fairness and consistency, the increase in the number of breeding females should be applied to all three categories of animals covered by the exemption. We welcome comment on this alternative.

Executive Orders 12866 and 13563 and Regulatory Flexibility Act

This proposed rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

We have prepared an economic analysis for this rule. The economic analysis provides a cost-benefit analysis, as required by Executive Orders 12866 and 13563, and an initial regulatory flexibility analysis that examines the potential economic effects of this proposed rule on small entities, as required by the Regulatory Flexibility Act. The economic analysis is summarized below. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

Should this proposed rule be adopted, persons who sell covered animals to any buyer who does not enter their facility to observe the animals prior to purchase and/or to take custody of the animals after purchase, such as remote sales conducted over the Internet where the customer does not enter a storefront at any point in time, would need to obtain a license in accordance with AWA regulations. APHIS expects that this rule would primarily affect dog breeders that maintain more than four breeding females at their facilities. While the scope of this rule applies to certain other animals, as a practical matter, most of retailers of animals other than dogs would meet the proposed definition of *retail pet store* and continue to be exempt from regulation. APHIS estimates that there may be around 1,500 dog breeders who are not currently subject to the AWA regulations but would be required to be licensed as a result of this proposed rule. We base this estimate on the ratio of the number of wholesale breeders

[3] *http://www.akc.org/enewsletter/akc_breeder/2009/fall/handbook.cfm.*

regulated by USDA in Iowa, Kansas, and Missouri to the number of retail breeders currently regulated by these three States and that are likely to have more than four breeding females. Assuming this ratio between the numbers of wholesale and retail breeders in the three States is similar to that for the United States as a whole, we extrapolate that there are about 1,500 U.S. retail breeders who would be newly subject to regulation. This figure is likely overly inclusive, as it assumes that all retail breeders, except for traditional retail pet stores and hobby breeders, would be regulated. However, those retailers for which each buyer visits their place of business prior to purchase or taking custody would continue to be exempt from regulation.

In addition to obtaining a license, regulated entities must comply with animal identification and recordkeeping requirements. Licensed entities are also subject to standards that address the following: Facilities and operations (including space, structure and construction, waste disposal, heating, ventilation, lighting, and interior surface requirements for indoor and outdoor primary enclosures and housing facilities); animal health and husbandry (including requirements for veterinary care, sanitation and feeding, watering, and separation of animals); and transportation (including specifications for primary enclosures, primary conveyances, terminal facilities, and feeding, watering, care, and handling of animals in transit).

Some affected entities may need to make infrastructural and/or operational changes in order to comply with the standards. Based on our experience with regulating wholesale breeders, the most common areas of regulatory noncompliance at prelicensing inspections are veterinary care, facility maintenance and construction, shelter construction, primary enclosure minimum space requirements, and cleaning and sanitation. Assuming patterns of noncompliance by retail breeders newly regulated as a result of the proposed changes would be similar to those observed in prelicensing inspection of wholesale breeders, we estimate that the total cost attributable to the proposed rule may range from $2.2 million to $5.5 million. The majority of businesses that would be affected are likely to be small entities.

Expanding the licensing exemption from three or fewer breeding females to four or fewer breeding females could substantially reduce the number of Class A licensees (breeders). APHIS inspection data suggest that the number of current Class A licensees, 2,064, could be reduced by about 638 facilities (31 percent) due to this increase in the exemption threshold. Licensing fees range from $40 to $760 annually, depending on a facility's yearly income from the sale of regulated animals. In 2010, more than 85 percent of Class A licensees had gross income associated with license fees of between $70 and $235. Assuming that the entities no longer required to be licensed fall in this range, total cost savings by these entities could range from about $45,000 to about $150,000 per year.

We believe that the benefits of this rule, primarily enhanced animal welfare, would justify the costs. The rule would help ensure that animals sold at retail, but lacking public oversight receive humane handling, care and treatment in keeping with the requirements of the AWA. It would also address the competitive disadvantage of retail breeders who adhere to the AWA regulations, when compared to those retailers who do not operate their facilities according to AWA standards and may therefore bear lower costs. These benefits are not quantified.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. The Act does not provide administrative procedures which must be exhausted prior to a judicial challenge to the provisions of this rule.

Executive Order 13175

This proposed rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. APHIS–2011–0003. Please send a copy of your comments to: (1) APHIS, using one of the methods described under **ADDRESSES** at the beginning of this document, and (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

This proposed rule would revise the definition of *retail pet store* and related regulations to bring more pet animals sold at retail under the protection of the AWA. Specifically, we would narrow the definition of *retail pet store* so that it means a place of business or residence that each buyer physically enters in order to personally observe the animals available for sale prior to purchase and/or to take custody of the animals after purchase, and where only certain animals are sold or offered for sale, at retail, for use as pets. We are also proposing to increase from three to four the number of breeding female dogs, cats, and/or small exotic or wild mammals that a person may maintain on his or her premises and be exempt from licensing and inspection requirements, regardless if those animals are sold at retail or wholesale. This proposed rule is necessary to ensure that animals sold at retail are monitored for their health and humane treatment and to concentrate our regulatory efforts on those facilities that present the greatest risk of noncompliance with the regulations.

We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the proposed information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond (such as through the use of appropriate automated, electronic, mechanical, or other technological

collection techniques or other forms of information technology; e.g., permitting electronic submission of responses).

Estimate of burden: Public reporting burden for this collection of information is estimated to average 0.355921499 hours per response.

Respondents: Retailers and wholesalers of pet animals.

Estimated annual number of respondents: 1,500.

Estimated annual number of responses per respondent: 28.50066667.

Estimated annual number of responses: 42,751.

Estimated total annual burden on respondents: 15,216 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

List of Subjects in 9 CFR Parts 1 and 2

Animal welfare, Pets, Reporting and recordkeeping requirements, Research.

Accordingly, we propose to amend 9 CFR parts 1 and 2 as follows:

PART 1—DEFINITION OF TERMS

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

Authority: 7 U.S.C. 2131–2159; 7 CFR 2.22, 2.80, and 371.7.

2. In § 1.1, the definition of *dealer* and the introductory text of the definition of *retail pet store* are revised to read as follows:

§ 1.1 Definitions.

* * * * *

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog at the wholesale level for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section; any retail outlet where dogs are sold for hunting, breeding, or security purposes; or any person who does not sell or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than $500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats during any calendar year.

* * * * *

Retail pet store means a place of business or residence that each buyer physically enters in order to personally observe the animals available for sale prior to purchase and/or to take custody of the animals after purchase, and where only the following animals are sold or offered for sale, at retail, for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchilla, domestic ferrets, domestic farm animals, birds, and coldblooded species. A retail pet store also includes any person who meets the criteria in § 2.1(a)(3)(iii) of this subchapter. Such definition excludes—

* * * * *

PART 2—REGULATIONS

3. The authority citation for part 2 continues to read as follows:

Authority: 7 U.S.C. 2131–2159; 7 CFR 2.22, 2.80, and 371.7.

4. Section 2.1 is amended as follows:

a. By revising paragraph (a)(3)(i) to read as set forth below.

b. In paragraph (a)(3)(ii), by removing the words ''to a research facility, an exhibitor, a dealer, or a pet store''.

c. In paragraph (a)(3)(iii), in the first sentence, by removing the words ''three (3)'' and adding the word ''four'' in their place, and in the second sentence, by removing the word ''three'' each of the three times it appears and adding the word ''four'' in its place.

d. By removing paragraph (a)(3)(vii) and redesignating paragraph (a)(3)(viii) as paragraph (a)(3)(vii).

§ 2.1 Requirements and application.

* * * * *

(a) * * *

(3) * * *

(i) Retail pet stores as defined in part 1 of this subchapter;

* * * * *

Done in Washington, DC, this 10th day of May 2012.

Edward Avalos,

Under Secretary for Marketing and Regulatory Programs.

[FR Doc. 2012–11839 Filed 5–15–12; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 430

[Docket No. EERE–2008–BT–TP–0011]

RIN 1904–AB78

Energy Conservation Program: Test Procedures for Microwave Ovens

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

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: On November 23, 2011, the U.S. Department of Energy (DOE) issued a supplemental notice of proposed rulemaking (SNOPR) to amend the test procedures for microwave ovens. That SNOPR proposed amendments to the DOE test procedure to incorporate provisions from the International Electrotechnical Commission (IEC) Standard 62301, ''Household electrical appliances—Measurement of standby power,'' Edition 2.0 2011–01 (IEC Standard 62301 (Second Edition)). Today's SNOPR proposes additional provisions for measuring the standby mode and off mode energy use of products that combine a microwave oven with other appliance functionality, as well as minor technical clarifications.

DATES: DOE will accept comments, data, and information regarding this SNOPR submitted no later than June 15, 2012. See section V, ''Public Participation,'' for details.

ADDRESSES: Any comments submitted must identify the SNOPR on Test Procedures for Microwave Ovens, and provide docket number EERE–2008–BT–TP–0011 and/or regulatory information number (RIN) 1904–AB78. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.

2. *Email: MicroOven-2008-TP-0011@ee.doe.gov.* Include docket number EERE–2008–BT–TP–0011 and/or RIN 1904–AB78 in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 6th Floor, 950 L'Enfant Plaza SW., Washington, DC 20024. *Telephone:*

(202) 586–2945. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

For detailed instructions on submitting comments and additional information on the rulemaking process, see section V of this document (Public Participation).

Docket: The docket is available for review at *www.regulations.gov,* including **Federal Register** notices, framework documents, public meeting attendee lists and transcripts, comments, and other supporting documents/materials. All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

A link to the docket Web page can be found at: *http://www.regulations.gov/#!docketDetail;rpp=10;po=0;D=EERE-2008-BT-TP-0011.* This web page contains a link to the docket for this notice on the *www.regulations.gov site.* The *www.regulations.gov* Web page contains simple instructions on how to access all documents, including public comments, in the docket. See section V for information on how to submit comments through *www.regulations.gov.*

For further information on how to submit a comment or review other public comments and the docket, contact Ms. Brenda Edwards at (202) 586–2945 or email: *Brenda.Edwards@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Wes Anderson, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–7335. Email: *wes.anderson@ee.doe.gov.*

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I. Authority and Background

Title III of the Energy Policy and Conservation Act (42 U.S.C. 6291, *et seq.;* ''EPCA'' or, ''the Act'') sets forth a variety of provisions designed to improve energy efficiency. (All references to EPCA refer to the statute as amended through the Energy Independence and Security Act of 2007 (EISA 2007), Public Law 110–140 (Dec. 19, 2007)). Part B of title III, which for editorial reasons was redesignated as Part A upon incorporation into the U.S. Code (42 U.S.C. 6291–6309), establishes the ''Energy Conservation Program for Consumer Products Other Than Automobiles.'' These include microwave ovens, the subject of today's notice. (42 U.S.C. 6291(1)–(2) and 6292(a)(10))

Under EPCA, this program consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. The testing requirements consist of test procedures that manufacturers of covered products must use (1) as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA, and (2) for making representations about the efficiency of those products. Similarly, DOE must use these test requirements to determine whether the products comply with any relevant standards promulgated under EPCA.

General Test Procedure Rulemaking Process

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. EPCA provides in relevant part that any test procedures prescribed or amended under this section shall be reasonably designed to produce test results that measure energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle or period of use and shall not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)).

In addition, if DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments on them. (42 U.S.C. 6293(b)(2)) Finally, in any rulemaking to amend a test procedure, DOE must determine to what extent, if any, the proposed test procedure would alter the measured energy efficiency of any covered product as determined under the existing test procedure. (42 U.S.C. 6293(e)(1)) If DOE determines that the amended test procedure would alter the measured efficiency of a covered product, DOE must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6293(e)(2)).

The EISA 2007 amendments to EPCA, in relevant part, require DOE to amend the test procedures for all residential covered products to include measures of standby mode and off mode energy consumption. Specifically, section 310 of EISA 2007 provides definitions of ''standby mode'' and ''off mode'' (42 U.S.C. 6295(gg)(1)(A)) and permits DOE to amend these definitions in the context of a given product (42 U.S.C. 6295(gg)(1)(B)). The statute requires integration of such energy consumption ''into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product, unless the Secretary determines that—

(i) The current test procedures for a covered product already fully account for and incorporate the standby mode and off mode energy consumption of the covered product; or

(ii) such an integrated test procedure is technically infeasible for a particular covered product, in which case the Secretary shall prescribe a separate standby mode and off mode energy use test procedure for the covered product, if technically feasible.'' (42 U.S.C. 6295(gg)(2)(A))

Under the statutory provisions adopted by EISA 2007, any such amendment must consider the most current versions of IEC Standard 62301, ''Household electrical appliances—Measurement of standby power,'' and IEC Standard 62087, ''Methods of measurement for the power consumption of audio, video, and related equipment.'' [1] *Id.* At the time of the enactment of EISA 2007, the most current versions of these standards were IEC Standard 62301 (First Edition 2005–06) (IEC Standard 62301 (First Edition)) and IEC Standard 62087 (Second Edition 2008–09).

[1] EISA 2007 directs DOE to also consider IEC Standard 62087 when amending its test procedures to include standby mode and off mode energy consumption. *See* 42 U.S.C. 6295(gg)(2)(A). However, IEC Standard 62087 addresses the methods of measuring the power consumption of audio, video, and related equipment. Accordingly, the narrow scope of this particular IEC standard reduces its relevance to today's proposal.

DOE Microwave Oven Test Procedure

DOE's test procedure for microwave ovens is codified at appendix I to subpart B of Title 10 of the Code of Federal Regulations (CFR). The test procedure was established in an October 3, 1997 final rule that addressed active mode energy use only. 62 FR 51976.

To address standby mode and off mode energy use, DOE published a notice of proposed rulemaking (NOPR) on October 17, 2008 (hereafter referred to as the October 2008 TP NOPR), in which it proposed incorporating provisions from IEC Standard 62301 (First Edition) into the DOE active mode test procedure, as well as language to clarify application of these provisions for measuring standby mode and off mode power in microwave ovens. 73 FR 62134. DOE held a public meeting on November 14, 2008 (hereafter referred to as the November 2008 public meeting) to hear oral comments on and solicit information relevant to the October 2008 TP NOPR. Interested parties remarked upon, among other things, harmonization of standards and test procedures with those of other countries and international agencies. In particular commenters urged DOE to consider IEC Standard 62301 (Second Edition) (or ''Second Edition''), which was in the process of being drafted.

EPCA requires DOE to consider the most recent version of IEC Standard 62301. (42 U.S.C. 6295(gg)(2)(A)) After the October 2008 TP NOPR was published, DOE determined that it would consider the revised version of IEC Standard 62301, (*i.e.,* IEC Standard 62301 (Second Edition)), in the microwave oven test procedure rulemaking. DOE anticipated, based on review of drafts of the updated IEC Standard 62301, that the revisions could include different mode definitions. The revised version was expected in July 2009. IEC Standard 62301 (Second Edition) was not published, however, until January 27, 2011.

In order to ensure that DOE could establish test procedures for standby mode and off mode by March 31, 2011, as required by the EISA 2007 amendments to EPCA, DOE published an SNOPR on July 22, 2010 (hereafter referred to as the July 2010 TP SNOPR) proposing mode definitions based on those in the then current draft version of IEC Standard 62301 (Second Edition), designated as IEC Standard 62301 Second Edition, Committee Draft for Vote (IEC Standard 62301 (CDV)). 75 FR 42612, 42620–23 (July 22, 2010). DOE noted in the July 2010 TP SNOPR that IEC Standard 62301 (CDV) contained proposed amendments to IEC Standard 62301 (First Edition), including new mode definitions based on those proposed in IEC Standard 62301 (Second Edition), Committee Draft 2 (IEC Standard 62301 (CD2)) [2] and which addressed comments received by interested parties in response to IEC Standard 62301 (CD2). As a result of this continued refinement on the basis of public comment to IEC during its test standards development process, DOE stated that it believed that those most recent mode definitions represented the best definitions available for the analysis in support of this rulemaking. 75 FR 42612, 42621.

DOE held a public meeting on September 16, 2010 (hereafter referred to as the September 2010 public meeting), to hear oral comments on and solicit information relevant to the July 2010 TP SNOPR. Interested parties remarked upon, among other things, covered products, incorporation of IEC Standard 62301 (First Edition), mode definitions, and testing procedures. On October 29, 2010, the IEC released a finalized draft version of IEC Standard 62301 (Second Edition), IEC Standard 62301 (FDIS).

On March 9, 2011, DOE published an interim final rule (hereafter referred to as the March 2011 Interim Final Rule) amending the test procedures for microwave ovens. 76 FR 12825. The March 2011 Interim Final Rule incorporated by reference specific clauses from IEC Standard 62301 (First Edition) regarding test conditions and testing procedures for measuring the average standby mode and average off mode power consumption into the microwave oven test procedure. DOE also incorporated into the microwave oven test procedure definitions of ''active mode,'' ''standby mode,'' and ''off mode'' based on the definitions provided in IEC Standard 62301 (FDIS). DOE further adopted language to clarify the application of clauses from IEC Standard 62301 (First Edition) for measuring standby mode and off mode power in the March 2011 Interim Final rule. Specifically, DOE defined the test duration for cases in which the measured power is not stable (*i.e.,* varies over a cycle), recognizing that the power consumption of microwave oven displays can vary based on the displayed clock time. 76 FR 12825, 12828.

The amendments adopted in the March 2011 Interim Final Rule became effective on April 8, 2011. However, DOE noted that in order to ensure that the amended test procedure adequately addresses the EISA 2007 requirement to consider the most recent version of IEC Standard 62301, and recognizing that the IEC issued IEC Standard 62301 (Second Edition) in January of 2011, DOE issued the microwave oven test procedure as an interim final rule and offered an additional 180-day comment period to consider whether any changes should be made to the interim final rule in light of publication of IEC Standard 62301 (Second Edition). DOE stated that it would consider these comments and, to the extent necessary, publish a final rulemaking incorporating any changes. 76 FR 12825, 12830–31. In response to the March 2011 Interim Final Rule, interested parties commented that, among other things, DOE should incorporate by reference IEC Standard 62301 (Second Edition) for optimal international harmonization, to give clarity and consistency to the regulated community and to decrease the testing burden.

Based upon the public comment, DOE decided to further analyze IEC Standard 62301 (Second Edition). DOE reviewed this latest version of the IEC standard and believes that it improves some measurements of standby mode and off mode energy use. Accordingly, DOE published a second SNOPR on November 23, 2011 (hereafter referred to as the November 2011 TP SNOPR), proposing to incorporate certain provisions of IEC Standard 62301 (Second Edition), along with clarifying language, into the DOE test procedures for microwave ovens adopted in the March 2011 Interim Final Rule. In addition, DOE proposed in the November 2011 TP SNOPR to make minor editorial changes in 10 CFR part 430, subpart B, appendix I, section 2.2.1.1 to aid the reader by presenting the electrical supply voltages consistently for microwave ovens and conventional cooking products, and also in section 1.12 to clarify the alternative use of metric units for various measurements and calculations in the conventional cooking products test procedure. 76 FR 72331 (Nov. 23, 2011).

II. Summary of the Supplemental Notice of Proposed Rulemaking

In the course of reviewing comments on the November 2011 TP SNOPR, DOE determined that an additional SNOPR would be necessary before moving to a final rule. As discussed in section I, DOE published the March 2011 Interim Final Rule to provide an opportunity for it to fully consider whether any changes should be made in light of publication of IEC Standard 62301 (Second Edition). Based upon the public comment received on the March 2011 Interim

[2] IEC Standard 62301 (CD2) was the draft version immediately preceding IEC Standard 62301 (CDV).

Final Rule, DOE analyzed IEC Standard 62301 (Second Edition) for the November 2011 TP SNOPR. Today's SNOPR addresses comments received on the November 2011 TP SNOPR regarding coverage of additional microwave oven product types in the DOE test procedure. Comments on other topics received in response to the November 2011 TP SNOPR will be addressed in the subsequent final rule.

In today's SNOPR, DOE proposes that for products combining a microwave oven with other appliance functionality (*i.e.,* a product with a compartment incorporating microwave capability and one or more other components or appliance features that provide different functionality), the compartment incorporating microwave cooking would be considered a covered product under the definition of a microwave oven at 10 CFR 430.2. DOE is therefore proposing in today's SNOPR provisions that would apportion the overall standby mode and off mode power in such ''combined products'' among the microwave oven component and other components, and thus would determine the portion of the standby mode and off mode power associated specifically with the microwave oven component. For certain combined products that contain a microwave oven as one of its functional components, DOE is proposing specific values by which to apportion the standby mode and off mode power. However, the proposed amendments would allow a manufacturer, upon submission of suitable supporting information to DOE, to use alternate apportionment values for such combined products. Manufacturers of combined products for which specific apportionment values are not provided in the test procedure would also be required to submit information as to the appropriate values for their products.

In addition, the proposed amendments in today's SNOPR would make minor editorial changes in 10 CFR part 430, subpart B, appendix I, section 2.2.1.1 to aid the reader by presenting the electrical supply voltages consistently for microwave ovens and conventional cooking products, and also in newly designated section 1.12 to clarify the alternative use of metric units for various measurements and calculations in the definition of a standard cubic foot of gas for the conventional cooking products test procedure.

For the reader's convenience, DOE has reproduced in this SNOPR the amendments proposed in the November 2011 TP SNOPR, further amended as appropriate according to today's proposal.

As noted above, EPCA requires that DOE determine whether a proposed test procedure amendment would alter the measured efficiency of a product, thereby requiring adjustment of existing standards. (42 U.S.C. 6293(e)) Because there are currently no Federal energy conservation standards for microwave ovens (including standards for energy use in the standby and off modes), such requirement does not apply to this rulemaking. DOE is conducting a concurrent rulemaking process to consider standby and off mode energy conservation standards and will consider whether this test procedure alters the measured efficiency as any standards are developed.

III. Discussion

A. Products Covered by This Test Procedure Rulemaking

DOE defines ''microwave oven'' as a class of kitchen ranges and ovens which is a household cooking appliance consisting of a compartment designed to cook or heat food by means of microwave energy. 10 CFR 430.2 In the March 2011 Interim Final Rule, DOE determined that this regulatory definition includes all ovens equipped with microwave capability, including convection microwave ovens (*i.e.,* microwave ovens that incorporate convection features and possibly other means of cooking) because they are capable of cooking or heating food by means of microwave energy. 76 FR 12825, 12828–30 (March 9, 2011). Note that in the March 2011 Interim Final Rule, DOE referred to such a product as a ''combination oven''. There is some confusion, however, among interested parties as to whether the convection features are required to be incorporated in the same cavity as the microwave capability. Further, in today's SNOPR, DOE proposes that the regulatory definition of microwave oven also includes all products that combine a microwave oven with other appliance functionality. To aid in distinguishing such other ''combined products'' from the type of microwave oven that incorporates convection features and any other means of cooking, DOE proposes in today's SNOPR to use the term ''convection microwave oven'' to more accurately describe the latter, and to provide a definition of convection microwave oven in 10 CFR 430.2. In this definition, DOE would clarify that the microwave capability, convection features, and any other cooking means are incorporated in a single cavity.

As established in the March 2011 Interim Final Rule, the test procedure does not currently apply to the type of cooking appliance classified by DOE regulations as a microwave/conventional range, which has separate compartments or components consisting of a microwave oven, a conventional oven, and a conventional cooking top. 76 FR 12825, 12830 (March 9, 2011). However, in the March 2011 Interim Final Rule, DOE's determination of products covered under this test procedure rulemaking did not specifically consider other combined products that could contain a microwave oven as one of its functional components.

In response to the March 2011 Interim Final Rule, interested parties commented that the determination of covered products in the March 2011 Interim Final Rule is overly broad and unclear as to whether ranges with microwave capability would be included as covered products. Comments from interested parties further urged DOE to exclude a combined product consisting of a microwave oven, refrigerator/freezer, and two charging stations as a covered product for the DOE microwave oven test procedure. 76 FR 72332, 72336 (Nov. 23, 2011).

DOE determined that it would consider further the comments regarding combined products in today's SNOPR. The following sections present DOE's initial proposals from the November 2011 TP SNOPR, discussion of comments from interested parties, and DOE's updated proposal for each category of product that combines a microwave oven with other appliance functionality.

1. Microwave/Conventional Ranges

In the November 2011 TP SNOPR, DOE noted that 10 CFR 430.2 additionally defines a microwave/conventional range as a class of kitchen ranges and ovens (distinct from a microwave oven) which is a household cooking appliance consisting of a microwave oven, a conventional oven, and conventional cooking top. Because DOE asserted in the March 2011 Interim Final Rule that the test procedure applies only to microwave ovens and not to microwave/conventional ranges, DOE reiterated in the November 2011 TP SNOPR the determination it made in the March 2011 Interim Final Rule that a free-standing range with microwave capability in one compartment and a conventional oven in a separate compartment would not be a covered product under this rulemaking. Additionally, DOE proposed in the November 2011 TP SNOPR that a range incorporating a single compartment with microwave capability and other

cooking or heating means, along with a conventional cooking top, would not be considered a covered product because the cooking top portion would exclude the range from the relevant portion of the definition of ''microwave oven'' (*e.g.,* a compartment designed to cook or heat food by means of microwave energy.) 76 FR 72332, 72336 (Nov. 23, 2011).

In response to the November 2011 TP SNOPR, Whirlpool Corporation (Whirlpool) commented that it agreed that microwave/conventional ranges should not be considered covered products, but that this exclusion should not be limited to free-standing ranges. Whirlpool stated that other installation configurations, such as built-in products, should also be considered covered products. (Whirlpool, No. 33 at p. 1) [3]

In considering Whirlpool's comment, DOE believes that the definition of ''microwave/conventional range'' hinges on the appliance functionality provided by each of the components (*i.e.,* microwave cooking, cooking in a conventional oven, and cooking on a conventional cooking top), rather than the installation configuration. Thus, DOE clarifies that an appliance need not be free-standing to be covered as a microwave/conventional range.

DOE also notes that the definition of ''microwave oven'' includes a compartment that may heat food by means of electric resistance heating as well as by microwave energy, thereby providing the cooking function of a conventional oven. As a result, DOE believes that products covered under this rulemaking should include products that consist of a microwave oven, conventional oven, and conventional cooking top, as well as those products that consist only of a microwave oven and a conventional cooking top. DOE, therefore, proposes in today's SNOPR to add a definition of ''microwave/conventional cooking top'' in 10 CFR 430.2 to state that it is a class of kitchen ranges and ovens that is a household cooking appliance consisting of a microwave oven and a conventional cooking top. DOE also proposes to clarify in the definition of microwave/conventional range that the microwave oven and conventional oven are incorporated as separate compartments.

Because a microwave/conventional range or microwave/conventional cooking top contains a microwave oven as one of its functional components, DOE now proposes that the microwave oven component of these products would meet the statutory requirements as a covered product for the purposes of measuring standby mode and off mode energy use under EPCA. (42 U.S.C. 6295(gg)(2)(B)(vi)) DOE acknowledges that it had proposed in the November 2011 TP SNOPR that a microwave/conventional range should be excluded as a covered product on the basis of a regulatory definition separate from that of a microwave oven, but has reconsidered that position because it does not believe that the presence of additional appliance functionality would eliminate the statutory requirement to evaluate standby mode and off mode energy use in the microwave oven component.

2. Microwave/Conventional Ovens

The regulatory definition of ''conventional oven'' is ''a class of kitchen ranges and ovens which is a household cooking appliance consisting of one or more compartments intended for the cooking or heating of food by means of either a gas flame or electric resistance heating. It does not include portable or countertop ovens which use electric resistance heating for the cooking or heating of food and are designed for an electrical supply of approximately 120 volts.'' 10 CFR 430.2 Because this definition does not provide for the option of cooking or heating food by means of microwave energy, DOE concluded in the November 2011 TP SNOPR that a product comprising a single compartment that uses both radiant heat and microwave energy for cooking would be covered only under the definition of ''microwave oven,'' which includes convection microwave ovens [4] (including those with radiant heating elements) regardless of which is considered the primary cooking mode, and would not be covered as a conventional cooking product. 76 FR 72332, 72336 (Nov. 23, 2011).

In the November 2011 TP SNOPR, DOE acknowledged that the definition of ''microwave oven'' considers only a single compartment, while the definition of ''conventional oven'' allows for the possibility of one or more compartments. DOE believes that, for products that consist of multiple oven compartments but no integral cooking top portion, the compartment(s) that provide for cooking by means of microwave energy and any other cooking or heating means would be classified as microwave ovens, while the compartment(s) that cook or heat food by means of a gas flame or electric resistance heating without the use of microwave energy would be classified as conventional ovens. *Id.* at 72336–37.

DOE did not provide specific methodology for such a ''microwave/conventional oven'' in the November 2011 TP SNOPR, but noted that its regulations contain certain provisions allowing a manufacturer to seek a waiver from the test procedure requirements for covered consumer products if at least one of the following conditions is met: (1) The petitioner's basic model contains one or more design characteristics that prevent testing according to the prescribed test procedure, or (2) the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1).

In response to the November 2011 TP SNOPR, Whirlpool stated that a cooking product with two separate compartments, one of which has microwave capability and the other which is a conventional oven, but with a single control panel, should be classified as either a microwave oven or a conventional oven. In Whirlpool's opinion, such a product should not be classified as a microwave oven because proprietary market research that it submitted to DOE demonstrates that the product is primarily used for conventional cooking. According to Whirlpool, the data show that the annual microwave oven energy use is 10 percent of the annual energy used by the conventional oven. Therefore, Whirlpool commented that the primary use under which the product should be tested is as a conventional oven. Whirlpool further commented that products with two compartments that can operate independently should have each compartment considered separately, with each compartment classified by its cooking energy source. (Whirlpool, No. 33 at p. 1)

As discussed above, DOE reiterates its determination from the November 2011 TP SNOPR that the compartment(s) of a microwave/conventional oven that provide for cooking by means of microwave energy and any other cooking or heating means would be classified as microwave ovens, while

[3] A notation in the form ''Whirlpool, No. 33 at p. 1'' identifies a written comment: (1) Made by Whirlpool Corporation; (2) recorded in document number 33 that is filed in the docket of the microwave oven test procedure rulemaking (Docket No. EERE–2008–BT–TP–0011) and available for review at www.regulations.gov; and (3) which appears on page 1 of document number 33.

[4] In previous stages of this rulemaking, DOE referred to microwave ovens which incorporate convection features and any other means of cooking as a combination microwave oven. As discussed earlier in the section, DOE is now referring to such products as convection microwave ovens, and is using this terminology in today's SNOPR for clarity.

the compartment(s) that cook or heat food by means of a gas flame or electric resistance heating without the use of microwave energy would be classified as conventional ovens. In considering this issue further, DOE believes that a cooking product with two separate compartments, one of which has microwave capability and the other which is a conventional oven, should be considered a covered product in this rulemaking, and for clarity and consistency with the existing regulatory definition of microwave/conventional range, proposes to add a definition in 10 CFR 430.2 of a ''microwave/conventional oven'' as a class of kitchen ranges and ovens which is a household cooking appliance consisting of a microwave oven and a conventional oven in separate compartments. DOE does not agree with Whirlpool's comment that microwave/conventional ovens with a single control panel should be classified as a conventional oven. DOE believes that for both microwave/conventional ovens with a single control panel and those with functional components that can operate independently, the microwave oven component would be considered a covered product under this rulemaking. As discussed in section III.C, DOE is proposing specific values by which to apportion the standby mode and off mode power for these combined products, regardless of whether such products use a single control panel or can be operated independently.

For the same reasons as discussed above for microwave/conventional ranges and microwave/conventional cooking tops, DOE believes that the microwave oven component of a microwave/conventional oven would meet the statutory requirements as a covered product for the purposes of measuring standby mode and off mode energy use under EPCA. (42 U.S.C. 6295(gg)(2)(B)(vi)) DOE tentatively concludes that the test procedure should only measure the standby mode and off mode energy use associated with the microwave oven portion of combined products, and for that reason the proposed amendments do not require any determination as to which appliance function of a combined product with a microwave oven component represents the primary usage of the product.

3. Other Combined Products

Consistent with its determination for microwave/conventional ranges, microwave conventional cooking tops, and microwave/conventional ovens, DOE further proposes that for all other products combining a microwave oven with other components providing appliance functionality, such as a microwave/refrigerator-freezer/charging station, the portion of the combined product which meets the definition of a microwave oven or convection microwave oven under 10 CFR 430.2 would be a covered product under the microwave oven test procedure.

The methodology by which DOE proposes to measure the standby mode and off mode energy use of all combined products is discussed in section III.C of today's SNOPR.

B. Effective Date for the Test Procedure and Date on Which Use of the Test Procedure Will Be Required

The effective date of the standby and off mode test procedures for microwave ovens would be 30 days after the date of publication of the final rule. DOE's amended test procedure regulations codified in the CFR would clarify, though, that the procedures and calculations adopted in the final rule need not be performed to determine compliance with energy conservation standards until compliance with any final rule establishing amended energy conservation standards for microwave ovens in standby mode and off mode is required. However, as of 180 days after publication of the final rule, any representations as to the standby mode and off mode energy consumption of the products that are the subject of this rulemaking will need to be based upon results generated under the applicable provisions of this test procedure. (42 U.S.C. 6293(c)(2))

C. Specifications for the Test Methods and Measurements for Combined Products

As discussed above in section III.A, DOE has determined that for products combining a microwave oven with other appliance functionality, the compartment incorporating microwave cooking capability would be considered to meet the definition of a microwave oven at 10 CFR 430.2. As a result, DOE is proposing in today's SNOPR testing procedures specifically for such combined products. In particular, DOE proposes that the standby mode and off mode power for combined products be measured according to the same methodology proposed in the November 2011 TP SNOPR for microwave ovens; *i.e.,* according to the provisions incorporated from IEC Standard 62301 (Second Edition), except in the case in which standby mode power consumption varies as a function of displayed time. In that case, the standby mode power would be measured for the entire product according to the method outlined in the November 2011 TP SNOPR. To determine the standby mode and off mode power associated with the microwave oven portion only, apportionment factors representing the fractional contribution of the microwave oven portion to the total standby mode and off mode power consumption would be multiplied by the overall standby mode and off mode power measurements.

DOE further proposes specific standby mode apportionment factors for products that incorporate microwave ovens and conventional cooking products, based on the following testing and analysis. DOE measured the standby power of a representative sample of four conventional electric cooking tops, nine conventional built-in electric ovens, three conventional built-in gas ovens, eight over-the-range microwave-only ovens, and ten over-the-range convection microwave ovens, using today's proposed methodology. DOE selected over-the-range units as most representative of microwave ovens that would be incorporated in combined products. For each product type, DOE determined the average standby power, which includes the power consumption of the display as well as other components. DOE then determined the average standby power associated with the display only, using teardowns and component testing of a subsample of five of the convection microwave ovens. DOE believes that the complexity of the convection microwave oven displays would more closely approximate the displays of microwave/conventional ranges, microwave/conventional ovens, and other combined products than microwave-only units due to the multiple cooking modes of convection microwave units. The subsample included both vacuum fluorescent displays (VFDs) and touchscreen liquid crystal displays (LCDs), and the standby power associated with the displays were observed to range from 0.75 to 1.96 watts (W), with an average of 1.41 W, as shown in Table 1.

TABLE 1—AVERAGE DISPLAY STANDBY POWER FOR BUILT-IN AND OVER-THE-RANGE CONVECTION MICROWAVE OVENS

Configuration	Display type	Display standby power (*W*)
Over-the-Range	LCD with Touch	1.88
Over-the-Range	LCD with Touch	1.96
Over-the-Range	VFD	0.75
Over-the-Range	VFD	1.38
Over-the-Range	VFD	1.10

TABLE 1—AVERAGE DISPLAY STANDBY POWER FOR BUILT-IN AND OVER-THE-RANGE CONVECTION MICROWAVE OVENS—Continued

Configuration	Display type	Display standby power (*W*)
Average	.....	1.41

For the full sample of conventional ovens and microwave ovens, the average display standby power was subtracted from the average total standby power to obtain the standby power associated with components other than the display that would be attributed to the functionality of that particular product. No displays were incorporated in the cooking tops tested, and thus no display standby power was subtracted from the average for those products. Table 2 summarizes the average overall standby power measured for each product type, and, for conventional ovens and microwave ovens, the portion of that average that corresponds to components other than the display.

TABLE 2—AVERAGE STANDBY POWER FOR CONVENTIONAL COOKING TOP, CONVENTIONAL OVENS, AND MICROWAVE OVENS WITH AND WITHOUT A DISPLAY

Conventional cooking top		Conventional oven		Microwave oven	
Test unit	Standby power *(W)*	Test unit	Standby power *(W)*	Test unit	Standby power *(W)*
Unit 1	2.99	Unit 1	1.28	Unit 1	4.19
Unit 2	0.60	Unit 2	7.84	Unit 2	4.37
Unit 3	2.36	Unit 3	1.35	Unit 3	4.50
Unit 4	1.53	Unit 4	1.47	Unit 4	4.59
		Unit 5	1.14	Unit 5	4.14
		Unit 6	1.28	Unit 6	6.65
		Unit 7	3.27	Unit 7	3.37
		Unit 8	3.37	Unit 8	1.77
		Unit 9	10.66	Unit 9	3.67
		Unit 10	2.04	Unit 10	3.78
		Unit 11	8.20	Unit 11	4.45
		Unit 12	3.73	Unit 12	3.15
				Unit 13	0.89
				Unit 14	5.14
				Unit 15	4.13
				Unit 16	3.40
				Unit 17	4.48
				Unit 18	2.84
Average	1.87	*Average*	3.80	*Average*	3.86
Average Without Display	1.87	*Average Without Display*	2.39	*Average Without Display*	2.45

To obtain specific standby power apportionment factors for microwave/conventional ranges, DOE estimated Overall Standby Power = (Microwave Oven Standby Power without Display) + (Conventional Cooking Top Standby Power without Display) + (Conventional Oven Standby Power without Display) + (Display Standby Power). Because the display typically includes features such as a clock and timer, which can provide utility for each functional component of the microwave/conventional range, the display standby power is assumed to be apportioned equally among each of the functional components. The standby apportionment factor (F_{SB}) for each component would thus be:

F_{SB} = [(Standby Power of that Component without Display) + (1/Number of Components) × (Display Standby Power)]/(Overall Standby Power), where the number of components would be two. DOE used a similar approach for microwave/conventional cooking tops, where the overall standby power was obtained from the sum of the microwave oven standby power without display, conventional cooking top standby power without display, and display standby power. In that case, the standby power apportionment factor would also be calculated using two as the number of components. Similarly, for microwave/conventional ovens, the overall standby power was obtained from the sum of the conventional oven standby power without display, microwave oven standby power without display, and display standby power, and the standby power apportionment factor would be calculated using two as the number of components. Table 3 summarizes these calculations, and presents the resulting standby power apportionment factors for each of the functional components. DOE proposes to use the microwave oven standby power apportionment factors in its test procedure for these products.

TABLE 3—STANDBY POWER APPORTIONMENT FACTORS FOR MICROWAVE/CONVENTIONAL RANGES AND MICROWAVE/CONVENTIONAL OVENS

	Microwave/ conventional range	Microwave/ conventional cooking top	Microwave/ conventional oven
Standby Power (*W*):			
Cooking Top Portion	1.87	1.87	.....
Oven Portion	2.39	.....	2.39
Microwave Oven Portion	2.45	2.45	2.45
Display	1.41	1.41	1.41
Total with Display	8.12	5.73	6.25
Standby Apportionment Factor (%):			
Cooking Top Portion	29%	45%	.....
Oven Portion	35%	.....	50%
Microwave Oven Portion	36%	55%	50%

DOE had insufficient data on cooking tops, ovens, and microwave ovens capable of operating in off mode to conduct a similar analysis for off mode apportionment factors, due to the limited number of products capable of operation in such a mode. DOE estimates, however, that components in microwave/conventional ranges, microwave/conventional cooking tops, and microwave/conventional ovens that would be energized in off mode would be equally applicable to each of the functional components. Thus, DOE estimates that any off mode power consumption should be evenly apportioned among the components, meaning that the apportionment factors would be a function solely of the number of components in the product, *i.e.,* F_O = (1/Number of Components). Thus, F_O for the microwave portion would be 50 percent for microwave/conventional ovens and microwave/conventional cooking tops, and 33 percent for microwave/conventional ranges.

DOE seeks information and comments on these proposed standby mode and off mode apportionments. DOE also proposes that manufacturers could provide information to DOE to determine alternative apportionment values for specific models of microwave/conventional ranges, microwave/conventional cooking tops, and microwave/conventional ovens. In addition, manufacturers of other combined products that incorporate a microwave oven, including a combination microwave/refrigerator-freezer/charging station would be required to provide such information on appropriate apportionment values for determining the standby mode and off mode power of the microwave oven portion.

D. Compliance With Other EPCA Requirements

EPCA requires that test procedures shall be reasonably designed to produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use. Test procedures must also not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

In the March 2011 Interim Final Rule, DOE concluded that the amended test procedure would produce test results that measure the power consumption of covered products during a representative average use cycle as well as annual energy consumption, and that the test procedure would not be unduly burdensome to conduct. 76 FR 12825, 12840 (March 9, 2011).

The amendments to the DOE test procedures proposed in the November 2011 TP SNOPR would be based on an updated version of IEC Standard 62301, IEC Standard 62301 (Second Edition). For the reasons discussed in the November 2011 TP SNOPR, DOE concluded that the proposed amended test procedures would produce test results that measure the standby mode and off mode power consumption during representative use, and that the test procedures would not be unduly burdensome to conduct.

Whirlpool stated that it considers the test burden acceptable. However, Whirlpool added that this is contingent upon its comments on the following topics: (1) The exclusion of all products with multiple cavities, with one cavity having microwave capability and the other having a conventional oven, as covered products, (2) the proposed use of IEC Standard 62301 (Second Edition), (3) the measurement of total harmonic distortion before and/or after the actual test, and (4) the use of a manufacturer-determined stabilization period at the start of standby power testing for microwave ovens with clocks. (Whirlpool, No. 33 at p. 2)

For the reasons discussed in section III.A, DOE is proposing in today's notice to cover all products with a microwave oven component, including products that combine a microwave oven with other appliance functionality, for the purposes of the microwave oven test procedure. Because the proposed test procedure would require the same measurement methodology for all covered products, with the additional application of an apportionment factor for combined products, DOE concludes that the proposed amended test procedures would produce test results that measure the standby mode and off mode power consumption during representative use, and that the test procedures would not be unduly burdensome to conduct. In a subsequent final rule to follow, DOE will address Whirlpool's comments on the test burden associated with the proposed use of IEC Standard 62301 (Second Edition), the power measurement requirements, and the use of a manufacturer-determined stabilization period at the start of standby power testing for microwave ovens with clocks.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget has determined that test procedure rulemakings do not constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IFRA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE's procedures and policies may be viewed on the Office of the General Counsel's Web site (*www.gc.doe.gov*). DOE reviewed today's SNOPR under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003.

In conducting this review, DOE first determined the potential number of affected small entities. The Small Business Administration (SBA) considers an entity to be a small business if, together with its affiliates, it employs fewer than the threshold number of workers specified in 13 CFR part 121 according to the North American Industry Classification System (NAICS) codes. The SBA's Table of Size Standards is available at: *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.* The threshold number for NAICS classification 335221, *Household Cooking Appliance Manufacturers,* which includes microwave oven manufacturers, is 750 employees. DOE surveyed the AHAM member directory to identify manufacturers of microwave ovens. In addition, as part of the appliance standards rulemaking, DOE asked interested parties and AHAM representatives within the microwave oven industry if they were aware of any small business manufacturers. DOE consulted publicly available data, purchased company reports from sources such as Dun & Bradstreet, and contacted manufacturers, where needed, to determine if they meet the SBA's definition of a small business manufacturing facility and have their manufacturing facilities located within the United States. Based on this analysis, DOE estimates that there is one small business which manufactures a product which combines a microwave oven with other appliance functionality.

The proposed rule would amend DOE's test procedure for microwave ovens by incorporating testing provisions to address standby mode and off mode energy use in these products, including the microwave oven portion of combined products. The test procedure amendments involve measuring power input when the product is in standby mode or off mode, and in the case of combined products, apportioning the measured power to the microwave oven portion. Because manufacturers are not currently required to conduct energy testing for microwave ovens, there could be additional facilities and equipment costs required by the proposed rule. DOE notes that the small business submitted data to DOE on standby power consumption of its products, indicating that it may already have facilities and equipment that meet the proposed requirements. In addition, an Internet search of equipment that specifically meets the proposed requirements reveals a cost of approximately $2,000. This cost is small compared to the overall financial investment needed to undertake the business enterprise of testing and developing consumer products which involves facilities, qualified staff, and specialized equipment. Based on its review of industry data,[5] DOE estimates that the small business has annual revenues of approximately $22 million.

For these reasons, DOE continues to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE seeks comment on the updated certification set forth above, and will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of microwave ovens must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for microwave ovens, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including microwave ovens. (76 FR 12422 (March 7, 2011). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

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.

D. Review Under the National Environmental Policy Act of 1969

In this proposed rule, DOE is adopting test procedure amendments that it expects will be used to develop and implement future energy conservation standards for microwave ovens. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this proposed rule would amend the existing test procedures without affecting the amount, quality or distribution of energy usage, and, therefore, would not result in any environmental impacts. Thus, this rulemaking is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D, which applies to any rulemaking that interprets or amends an existing rule without changing the environmental effect of that rule. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies

[5] Annual revenues estimate based on financial data obtained from Hoover's Inc., available online at *www.hoovers.com.*

to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *www.gc.doe.gov.* DOE examined today's proposed rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action to amend the test procedure for measuring the energy efficiency of microwave ovens is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the DOE Organization Act (Pub. L. 95–91), DOE must comply with section 32 of the Federal Energy Administration Act of 1974 (Pub. L. 93–275), as amended by the Federal Energy Administration Authorization Act of 1977 (FEAA; Pub. L. 95–70) (15 U.S.C. 788). Section 32 essentially provides that, where a rule authorizes or requires use of commercial standards, the rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

The proposed rule incorporates testing methods contained in sections 4 and 5 (paragraphs 4.2, 4.4, 4.5, 5.1 (Note 1), 5.2, and 5.3) of the commercial standard, IEC Standard 62301 (First Edition). DOE has evaluated this standard and is unable to conclude whether it fully complies with the requirements of section 32(b) of the FEAA, *i.e.,* whether it was developed in a manner that fully provides for public participation, comment, and review. DOE will consult with the Attorney General and the Chairman of the FTC about the impact on competition of using the methods contained in this standard and will address any concerns when it publishes a response to the public comments on this SNOPR.

V. Public Participation

A. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this notice.

Submitting comments via regulations.gov. The regulations.gov Web page will require you to provide your name and contact information. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment.

Do not submit to regulations.gov information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through regulations.gov cannot be claimed as CBI. Comments received through the Web site will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section below.

DOE processes submissions made through regulations.gov before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that regulations.gov provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or mail. Comments and documents submitted via email, hand delivery, or mail also will be posted to regulations.gov. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: One copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

B. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties on (1) its tentative determination that all products which combine a microwave oven with other appliance functionality are covered products for the purposes of the microwave oven test procedure; (2) the proposed approach to apportion the standby power of a combined product among the

microwave oven and other functional portions; (3) the proposed apportionment values for microwave/conventional ovens, microwave conventional cooking tops, and microwave/conventional ranges; and (4) DOE's proposal to allow manufacturers of microwave/conventional ovens, microwave/conventional cooking tops, and microwave/conventional ranges to submit alternate values with supporting data, and to require such an approach for other combined products.

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects

10 CFR Part 429

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Reporting and recordkeeping requirements.

10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Dated: Issued in Washington, DC, on May 9, 2012.

Kathleen B. Hogan,

Deputy Assistant Secretary, Energy Efficiency and Renewable Energy.

For the reasons stated in the preamble, DOE is proposing to amend parts 429 and 430 of title 10 of the Code of Federal Regulations, as set forth below:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

2. Section 429.23 is amended by revising paragraph (a)(2)(i) introductory text to read as follows:

§ 429.23 Conventional cooking tops, conventional ovens, microwave ovens.

* * * * *

(a) * * *

(2) * * *

(i) Any represented value of estimated annual operating cost, energy consumption, standby mode power consumption, off mode power consumption, or other measure of energy consumption of a basic model for which consumers would favor lower values shall be greater than or equal to the higher of:

* * * * *

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

3. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

4. Section 430.2 is amended by:

a. Revising the definition of ''Microwave/conventional range''; and

b. Adding the definitions for ''Convection microwave oven'', ''Microwave/conventional cooking top'', and ''Microwave/conventional oven'' in alphabetical order.

The revisions and additions read as follows:

§ 430.2 Definitions.

* * * * *

Convection microwave oven means a microwave oven that incorporates convection features and any other means of cooking in a single compartment.

* * * * *

Microwave/conventional cooking top means a class of kitchen ranges and ovens that is a household cooking appliance consisting of a microwave oven and a conventional cooking top.

Microwave/conventional oven means a class of kitchen ranges and ovens that is a household cooking appliance consisting of a microwave oven and a conventional oven in separate compartments.

Microwave/conventional range means a class of kitchen ranges and ovens that is a household cooking appliance consisting of a microwave oven and a conventional oven in separate compartments and a conventional cooking top.

* * * * *

5. Section 430.3 is amended by revising paragraph (m)(2) to read as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(m) * * *

(2) IEC Standard 62301 (''IEC 62301''), *Household electrical appliances–Measurement of standby power* (Edition 2.0, 2011–01), IBR approved for Appendix J2 and Appendix I to Subpart B.

* * * * *

6. Appendix I to Subpart B of Part 430 is amended:

a. By revising the note after the heading;

b. In section 1. *Definitions:*

1. By revising section 1.6;

2. By redesignating sections 1.7 through 1.14 as sections 1.8 through 1.15;

3. By revising newly designated sections 1.12 and 1.15; and

3. By adding section 1.7;

c. In section 2. *Test Conditions,* by revising sections 2.1, 2.1.3, 2.2.1.1, 2.2.1.2, 2.5.1, 2.5.2, 2.6, and 2.9.1.3 and adding sections 2.1.4, 2.1.4.1, and 2.1.4.2;

d. In section 3. *Test Methods and Measurements,* by revising sections 3.1.1, 3.1.1.1, 3.1.2, 3.1.3, 3.1.3.1, 3.2.3; and 3.3.13, and adding sections 3.1.3.2, 3.2.4, and 3.3.14; and

e. In section 4. *Calculation of Derived Results From Test Measurements,* by revising section 4.3 and adding sections 4.3.1, 4.3.2, and 4.3.3.

The revisions and additions read as follows:

Appendix I to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Conventional Ranges, Conventional Cooking Tops, Conventional Ovens, and Microwave Ovens

Note: Any representation related to standby mode and off mode energy consumption of these products made after [*date 180 days after date of publication of the test procedure final rule in the* ***Federal Register***] must be based upon results generated under this test procedure, consistent with the requirements of 42 U.S.C. 6293(c)(2). After July 1, 2010, however, when DOE adopts an energy conservation standard that incorporates standby mode and off mode energy consumption, and upon the compliance date for such standards, compliance with the applicable provisions of this test procedure will also be required. Future revisions may add relevant provisions for measuring active mode in microwave ovens.

1. Definitions

* * * * *

1.6 *IEC 62301 First Edition* refers to the test standard published by the International Electrotechnical Commission, titled ''Household electrical appliances—Measurement of standby power,'' Publication 62301 (first edition June 2005) (incorporated by reference, see § 430.3).

1.7 *IEC 62301 Second Edition* refers to the test standard published by the International Electrotechnical Commission, titled ''Household electrical appliances—Measurement of standby power,'' Publication 62301 Edition 2.0 2011–01 (incorporated by reference, see § 430.3).

* * * * *

1.12 *Standard cubic foot (or liter (L)) of gas* means that quantity of gas that occupies

1 cubic foot (or alternatively expressed in L) when saturated with water vapor at a temperature of 60 °F (15.6 °C) and a pressure of 30 inches of mercury (101.6 kPa) (density of mercury equals 13.595 grams per cubic centimeter).

* * * * *

1.15 *Symbol usage.* The following identity relationships are provided to help clarify the symbology used throughout this procedure.

A—Number of Hours in a Year
B—Number of Hours Pilot Light Contributes to Cooking
C—Specific Heat
E—Energy Consumed
Eff—Cooking Efficiency
F—Power Apportionment Factor
H—Heating Value of Gas
K—Conversion for Watt-hours to Kilowatt-hours
K_e—3.412 Btu/Wh, Conversion for Watt-hours to Btu's
M—Mass
n—Number of Units
O—Annual Useful Cooking Energy Output
P—Power
Q—Gas Flow Rate
R—Energy Factor, Ratio of Useful Cooking Energy Output to Total Energy Input
S—Number of Self-Cleaning Operations per Year
T—Temperature
t—Time
V—Volume of Gas Consumed
W—Weight of Test Block

2. Test Conditions

2.1 *Installation.* A free-standing kitchen range shall be installed with the back directly against, or as near as possible to, a vertical wall which extends at least 1 foot above and on either side of the appliance. There shall be no side walls. A drop-in, built-in or wall-mounted appliance shall be installed in an enclosure in accordance with the manufacturer's instructions. These appliances are to be completely assembled with all handles, knobs, guards and the like mounted in place. Any electric resistance heaters, gas burners, baking racks, and baffles shall be in place in accordance with the manufacturer's instructions; however, broiler pans are to be removed from the oven's baking compartment. For conventional ovens and conventional cooking tops, and for active mode testing of the conventional oven or conventional cooking top portion of a microwave/conventional oven, microwave/conventional cooking top, or microwave/conventional range, disconnect any electrical clock which uses energy continuously, except for those that are an integral part of the timing or temperature controlling circuit. Do not disconnect or modify the circuit to any other electrical devices or features.

* * * * *

2.1.3 *Microwave ovens.* Install the microwave oven in accordance with the manufacturer's instructions and connect to an electrical supply circuit with voltage as specified in section 2.2.1 of this appendix. The microwave oven shall also be installed in accordance with section 5, paragraph 5.2 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3), disregarding the provisions regarding batteries and the determination, classification, and testing of relevant modes. A watt meter shall be installed in the circuit and shall be as described in section 2.9.1.3 of this appendix.

2.1.4 *Microwave/conventional ovens, microwave conventional cooking tops, and microwave/conventional ranges.*

2.1.4.1 *Active mode.* For testing other than for standby mode and off mode power, these products shall be connected to an electrical supply circuit with voltage as specified in section 2.2.1 of this appendix with a watt-hour meter installed in the circuit. The watt-hour meter shall be as described in section 2.9.1.1 of this appendix.

2.1.4.2 *Standby mode and off mode.* For testing standby mode and off mode power, install the product in accordance with the manufacturer's instructions and connect to an electrical supply circuit with voltage as specified in section 2.2.1 of this appendix. The product shall also be installed in accordance with section 5, paragraph 5.2 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3), disregarding the provisions regarding batteries and the determination, classification, and testing of relevant modes. A watt meter shall be installed in the circuit and shall be as described in section 2.9.1.3 of this appendix.

* * * * *

2.2.1.1 *Voltage.* Maintain the electrical supply to the conventional range, conventional cooking top, and conventional oven being tested at 240/120 volts ±2 percent except that basic models rated only at 208/120 volts shall be tested at that rating ±2 percent. For microwave oven, microwave/conventional oven, microwave/conventional cooking top, and microwave/conventional range testing, maintain the electrical supply to the unit at 240/120 volts ±1 percent. Maintain the electrical supply frequency for all products at 60 hertz ±1 percent.

2.2.1.2 *Supply voltage waveform.* For the standby mode and off mode testing, maintain the electrical supply voltage waveform as indicated in section 4, paragraph 4.3.2 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3). If the power measuring instrument used for testing is unable to measure and record the total harmonic content during the test measurement period, it is acceptable to measure and record the total harmonic content immediately before and after the test measurement period.

* * * * *

2.5.1 *Active mode ambient room air temperature.* During the active mode test, maintain an ambient room air temperature, T_R, of 77° ± 9 °F (25° ± 5 °C) for conventional ovens, conventional cooking tops, microwave/conventional ovens, microwave/conventional cooking tops, and microwave/conventional ranges, as measured at least 5 feet (1.5 m) and not more than 8 feet (2.4 m) from the nearest surface of the unit under test and approximately 3 feet (0.9 m) above the floor. The temperature shall be measured with a thermometer or temperature indicating system with an accuracy as specified in section 2.9.3.1 of this appendix.

2.5.2 *Standby mode and off mode ambient temperature.* For standby mode and off mode testing, maintain room ambient air temperature conditions as specified in section 4, paragraph 4.2 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3).

2.6 *Normal nonoperating temperature.* All areas of the appliance to be tested shall attain the normal nonoperating temperature, as defined in section 1.8 of this appendix, before any testing begins. The equipment for measuring the applicable normal nonoperating temperature shall be as described in sections 2.9.3.1, 2.9.3.2, 2.9.3.3, and 2.9.3.4 of this appendix, as applicable.

* * * * *

2.9.1.3 *Standby mode and off mode watt meter.* The watt meter used to measure standby mode and off mode shall meet the requirements specified in section 4, paragraph 4.4 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3). If the power measuring instrument used for testing is unable to measure and record the crest factor, power factor, or maximum current ratio during the test measurement period, it is acceptable to measure the crest factor, power factor, and maximum current ratio immediately before and after the test measurement period.

* * * * *

3. Test Methods and Measurements

* * * * *

3.1.1 *Conventional oven.* Perform a test by establishing the testing conditions set forth in section 2, ''TEST CONDITIONS,'' of this appendix, and adjust any pilot lights of a conventional gas oven in accordance with the manufacturer's instructions and turn off the gas flow to the conventional cooking top, if so equipped. Before beginning the test, the conventional oven shall be at its normal nonoperating temperature as defined in section 1.8 and described in section 2.6 of this appendix. Set the conventional oven test block W_1 approximately in the center of the usable baking space. If there is a selector switch for selecting the mode of operation of the oven, set it for normal baking. If an oven permits baking by either forced convection by using a fan, or without forced convection, the oven is to be tested in each of those two modes. The oven shall remain on for at least one complete thermostat ''cut-off/cut-on'' of the electrical resistance heaters or gas burners after the test block temperature has increased 234 °F (130 °C) above its initial temperature.

3.1.1.1 *Self-cleaning operation of a conventional oven.* Establish the test conditions set forth in section 2, ''TEST CONDITIONS,'' of this appendix. Adjust any pilot lights of a conventional gas oven in accordance with the manufacturer's instructions and turn off the gas flow to the conventional cooking top. The temperature of the conventional oven shall be its normal nonoperating temperature as defined in section 1.8 and described in section 2.6 of this appendix. Then set the conventional oven's self-cleaning process in accordance with the manufacturer's instructions. If the self-cleaning process is adjustable, use the

average time recommended by the manufacturer for a moderately soiled oven.

* * * * *

3.1.2 *Conventional cooking top.* Establish the test conditions set forth in section 2, ''TEST CONDITIONS,'' of this appendix. Adjust any pilot lights of a conventional gas cooking top in accordance with the manufacturer's instructions and turn off the gas flow to the conventional oven(s), if so equipped. The temperature of the conventional cooking top shall be its normal nonoperating temperature as defined in section 1.8 and described in section 2.6 of this appendix. Set the test block in the center of the surface unit under test. The small test block, W_2, shall be used on electric surface units of 7 inches (178 mm) or less in diameter. The large test block, W_3, shall be used on electric surface units over 7 inches (177.8 mm) in diameter and on all gas surface units. Turn on the surface unit under test and set its energy input rate to the maximum setting. When the test block reaches 144 °F (80 °C) above its initial test block temperature, immediately reduce the energy input rate to 25 ± 5 percent of the maximum energy input rate. After 15 ± 0.1 minutes at the reduced energy setting, turn off the surface unit under test.

* * * * *

3.1.3 *Microwave oven, microwave/conventional oven, microwave oven/conventional cooking top, and microwave/conventional range.*

3.1.3.1 *Microwave oven test standby mode and off mode power.* Establish the testing conditions set forth in section 2, ''TEST CONDITIONS,'' of this appendix. For microwave ovens that drop from a higher power state to a lower power state as discussed in section 5, paragraph 5.1, Note 1 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3), allow sufficient time for the microwave oven to reach the lower power state before proceeding with the test measurement. Follow the test procedure as specified in section 5, paragraph 5.3.2 of IEC 62301 (Second Edition). For units in which power varies as a function of displayed time in standby mode, set the clock time to 3:23 and use the average power approach described in section 5, paragraph 5.3.2(a) of IEC 62301 (First Edition), but with a single test period of 10 minutes +0/-2 sec after an additional stabilization period until the clock time reaches 3:33. If a microwave oven is capable of operation in either standby mode or off mode, as defined in sections 1.13 and 1.9 of this appendix, respectively, or both, test the microwave oven in each mode in which it can operate.

3.1.3.2 *Microwave/conventional oven, microwave/conventional cooking top, and microwave/conventional range standby mode and off mode power.* For standby mode and off mode power testing of the microwave oven portion of the microwave/conventional oven, microwave/conventional cooking top, or microwave/conventional range, follow the procedure established in section 3.1.3.1 of this appendix. If the product has separate displays for the microwave oven and conventional oven, conventional cooking top, or conventional range portions, in which power varies as a function of the displayed time in standby mode, follow the procedure in section 3.1.3.1 of this appendix for each clock simultaneously.

* * * * *

3.2.3 *Microwave oven test standby mode and off mode power.* Make measurements as specified in section 5, paragraph 5.3 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3). If the microwave oven is capable of operating in standby mode, measure the average standby mode power of the microwave oven, P_{SB}, in watts as specified in section 3.1.3.1 of this appendix. If the microwave oven is capable of operating in off mode, measure the average off mode power of the microwave oven, P_O, as specified in section 3.1.3.1 of this appendix.

3.2.4 *Microwave/conventional oven, microwave/conventional cooking top, and microwave/conventional range test standby mode and off mode power.* Make measurements as specified in section 5, paragraph 5.3 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3). If the microwave/conventional oven, microwave/conventional cooking top, or microwave/conventional range is capable of operating in standby mode, measure the average standby mode power of the combined product, P_{SBC}, in watts as specified in section 3.1.3.2 of this appendix. If the microwave/conventional oven, microwave/conventional cooking top, or microwave/conventional range is capable of operating in off mode, measure the average off mode power of the combined product, P_{OC}, as specified in section 3.1.3.2 of this appendix.

* * * * *

3.3.13 Record the average standby mode power, P_{SB}, for the microwave oven standby mode, as determined in section 3.2.3 of this appendix for a microwave oven capable of operating in standby mode. Record the average off mode power, P_O, for the microwave oven off mode power test, as determined in section 3.2.3 of this appendix for a microwave oven capable of operating in off mode.

3.3.14 Record the average standby mode power, P_{SBC}, for the microwave/conventional oven, microwave/conventional cooking top, or microwave/conventional range standby mode, as determined in section 3.2.4 of this appendix for a microwave/conventional oven, microwave/conventional cooking top, or microwave/conventional range capable of operating in standby mode. Record the average off mode power, P_{OC}, for the microwave/conventional oven, microwave/conventional cooking top, or microwave/conventional range off mode power test, as determined in section 3.2.4 of this appendix for a microwave oven capable of operating in off mode.

4. Calculation of Derived Results From Test Measurements

* * * * *

4.3 *Combined components.*

4.3.1 *Combined conventional cooking products.* The annual energy consumption of a conventional range, *e.g.* a conventional cooking top and conventional oven combined, shall be the sum of the annual energy consumption of each of its components. The annual energy consumption for other combinations of conventional ovens and conventional cooking tops will also be treated as the sum of the annual energy consumption of each of its components. The energy factor of a combined component is the sum of the annual useful cooking energy output of each component divided by the sum of the total annual energy consumption of each component.

4.3.2 *Microwave/conventional oven, microwave/conventional cooking top, and microwave/conventional range.* Calculate the average standby mode power, P_{SB}, for the microwave oven portion of the microwave/conventional oven, microwave/conventional cooking top, or microwave/conventional range capable of operating in standby mode, in watts, defined as:

$$P_{SB} = P_{SBC} \times F_{SBM}$$

Where:

P_{SBC} = the average standby mode power for the microwave/conventional oven, microwave/conventional cooking top, or microwave/conventional range as determined in section 3.3.14 of this appendix.

F_{SBM} = the power apportionment factor for the microwave oven portion of the average standby mode power for the microwave/conventional oven, microwave/conventional cooking top, or microwave/conventional range = 0.50 for microwave/conventional ovens, 0.55 for microwave/conventional cooking tops, and 0.36 for microwave/conventional ranges. Alternatively, manufacturers may submit data to DOE that DOE may use to permit a different value of F_{SBM} for that particular model of microwave/conventional oven, microwave/conventional cooking top, or microwave/conventional range.

Calculate the average off mode power, P_O, for the microwave oven portion of the microwave/conventional oven, microwave/conventional cooking top, or microwave/conventional range capable of operating in off mode, in watts, defined as:

$$P_O = P_{OC} \times F_{OM}$$

Where:

P_{OC} = the average off mode power for the microwave/conventional oven, microwave/conventional cooking top, or microwave/conventional range as determined in section 3.3.14 of this appendix.

F_{OM} = the power apportionment factor for the microwave oven portion of the average off mode power for the microwave/conventional oven, microwave/conventional cooking top, or microwave conventional range = 0.50 for microwave/conventional ovens and microwave/conventional cooking tops, and 0.33 for microwave/conventional ranges. Alternatively, manufacturers may submit data to DOE that DOE may use to permit a different value of F_{OM} for that particular model of microwave/conventional oven, microwave/conventional cooking top, or microwave/conventional range.

4.3.3 *Other combined products.* For products that combine a microwave oven

with appliance functionality other than cooking or heating food, the average standby power, P_{SB}, and average off mode power, P_O, of the microwave oven portion shall be determined as for microwave/conventional ovens, microwave/conventional cooking tops, and microwave/conventional ranges, except that manufacturers must submit data to DOE that DOE shall use to determine the values of the apportionment factors, F_{SBM} and F_{OM}, as defined in section 4.3.2 of this appendix, for that particular model of combined product.

[FR Doc. 2012–11730 Filed 5–15–12; 8:45 am]

BILLING CODE 6450–01–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter 1

Second Amendment to July 14, 2011 Order for Swap Regulation

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of Proposed Amendment.

SUMMARY: On July 14, 2011, the Commodity Futures Trading Commission (''CFTC'' or the ''Commission'') issued a final order (''July 14 Order'') that granted temporary exemptive relief from certain provisions of the Commodity Exchange Act (''CEA'') that otherwise would have taken effect on the general effective date of title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'')—July 16, 2011. On December 23, 2011, the Commission amended the July 14 Order to extend the potential latest expiration date of the July 14 Order from December 31, 2011 to July 16, 2012, and added provisions to account for the repeal and replacement (as of December 31, 2011) of part 35 of the Commission's regulations (the ''First Amended July 14 Order''). In this Notice of Proposed Amendment (''Notice''), the Commission proposes to further modify the temporary exemptive relief provided in the First Amended July 14 Order by: (1) Removing references to the entities terms, including ''swap dealer,'' ''major swap participant,'' and ''eligible contract participant'' in light of the final, joint CFTC–SEC rulemaking further defining them issued on April 18, 2012; (2) extending the potential latest expiration date of the July 14 Order to December 31, 2012, or, depending on the nature of the relief, such other compliance date as may be determined by the Commission; (3) allowing the clearing of agricultural swaps, as described herein; and (4) removing any reference to the exempt commercial market (''ECM'') and exempt board of trade (''EBOT'') grandfather relief previously issued by the Commission. Only comments pertaining to these proposed amendments to the First Amended July 14 Order, as amended (the ''Second Amended July 14 Order''), will be considered.

DATES: Submit comments on or before May 30, 2012.

ADDRESSES: Comments may be submitted, referenced as ''Effective Date Amendments,'' by any of the following methods:

- Agency Web site, via its Comments Online process at *http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that may be exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established procedures in § 145.9 of the Commission's regulations, 17 CFR 145.9.

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Mark D. Higgins, Counsel, (202) 418–5864, *mhiggins@cftc.gov,* Office of the General Counsel; David Van Wagner, Chief Counsel, (202) 418–5481, *dvanwagner@cftc.gov,* Division of Market Oversight; Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581; or Anne Polaski, Special Counsel, (312) 596–0575, *apolaski@cftc.gov,* Division of Clearing and Risk; Commodity Futures Trading Commission, 525 West Monroe, Chicago, Illinois 60661.

SUPPLEMENTARY INFORMATION:

On July 14, 2011, the Commission exercised its exemptive authority under CEA section 4(c) [1] and its authority under section 712(f) of the Dodd-Frank Act by issuing a final order (the ''July 14 Order'') that addressed the potential that the final, joint CFTC–SEC rulemakings further defining the terms in sections 712(d) [2] and 721(c) [3] would not be in effect as of July 16, 2011 (*i.e.,* the general effective date set forth in section 754 of the Dodd-Frank Act).[4] In so doing, the Commission sought to address concerns that had been raised about the applicability of various regulatory requirements to certain agreements, contracts, and transactions after July 16, 2011, and thereby ensure that current practices would not be unduly disrupted during the transition to the new regulatory regime.[5]

[1] 7 U.S.C. 6(c).

[2] Section 712(d)(1) provides: ''Notwithstanding any other provision of this title and subsections (b) and (c), the Commodity Futures Trading Commission and the Securities and Exchange Commission, in consultation with the Board of Governors [of the Federal Reserve System], shall further define the terms 'swap', 'security-based swap', 'swap dealer', 'security-based swap dealer', 'major swap participant', 'major security-based swap participant', and 'security-based swap agreement' in section 1a(47)(A)(v) of the Commodity Exchange Act (7 U.S.C. 1a(47)(A)(v)) and section 3(a)(78) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(78)).''

[3] Section 721(c) provides: ''To include transactions and entities that have been structured to evade this subtitle (or an amendment made by this subtitle), the Commodity Futures Trading Commission shall adopt a rule to further define the terms 'swap', 'swap dealer', 'major swap participant', and 'eligible contract participant'.''

[4] Effective Date for Swap Regulation, 76 FR 42508 (issued and made effective by the Commission on July 14, 2011; published in the **Federal Register** on July 19, 2011). Section 712(f) of the Dodd-Frank Act states that ''in order to prepare for the effective dates of the provisions of this Act,'' including the general effective date set forth in section 754, the Commission may ''exempt persons, agreements, contracts, or transactions from provisions of this Act, under the terms contained in this Act.'' Section 754 specifies that unless otherwise provided in Title VII, provisions requiring a rulemaking become effective ''not less than 60 days after publication of the final rule'' (but not before July 16, 2011).

[5] Concurrent with the July 14 Order, the Commission's Division of Clearing and Intermediary Oversight (which is now two divisions—the Division of Clearing and Risk (''DCR'') and the Division of Swap Dealer and Intermediary Oversight (''DSIO'')) and the Division of Market Oversight (''DMO'') (together ''the

Continued

For those same reasons, on December 23, 2011, the Commission published in the **Federal Register** a final order, the First Amended July 14 Order, amending the July 14 Order in two ways.[6] First, the Commission extended the potential latest expiry date from December 31, 2011 to July 16, 2012 or, depending on the nature of the relief, such other compliance date as may be determined by the Commission,[7] to address the potential that, as of December 31, 2011, the aforementioned joint CFTC–Securities and Exchange Commission (''SEC'') joint rulemakings would not be effective. Second, the Commission included within the relief set forth in the First Amended July 14 Order any agreement, contract or transaction that fully meets the conditions in part 35 as in effect prior to December 31, 2011. This amendment addressed the fact that such transactions, which were not included within the scope of the original July 14 Order because the exemptive rules in part 35 covered them at that time, required temporary relief because part 35 would not be available as of December 31, 2011.[8] In so doing, the Commission clarified that new part 35 and the exemptive relief issued in the First Amended July 14 Order, and any interaction of the two, do not operate to expand the pre-Dodd-Frank Act scope of transactions eligible to be transacted on either an ECM or EBOT to include transactions in agricultural commodities.

In this Notice, the Commission is proposing to further amend the First Amended July 14 Order in the following four ways.[9] First, in light of the final, joint CFTC–SEC rulemaking further defining the entities terms in sections 712(d), including ''swap dealer,'' ''major swap participant,'' and ''eligible contract participant,'' issued on April 18, 2012,[10] the Commission is removing references to those terms in this proposed Second Amended July 14 Order. Second, the Commission is proposing to extend the latest potential expiry date from July 16, 2012 to December 31, 2012 or, depending on the nature of the relief, such other compliance date as may be determined by the Commission. The extension would ensure that market practices will not be unduly disrupted during the transition to the new regulatory regime.

Third, the Commission is proposing to further amend the First Amended July 14 Order to provide that agricultural swaps, whether entered into bilaterally, on a DCM, or a SEF, may be cleared in the same manner that any other swap may be cleared and without the need for the Commission to issue any further exemption under section 4(c) of the CEA.[11] This amendment is intended to harmonize the First Amended July 14 Order and the final rules amending part 35 of the Commission's regulations, to the extent that the July 14 Order, as amended, maintained the pre-Dodd-Frank part 35 prohibition against the clearing of agricultural swaps. While the proposed Second Amended July 14 Order would remove the clearing prohibition for agricultural swaps, this proposal would not permit agricultural swaps to be entered into or executed on an ECM or EBOT. The Commission notes that ECMs and EBOTs both operate some form of trading facility without any self-regulatory responsibilities. The Commission generally believes that any form of exchange trading in agricultural swaps should only be permitted in a self-regulated environment. In other words, unlike exempt and excluded commodities, which were allowed to be transacted on a trading facility (*i.e.,* platform-traded) in an unregulated environment under the CEA prior to the Dodd-Frank Act and now during the transition to the Dodd-Frank Act regulatory regime, agricultural swaps, which were not allowed to be platform-traded on an ECM or EBOT under the CEA prior to Dodd-Frank Act, may not be platform-traded during the transition to the Dodd-Frank Act regulatory regime. Accordingly, under this proposed amendment and in conjunction with 17 CFR part 35, as effective on and after December 31, 2011, the Commission confirms that agricultural swaps may only be entered into or executed bilaterally, on a DCM,[12] or on a SEF.[13]

In connection with swaps executed on a DCM (whether agricultural swaps or otherwise), the Commission clarifies that a DCM may list such swaps for trading under the DCM's rules related to futures contracts without exemptive relief.[14] As required for futures, a DCM must submit such swaps to the Commission under either § 40.2 (listing products for trading by certification)[15] or § 40.3 (voluntary submission of new products for Commission review and approval)[16] of the Commission's regulations. Swaps that are traded on a DCM are required to be cleared by a DCO.[17] In order for a DCO to be able to clear a swap listed for trading on a

Divisions'') identified certain provisions of the Dodd-Frank Act and CEA as amended that would take effect on July 16, 2011, but that may not be eligible for the exemptive relief provided by the Commission in its July 14 Order—specifically, the amendments made to the CEA by Dodd-Frank Act sections 724(c), 725(a), and 731. On July 14, 2011, the Divisions issued Staff No-Action Relief addressing the application of these provisions after July 16, 2011. Available at: *http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/11-04.pdf.*

[6] Amendment to July 14, 2011 Order for Swap Regulation, 76 FR 80233 (Dec. 23, 2011).

[7] The Commission clarified that while the exemption set forth in the second part of the First Amended July 14 Order generally shall expire upon the earlier of July 16, 2012 or such other compliance date as may be determined by the Commission, it modified that alternative condition to provide that the exemption will not expire prior to July 16, 2012 in certain circumstances. Specifically, the Commission stated that no other compliance date will be determined (and thus, the exemption will remain in effect until July 16, 2012) for agreements, contracts, and transactions (and for persons offering, entering into, or rendering advice or rendering other services with respect to, such agreements, contracts or transactions) that: (1) Are executed on an ECM or EBOT that is operating under the terms of the Commission's Order Regarding the Treatment of Petitions Seeking Grandfather Relief for Exempt Commercial Markets and Exempt Boards of Trade, 75 FR 56513, Sept. 16, 2010 (the ECM/EBOT Grandfather Order''), and that complies with all of the applicable conditions of the ECM/EBOT Grandfather Order; and (2) are cleared by a Commission-registered derivatives clearing organization (''DCO''). Concurrent with the First Amended July 14 Order, the Divisions also issued a new staff no-action letter further addressing the applicability of the amendments made to the CEA by Dodd-Frank Act sections 724(c), 725(a), and 731. The Commission staff has informed the Commission that it is separately considering whether to issue a no-action letter in which the staff would state that it would not recommend that the Commission commence an enforcement action against markets or market participants for failure to comply with the above-referenced provisions over a period of time co-extensive with that set forth in the Second Amended July 14 Order, as proposed herein.

[8] The Commission promulgated a rule pursuant to section 723(c)(3) of the Dodd-Frank Act, and CEA sections 4(c) and 4c(b), that, effective December 31, 2011, repealed the existing part 35 relief and replaced it with new § 35.1 of the Commission's regulations. *See* Agricultural Swaps, 76 FR 49291 (Aug. 10, 2011). Rule 35.1 generally provides that ''agricultural swaps may be transacted subject to all provisions of the CEA, and any Commission rule, regulation or order thereunder, that is otherwise applicable to swaps. [It] also clarifies that by issuing a rule allowing agricultural swaps to transact subject to the laws and rules applicable to all other swaps, the Commission is allowing agricultural swaps to transact on [designated contract markets (''DCMs''), swap execution facilities (''SEFs'')], or otherwise to the same extent that all other swaps are allowed to trade on DCMs, SEFs, or otherwise.'' *Id.* at 49296.

[9] As proposed, the Second Amended July 14 Order.

[10] CFTC–SEC, Further Definition of ''Swap Dealer'', ''Security-Based Swap Dealer'', ''Major Swap Participant'', ''Major Security-Based Swap Participant'', and ''Eligible Contract Participant'' (issued Apr. 18, 2012) (to be codified at 17 CFR pt. 1), available at: *http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister041812b.pdf.*

[11] 7 U.S.C. 6(c).

[12] *See* December 23 Order, 76 FR at 80236, note 11 (Dec. 23, 2011).

[13] *See* 17 CFR 35.1(b).

[14] *See* 76 FR at 80236, note 22 (Dec. 23, 2011).

[15] 17 CFR 40.2.

[16] 17 CFR 40.3.

[17] *See* 7 U.S.C. 5(d)(11)(A).

DCM, the DCO must be eligible to clear such swap pursuant to § 39.5(a)(1) or (2),[18] and must submit the swap to the Commission pursuant to § 39.5(b).[19]

Fourth, the Commission is proposing to further amend the First Amended July 14 Order to remove any reference to the ECM/EBOT Grandfather Order, which expires on July 16, 2012.[20] After July 16, 2012, ECMs and EBOTs, as well as markets that rely on pre-Dodd-Frank CEA section 2(d)(2) (''2(d)(2) Markets''), will only be able to rely on the Second Amended July 14 Order, as proposed herein. The relief for ECMs and EBOTs, as well as for 2(d)(2) Markets, granted under the proposed Second Amended July 14 Order shall expire upon the effective date of the DCM or SEF final rules, whichever is later, unless the ECM or EBOT, or 2(d)(2) Markets, files a DCM or SEF application on or before the effective date of the DCM or SEF final rules, in which case the relief shall remain in place during the pendency of the application.[21] For these purposes, an application will be considered no longer pending upon the application being approved, provisionally approved,[22] withdrawn, or denied.

The Commission seeks comment on all aspects of this proposal.

Related Matters

A. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA'')[23] imposes certain requirements on Federal agencies (including the Commission) in connection with conducting or sponsoring any collection of information as defined by the PRA. The proposed Second Amended July 14 Order will not require a new collection of information from any persons or entities that will be subject to the final order.

B. Cost-Benefit Considerations

Section 15(a) of the CEA[24] requires the Commission to consider the costs and benefits of its action before issuing an order under the CEA. CEA section 15(a) further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

The Commission proposes that there are no significant, if any, costs associated with this proposed amendment. This is so because the proposed order is permissive—that is, it provides additional time beyond that provided for in the First Amended July 14 Order for persons to comply with any substantive or administrative requirements being imposed elsewhere.

The Commission further proposes that, as discussed above, the primary benefits of this proposal include that it ensures that market practices will not be unduly disrupted during the transition to the new regulatory regime, and removes any actual or perceived inconsistency between Commission orders and rules with regard to agricultural swaps.

The Commission requests comments on the consideration of costs and benefits of the proposed amendments discussed in this Notice.

Proposed Second Amended July 14 Order

The Commission proposes a Second Amended July 14 Order to read as follows:

The Commission, to provide for the orderly implementation of the requirements of Title VII of the Dodd-Frank Act, pursuant to sections 4(c) and 4c(b) of the CEA and section 712(f) of the Dodd-Frank Act, hereby issues this Order consistent with the determinations set forth above, which are incorporated in this final order, *as amended,* by reference, and:

(1) Exempts, subject to the conditions set forth in paragraph (4), all agreements, contracts, and transactions, and any person or entity offering, entering into, or rendering advice or rendering other services with respect to, any such agreement, contract, or transaction, from the provisions of the CEA, as added or amended by the Dodd-Frank Act, that reference one or more of the terms regarding instruments subject to further definition under sections 712(d) and 721(c) of the Dodd-Frank Act, which provisions are listed in Category 2 of the Appendix to this Order; *provided, however,* that the foregoing exemption:

a. Applies only with respect to those requirements or portions of such provisions that specifically relate to such referenced terms; and

b. With respect to any such provision of the CEA, shall expire upon the earlier of: (i) The effective date of the applicable final rule further defining the relevant term referenced in the provision; or (ii) December 31, 2012.

(2) *Agricultural Commodity Swaps.* Exempts, subject to the conditions set forth in paragraph (4), all agreements, contracts, and transactions in an agricultural commodity, and any person or entity offering, entering into, or rendering advice or rendering other services with respect to, any such agreement, contract, or transaction, from the provisions of the CEA, if the agreement, contract, or transaction complies with part 35 of the Commission's regulations as in effect prior to December 31, 2011, including any agreement, contract, or transaction that complies with such provisions then in effect notwithstanding that:

a. The agreement, contract, or transaction may be part of a fungible class of agreements that are standardized as to their material economic terms; and/or

b. The creditworthiness of any party having an actual or potential obligation under the agreement, contract, or transaction would not be a material consideration in entering into or determining the terms of the agreement, contract, or transaction *i.e.,* the agreement, contract, or transaction may be cleared.

[18] 17 CFR 39.5(a).

[19] 17 CFR 39.5(b).

[20] The Commission issued the ECM/EBOT Grandfather Order pursuant to Sections 723(c) and 734(c) of the Dodd-Frank Act which authorized the Commission to permit ECMs and EBOTs respectively to continue to operate pursuant to CEA Sections 2(h)(3) and 5d for no more than one year after the general effective date of the Dodd-Frank Act's amendments to the CEA.

[21] The Commission currently receives notice filings from ECMs and EBOTs, and thus has a general familiarity with the nature and number of markets operating pursuant to ECM and EBOT exemptive relief. *See* 17 CFR 36.2(b) and 17 CFR 36.3(a). In order for the Commission to gain a similar familiarity with 2(d)(2) Markets, and to facilitate their eventual transition to registered DCM or registered SEF status, the Commission strongly encourages 2(d)(2) Markets intending to operate pursuant to the exemptive relief proposed in this Second Amended Order to provide the Commission with notice of their operations (or intent to so operate) on or before July 16, 2012, or as reasonably soon thereafter as is practicable. Any such notice should be sent to the Commission's Division of Market Oversight, 1155 21st St. NW., Washington, DC 20581 (or electronically, to *DMOLetters@cftc.gov*), and should include the name and address of the 2(d)(2) Market, and the name and telephone number of a contact person. The Commission anticipates that such notice will assist the Commission in its preparation to review any subsequent application for registration, or provisional registration, as a SEF or DCM submitted by such 2(d)(2) Market. Notwithstanding the provision of such notice, the Commission notes that any subsequent SEF or DCM registration application by a 2(d)(2) Market will still undergo a separate, complete, and independent evaluation by the Commission, just as will every SEF and/or DCM application submitted by an ECM and/or EBOT.

[22] For these purposes, an application is ''provisionally approved'' on the date that such provisional approval becomes effective such that the ECM, EBOT, or 2(d)(2) Market may then rely on such provisional approval to operate as a DCM or SEF, as applicable.

[23] 44 U.S.C. 3507(d).

[24] 7 U.S.C. 19(a).

This exemption shall expire upon the earlier of (i) December 31, 2012; or (ii) such other compliance date as may be determined by the Commission.

(3) *Exempt and Excluded Commodity Swaps.* Exempts, subject to the conditions set forth in paragraph (4), all agreements, contracts, and transactions, and any person or entity offering, entering into, or rendering advice or rendering other services with respect to, any such agreement, contract, or transaction, from the provisions of the CEA, if the agreement, contract, or transaction complies with part 35 of the Commission's regulations as in effect prior to December 31, 2011, including any agreement, contract, or transaction in an exempt or excluded (but not agricultural) commodity that complies with such provisions then in effect notwithstanding that:

a. The agreement, contract, or transaction may be executed on a multilateral transaction execution facility;

b. The agreement, contract, or transaction may be cleared;

c. Persons offering or entering into the agreement, contract or transaction may not be eligible swap participants, provided that all parties are eligible contract participants as defined in the CEA prior to the date of enactment of the Dodd-Frank Act;

d. The agreement, contract, or transaction may be part of a fungible class of agreements that are standardized as to their material economic terms; and/or

e. No more than one of the parties to the agreement, contract, or transaction is entering into the agreement, contract, or transaction in conjunction with its line of business, but is neither an eligible contract participant nor an eligible swap participant, and the agreement, contract, or transaction was not and is not marketed to the public;

Provided, however, that:

a. Such agreements, contracts, and transactions in exempt or excluded commodities (and persons offering, entering into, or rendering advice or rendering other services with respect to, any such agreement, contract, or transaction) fall within the scope of any of the CEA sections 2(d), 2(e), 2(g), 2(h), and 5d provisions or the line of business provision as in effect prior to July 16, 2011; and

b. This exemption shall expire upon the earlier of: (i) December 31, 2012; or (ii) such other compliance date as may be determined by the Commission; except that, for agreements, contracts, and transactions executed on an exempt commercial market (''ECM''), exempt board of trade (''EBOT''), or pursuant to CEA section 2(d)(2) as in effect prior to July 16, 2011 (''2(d)(2) Market''), this exemption shall expire upon the earlier of (i) December 31, 2012; or (ii) the effective date of the designated contract market (''DCM'') or swap execution facility (''SEF'') final rules, whichever is later, unless the ECM, EBOT, or 2(d)(2) Market files a DCM or SEF registration application on or before the effective date of the DCM or SEF final rules, in which case the relief shall remain in place during the pendency of the application. For these purposes, an application will be considered no longer pending when the application has been approved, provisionally approved, withdrawn, or denied.

(4) Provided that the foregoing exemptions in paragraphs (1), (2), and (3) above shall not:

a. Limit in any way the Commission's authority with respect to any person, entity, or transaction pursuant to CEA sections 2(a)(1)(B), 4b, 4o, 6(c), 6(d), 6c, 8(a), 9(a)(2), or 13, or the regulations of the Commission promulgated pursuant to such authorities, including regulations pursuant to CEA section 4c(b) proscribing fraud;

b. Apply to any provision of the Dodd-Frank Act or the CEA that became effective prior to July 16, 2011;

c. Affect any effective or compliance date set forth in any rulemaking issued by the Commission to implement provisions of the Dodd-Frank Act;

d. Limit in any way the Commission's authority under section 712(f) of the Dodd-Frank Act to issue rules, orders, or exemptions prior to the effective date of any provision of the Dodd-Frank Act and the CEA, in order to prepare for the effective date of such provision, provided that such rule, order, or exemption shall not become effective prior to the effective date of the provision; and

e. Affect the applicability of any provision of the CEA to futures contracts or options on futures contracts, or to cash markets.

In its discretion, the Commission may condition, suspend, terminate, or otherwise modify this Order, as appropriate, on its own motion. This final order, as amended, shall be effective immediately.

Issued in Washington, DC, on May 10, 2012 by the Commission.

David A. Stawick,

Secretary of the Commission.

Appendices to Proposed Order Amending the Second Amendment to July 14, 2011 Order for Swap Regulation—Commission Voting Summary and Statements of Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations

On this matter, Chairman Gensler and Commissioner Sommers, Chilton, O'Malia and Wetjen voted in the affirmative; no Commissioner voted in the negative.

Appendix 1—Chairman Gary Gensler

I support the proposed exemptive order regarding the effective dates of certain Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) provisions. Today's proposed exemptive order makes four changes to the exemptive order issued on December 19, 2011.

First, the proposed exemptive order extends the sunset date from July 16, 2012, to December 31, 2012.

Second, the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission have now completed the rule further defining the term ''swap dealer'' and ''securities-based swap dealer.'' Thus, the proposed exemptive order no longer provides relief as it once did until those terms were further defined. The Commissions are also mandated by the Dodd-Frank Act to further define the term ''swap'' and ''securities-based swap.'' The staffs are making great progress, and I anticipate the Commissions will take up this final definitions rule in the near term. Until that rule is finalized, the proposed exemptive order appropriately provides relief from the effective dates of certain Dodd-Frank provisions.

Third, in advance of the completion of the definitions rule, market participants requested clarity regarding transacting in agricultural swaps. The proposed exemptive order allows agricultural swaps cleared through a derivatives clearing organization or traded on a designated contract market to be transacted and cleared as any other swap. This is consistent with the agricultural swaps rule the Commission already finalized, which allows farmers, ranchers, packers, processors and other end-users to manage their risk.

Fourth, unregistered trading facilities that offer swaps for trading were required under Dodd-Frank to register

as swap execution facilities (SEFs) or designated contract markets by July of this year. These facilities include exempt boards of trade, exempt commercial markets and markets excluded from regulation under section 2(d)(2). Given the Commission has yet to finalize rules with regard to SEFs, this proposed order gives these platforms additional time for such a transition.

Appendix 2—Statement of Commissioner Scott D. O'Malia

I concur in support of the Commission's proposal to further modify the temporary exemptive relief provided in the Commission's final order dated July 14, 2011 (the ''July 14 Order'').[25] In the July 14 Order, the Commission addressed concerns raised by industry regarding the applicability of various regulatory requirements to agreements, contracts and transactions after the effective date of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''). Today's proposal would, among other things, extend the temporary exemptive relief from last extension date (*i.e.,* July 16, 2012) to December 31, 2012.[26]

Based on the Chairman's statements at a recent industry conference,[27] I am supportive of the Commission's proposed amendment to the July 14 Order to the delay application until the end of the year or until the implementation. However, I understand that unless the Commission focuses on its priorities, it seems unlikely we can meet this schedule.

Assuming that we complete all Dodd-Frank Act-related rules, orders and guidance by the end of 2012, I think this proposed amendment is appropriate and will provide the industry with needed comfort that the new swaps regulatory regime will not unduly disrupt current market practices.

Notwithstanding today's proposed amendment, I believe that market participants continue to seek guidance regarding the timing of the Commission's remaining rules. I frequently hear that the Commission's rules are not sequenced in a manner that provides them with the certainty they need to make budgeting, investment and hiring decisions.

For that reason, I have included along with my statement a list of the remaining Commission rules, orders and guidance, as well as a timetable of when I understand the Commission expects to vote on those rules, orders and guidance. I have developed this list and timetable based on my knowledge and through my conversations with Commission staff. I strongly urge the public to provide comments on this list and timetable. I also ask that the public answer whether: (1) The Commission's year-end deadline is achievable; and (2) the sequencing of these rules, orders and guidance is appropriate?

While I support the proposed amendment to the July 14 Order, I believe that the Commission's accelerated rulemaking schedule will likely result in many unforeseen perils. For example, to address many of the problems arising out of the Commission's final rulemaking for large trader reporting for physical commodity swaps, the Commission issued temporary and conditional relief and a guidebook. These actions were intended to act as a Band-Aid fixing what the Commission could have addressed in the final rulemaking if it were not rushed.

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[25] *See Effective Date for Swap Regulation,* 76 FR 42508 (issued and made effective by the Commission on July 14, 2011; published in the **Federal Register** on July 19, 2011).

[26] The proposed amendment to the July 14 Order also seeks to: (1) Remove references to the entities terms in Sections 712(d) of the Dodd-Frank Act, including ''swap dealer,'' ''major swap participant,'' and ''eligible contract participant'' in light of the final, joint CFTC-Securities and Exchange Commission rulemaking further defining those terms on April 18, 2012; (2) allow the clearing of agricultural swaps; and (3) removing any reference to the exempt commercial market and exempt board of trade grandfather relief previously issued by the Commission.

[27] *See* Commodity Futures Trading Commission Chairman Gary Gensler, Remarks before International Swaps and Derivatives Association's 27 Annual General Meeting (May 2, 2012), available at *http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-112.*

Draft CFTC 2012 Rulemaking Schedule

Earliest Potential Date for Consideration	Rule	General Topics
May 2012	Historical Swaps (Part 46)	Reporting
May 2012	Ownership and Control Reports (OCR) – PROPOSAL	Reporting; Large Trader
May 2012	Aggregation for Position Limits – PROPOSAL	Position Limits; (Reporting)
June 2012	Cross-Border Guidance – PROPOSAL	Extraterritoriality; Interaffiliate; Registration; Clearing; Capital; Margin
June 2012	Cross Border Relief (4(c) Order) – PROPOSAL	Extraterritoriality; Interaffiliate; Registration; Clearing; Capital; Margin
June 2012	Inter-Affiliate Exemption – PROPOSAL	Clearing
June 2012	RTO/ISO Proposed Order – PROPOSAL	Products; Trading (DCM or SEF); Clearing
June 2012	Product Definitions	Products; Jurisdiction
June 2012	End-User Exemption	Clearing
June 2012	Exemption from Clearing Requirement (4(c) Order)	Co-operatives; Clearing
June 2012	Implementation: Clearing Rules	Mandatory Clearing
June 2012	Mandatory Clearing Determinations – PROPOSAL	Mandatory Clearing; 90-Day Review
June 2012	Aggregation and Work-Up Prohibition – PROPOSAL	Trading (DCM)
July 2012	Implementation: Trading Rules	Trading (DCM & SEF)
July 2012	Disruptive Trading Practices – PROPOSAL	Trading (SEF)
July 2012	Core Principle 9	Trading (DCM)
July 2012	SEF Core Principles	Trading (SEF)
July 2012	Made Available to Trade	Trading (SEF); Mandatory Trading
July 2012	Segregation for Uncleared Swaps	Clearing; Segregation and Bankruptcy
July 2012	201(f) Order – PROPOSAL	Products; Trading (DCM & SEF); Clearing
August 2012	Conforming Amendments (I, II, III)	Entity Definitions (Floor Broker); Trading (Best Execution)
August 2012	Associated Persons & Other Registrants – PROPOSAL	Registration
August 2012	Internal Business Conduct II	Portfolio Compression & Netting
August 2012	Harmonization b/w RICs & CPOs	CPO/CTA; Registration
September/October 2012	Block Trades for Swaps	Trading (DCM & SEF)
Fall 2012	Identity Theft Red Flags	Title X of Dodd-Frank; Consumer Protection
Fall 2012	SIDCOs: Financial Resources	Clearing; International Coordination
Fall 2012	Intermediary Customer Protection Measures – PROPOSAL	Segregation and Bankruptcy; Response to MF Global
Fall 2012	Reporting: Clean-Up	Reporting; Parts 43, 45, 46 and 49
Fall 2012	Conflicts of Interest & Governance	Trading (DCM & SEF); Clearing (DCO); Ownership; Governance
Fall 2012	Volcker Rule	Entity Definitions; Trading; Jurisdiction
Fall 2012	Capital for Non-Banks	Entity Definitions; Capital; Margin
Fall 2012	Margin for Non-Banks	Entity Definitions; Capital; Margin

[FR Doc. 2012–11838 Filed 5–15–12; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 162

[Docket No. USCG–2011–1086]

RIN 1625–AB84

Inland Waterways Navigation Regulations

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking; Correction of Preamble.

SUMMARY: This document makes a correction to the preamble of the Notice of Proposed Rule Making (NPRM) that was published in the **Federal Register** on May 8, 2012 (77 FR 27007). In the Basis and Purpose section of that NPRM, the Coast Guard stated that the channel between the Detroit River Light and the D33 stationary light is roughly twelve-hundred yards wide. This statement is incorrect. The channel in that area is approximately twelve-hundred feet wide.

FOR FURTHER INFORMATION CONTACT: LT Adrian Palomeque, Prevention Department, Coast Guard Sector Detroit, Detroit, Michigan, (313) 568–9508 or *Adrian.F.Palomeque@uscg.mil.*

Correction: On May 8, 2012, the Coast Guard published in the **Federal Register** an NPRM, proposing to amend 33 CFR Part 162. Specifically, the Coast Guard proposed to redefine the geographical points described in 33 CFR 162.138(a)(1)(ii) so that the southern point of the restricted speed area contained therein would be relocated from its current location to a point approximately 2.5 statute miles to the north.

The NPRM contained an error in the ''Basis and Purpose'' section. Specifically, the NPRM's Basis and Purpose section incorrectly stated that the channel width between the Detroit River Light and the D33 stationary light is roughly ''twelve-hundred yards'' wide. That is incorrect. The channel in that location is roughly ''twelve-hundred feet'' wide. Although this error does not affect the proposed rulemaking that would amend 33 CFR Part 162, the Coast Guard recognizes the confusion that this error might create. Accordingly, the Coast Guard continues to invite comments on the proposed rule that was published in the **Federal Register** on May 8, 2012. (77 FR 27007).

Dated: May 10, 2012.

Erin H. Ledford,

Lieutenant Commander, U.S. Coast Guard, Acting Chief, Office of Regulations and Administrative Law (CG–0943).

[FR Doc. 2012–11801 Filed 5–15–12; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2011–0114; FRL–9670–6]

Approval, Disapproval and Promulgation of State Implementation Plans; State of Utah; Regional Haze Rule Requirements for Mandatory Class I Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to partially approve and partially disapprove a State Implementation Plan (SIP) revision submitted by the State of Utah on May 26, 2011 that addresses regional haze. EPA is also proposing to approve specific sections of a State of Utah SIP revision submitted on September 9, 2008 to address regional haze. These SIP revisions were submitted to address the requirements of the Clean Air Act (CAA or Act) and our rules that require states to prevent any future and remedy any existing man-made 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 taking this action pursuant to section 110 of the CAA.

DATES: Comments must be received on or before July 16, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2011–0114, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Email: r8airrulemakings@epa.gov.*
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** if you are faxing comments).
- *Mail:* Carl Daly, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Hand Delivery:* Carl Daly, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8:00 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R08–OAR–2011–0114. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA, without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly-available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Program, Environmental

Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Laurel Dygowski, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P–AR, 1595 Wynkoop, Denver, Colorado 80202–1129, (303) 312–6144, *dygowski.laurel@epa.gov.*

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

i. The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

ii. The initials *BART* mean or refer to Best Available Retrofit Technology.

iii. The initials *CAC* mean or refer to clean air corridors.

iv. The initials *CEED* mean or refer to the Center for Energy and Economic Development.

v. The initials *EC* mean or refer to elemental carbon.

vi. The initials *EGUs* mean or refer to electric generating units.

vii. The initials *EATS* mean or refer to Emissions and Allowance Tracking System.

viii. The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

ix. The initials *GCVTC* mean or refer to the Grand Canyon Visibility Transport Commission.

x. The initials *IMPROVE* mean or refer to Interagency Monitoring of Protected Visual Environments monitoring network.

xi. The initials *IWAQM* mean or refer to Interagency Workgroup on Air Quality Modeling.

xii. The initials *MRR* mean or refer to monitoring, recordkeeping, and reporting.

xiii. The initials *LNB* mean or refer to low NO_X burner.

xiv. The initials NO_X mean or refer to nitrogen oxides.

xv. The initials *OC* mean or refer to organic carbon.

xvi. The initials $PM_{2.5}$ mean or refer to particulate matter with an aerodynamic diameter of less than 2.5 micrometers.

xvii. The initials PM_{10} mean or refer to particulate matter with an aerodynamic diameter of less than 10 micrometers.

xviii. The initials *RHR* mean or refer to the Regional Haze Rule.

xix. The initials *RMC* mean or refer to the Regional Modeling Center.

xx. The initials *RPO* mean or refer to regional planning organization.

xxi. The initials *SIP* mean or refer to State Implementation Plan.

xxii. The initials SO_2 mean or refer to sulfur dioxide.

xxiii. The initials *SOFA* mean or refer to separated overfire air.

xxiv. The initials *TSA* mean or refer to the tracking system administrator.

xxv. The initials *TSD* mean or refer to Technical Support Document.

xxvi. The words *Utah* or *State* mean or refer to the State of Utah.

xxvii. The initials *UAR* mean or refer to the Utah Administrative Rules.

xxviii. The initials *VOC* mean or refer to volatile organic compounds.

xxix. The initials *WRAP* mean or refer to the Western Regional Air Partnership.

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I. General Information

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

1. *Submitting CBI.* Do not submit CBI to EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

b. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period deadline identified.

B. Overview of Proposed Action

In this action, EPA is proposing to partially approve and partially disapprove a State of Utah SIP revision submitted on May 26, 2011 that addresses the regional haze rule (RHR) requirements for the mandatory Class I areas under 40 CFR 51.309. Specifically, EPA is proposing to approve all sections of the SIP submittal as meeting the requirements under 40 CFR 51.309, with the exception of the requirements under 40 CFR 51.309(d)(4)(vii) pertaining to nitrogen oxides (NO_X) and particulate matter (PM) best available retrofit technology (BART). EPA is proposing to disapprove the State's NO_X and PM BART determinations and limits in section D.6.d of the SIP for the following four subject-to-BART EGUs: PacifiCorp Hunter Unit 1, PacifiCorp Hunter Unit 2, PacifiCorp Huntington Unit 1, and PacifiCorp Huntington Unit 2. EPA is proposing to disapprove these BART determinations because they do not comply with our regulations under 40 CFR 51.308(e)(1)(ii)(A). EPA is also proposing to disapprove the State's SIP because it does not contain the provisions necessary to make BART limits practically enforceable as required by section 110(a)(2) of the CAA and Appendix V to part 51.

We are taking no action on section G—*Long-Term Strategy for Fire Programs* of the May 26, 2011 submittal as we have proposed approval of this section in a separate notice (76 FR 69217, November 8, 2011).

We are proposing to approve specific sections of the State's September 9, 2008 SIP submittal. Specifically, we are proposing to approve Utah Administrative Rules (UAR) R307–250—*Western Backstop Sulfur Dioxide Trading Program* and R307–250—*Emission Inventories.* R307–250, in conjunction with the SIP, implements the backstop trading program provisions in accordance with the requirements of the RHR under 40 CFR 51.309. The purpose of R305–250 is to establish consistent emission inventory reporting requirements for stationary sources in Utah to determine whether sulfur dioxide (SO_2) emissions are below the SO_2 milestones established for the trading program. We are taking no action on the rest of the September 9, 2008 submittal as the May 26, 2011 submittal supersedes and replaces the remaining sections of the September 9, 2008 SIP submittal. The State also submitted SIPs on December 12, 2003 and August 8, 2004 to meet the requirements of the RHR. These submittals have been superseded and replaced by the September 9, 2008 and May 26, 2011 submittals.

As explained in further detail below, 40 CFR 51.309 (section 309) allows western states an optional way to fulfill the RHR requirements as opposed to adopting the requirements under 40 CFR 51.308. Three states have elected to submit a SIP under 40 CFR 51.309. Those states are Wyoming, Utah, and New Mexico.[1] In this action, EPA is proposing to approve Utah's section 309 SIP submittal. As required by 40 CFR 51.309, the participating states must adopt a trading program, or what has been termed the Western Backstop Sulfur Dioxide Trading Program (backstop trading program or trading program). The 309 backstop trading program will not be effective until EPA has finalized action on all section 309 SIPs as the program is dependent on the participation of the three states. Wyoming submitted its 309 SIP to EPA on January 12, 2011, and New Mexico submitted its 309 SIP to EPA on June 30, 2011. EPA will be taking action on Wyoming and New Mexico's 309 SIPs separately. If EPA takes action approving the necessary components of the 309 backstop trading program to operate in all of the jurisdictions electing to submit 309 SIPs, the trading program will become effective.

II. Background Information

A. Regional Haze

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 (OC), elemental carbon (EC), and soil dust), and their precursors (e.g., SO_2, NO_X, and in some cases, ammonia (NH_3) and volatile organic compounds (VOC)). Fine particle precursors react in the atmosphere to form $PM_{2.5}$, 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[2] in many Class I

[1] In addition to the SIP submittals from the three states, Albuquerque/Bernalillo County in New Mexico must also submit a Section 309 RH 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). Albuquerque submitted its regional haze SIP to EPA on June 8, 2011. When we refer to New Mexico in this notice, we are also referring to Albuquerque/Bernalillo County.

[2] Visual range is the greatest distance, in kilometers or miles, at which a dark object can be viewed against the sky.

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. 64 FR 35715 (July 1, 1999).

B. Requirements of the CAA 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 [3] 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.'' 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 (July 1, 1999, codified at 40 CFR part 51, subpart P). 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 under 40 CFR 51.309 are summarized in sections III and IV of this preamble. The requirement to submit a regional haze SIP applies to all 50 states, the District of Columbia and the Virgin Islands. 40 CFR 51.308(b) and 40 CFR 51.309(c) require states to submit the first implementation plan addressing regional haze visibility impairment no later than December 17, 2007.[4]

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 PM and other pollutants leading to regional haze.

The Western Regional Air Partnership (WRAP) RPO 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 in the western United States. WRAP member state governments include: Alaska, Arizona, California, Colorado, Idaho, Montana, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. Tribal members include Campo Band of Kumeyaay Indians, Confederated Salish and Kootenai Tribes, Cortina Indian Rancheria, Hopi Tribe, Hualapai Nation of the Grand Canyon, Native Village of Shungnak, Nez Perce Tribe, Northern Cheyenne Tribe, Pueblo of Acoma, Pueblo of San Felipe, and Shoshone-Bannock Tribes of Fort Hall.

D. Development of the Requirements for 40 CFR 51.309

EPA's RHR provides two paths to address regional haze. One is 40 CFR 51.308, requiring states to perform individual point source BART determinations and evaluate the need for other control strategies. These strategies must be shown to make ''reasonable progress'' in improving visibility in Class I areas inside the state and in neighboring jurisdictions. The other method for addressing regional haze is through 40 CFR 51.309, and is an option for nine states termed the ''Transport Region States'' which include: Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, and Wyoming, and the 211 tribes located within those states. By meeting the requirements under 40 CFR 51.309, states are making reasonable progress toward the national goal of achieving natural visibility conditions for the 16 Class I areas on the Colorado Plateau.

Section 309 requires participating states to adopt regional haze strategies that are based on recommendations from the Grand Canyon Visibility Transport Commission (GCVTC) for protecting the 16 Class I areas on the Colorado Plateau.[5] The EPA established the GCVTC on November 13, 1991. The purpose of the GCVTC was to assess information about the adverse impacts on visibility in and around the 16 Class I areas on the Colorado Plateau and to provide policy recommendations to EPA to address such impacts. Section 169B of the CAA called for the GCVTC to

[3] 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.''

[4] EPA's regional haze regulations require subsequent updates to the regional haze SIPs. 40 CFR 51.308(g)–(i).

[5] The Colorado Plateau is a high, semi-arid tableland in southeast Utah, northern Arizona, northwest New Mexico, and western Colorado. The 16 mandatory Class I areas are as follows: Grand Canyon National Park, Mount Baldy Wilderness, Petrified Forest National Park, Sycamore Canyon Wilderness, Black Canyon of the Gunnison National Park Wilderness, Flat Tops Wilderness, Maroon Bells Wilderness, Mesa Verde National Park, Weminuche Wilderness, West Elk Wilderness, San Pedro Parks Wilderness, Arches National Park, Bryce Canyon National Park, Canyonlands National Park, Capital Reef National Park, and Zion National Park.

evaluate visibility research, as well as other available information, pertaining to adverse impacts on visibility from potential or projected growth in emissions from sources located in the region. The GCVTC determined that all transport region states could potentially impact visibility in the Class I areas on the Colorado Plateau. The GCVTC submitted a report to EPA in 1996 with its policy recommendations for protecting visibility for the Class I areas on the Colorado Plateau. Provisions of the 1996 GCVTC report include: Strategies for addressing smoke emissions from wildland fires and agricultural burning; provisions to prevent pollution by encouraging renewable energy development; and provisions to manage clean air corridors (CACs), mobile sources, and wind-blown dust, among other things. The EPA codified these recommendations as part of the 1999 RHR. 64 FR 35714 (July 1, 1999).

EPA determined that the GCVTC strategies would provide for reasonable progress in mitigating regional haze if supplemented by an annex containing quantitative emission reduction milestones and provisions for a trading program or other alternative measure (64 FR 35749 and 35756). Thus, the 1999 RHR required that western states submit an annex to the GCVTC report with quantitative milestones and detailed guidelines for an alternative program in order to establish the GCVTC recommendations as an alternative approach to fulfilling the section 308 requirements for compliance with the RHR. In September 2000, the WRAP, which is the successor organization to the GCVTC, submitted an annex to EPA. The annex contained SO_2 emission reduction milestones and the detailed provisions of a backstop trading program to be implemented automatically if voluntary measures failed to achieve the SO_2 milestones. EPA codified the annex on June 5, 2003 at 40 CFR 51.309(h). 68 FR 33764.

Five western states submitted implementation plans under section 309 in 2003. EPA was challenged by the Center for Energy and Economic Development (CEED) on the validity of the annex provisions. In *CEED* v. *EPA,* the D.C. Circuit vacated EPA's approval of the WRAP annex (*Center for Energy and Economic Development* v. *EPA,* No. 03–1222 (D.C. Cir. Feb. 18, 2005)). In response to the court's decision, EPA vacated the annex requirements adopted as 40 CFR 51.309(h), but left in place the stationary source requirements in 40 CFR 51.309(d)(4). 71 FR 60612. The requirements under 40 CFR 51.309(d)(4) contain general requirements pertaining to stationary sources and market trading, and allow states to adopt alternatives to the point source application of BART.

III. Requirements for Regional Haze SIPs Submitted Under 40 CFR 51.309

The following is a summary and basic explanation of the regulations covered under section 51.309 of the RHR. See 40 CFR 51.309 for a complete listing of the regulations under which this SIP was evaluated.

A. Projection of Visibility Improvement

For each of the 16 Class I areas located on the Colorado Plateau, the SIP must include a projection of the improvement in visibility expressed in deciviews. 40 CFR 51.309(d)(2). The RHR establishes the deciview as the principal metric or unit for expressing visibility. *See* 70 FR 39104, 39118. This visibility metric expresses uniform changes in the degree of haze 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.[6] States need to show the projected visibility improvement for the best and worst 20 percent days through the year 2018, based on the application of all section 309 control strategies.

B. Clean Air Corridors (CACs)

Pursuant to 40 CFR 51.309(d)(3), states must identify CACs. CACs are geographic areas located within transport region states that contribute to the best visibility days (least impaired) in the 16 Class I areas on the Colorado Plateau. The CAC as described in the 1996 GCVTC report covers nearly all of Nevada, large portions of Oregon, Idaho, and Utah, and encompasses several Indian nations. In order to meet the RHR requirements for CACs, states must adopt a comprehensive emissions tracking program for all visibility impairing pollutants within the CAC. Based on the emissions tracking, states must identify overall emissions growth or specific areas of emissions growth in and outside of the CAC that could be significant enough to result in visibility impairment at one or more of the 16 Class I areas. If there is visibility impairment in the CAC, states must conduct an analysis of the potential impact in the 16 Class I areas and determine if additional emission control measures are needed and how these measures would be implemented. States must also indicate in their SIP if any other CACs exist, and if others are found, provide necessary measures to protect against future degradation of visibility in the 16 Class I areas.

C. Stationary Source Reductions

1. Sulfur Dioxide Emission Reductions

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 their visibility impacts. 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 built between 1962 and 1977 procure, install, and operate BART 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 have the flexibility under section 309 to adopt an emissions trading program or other alternative program as long as the alternative provides greater reasonable progress than would be achieved by the application of BART pursuant to 40 CFR 51.309(e)(2). Under 40 CFR 51.309, states can satisfy the section 308 SO_2 BART requirements by adopting SO_2 emission milestones and a backstop trading program. 40 CFR 51.309(d)(4). Under this approach, states must establish declining SO_2 emission milestones for each year of the program through 2018. The milestones must be consistent with the GCVTC's goal of 50 to 70 percent reduction in SO_2 emissions by 2040. If the milestones are exceeded in any year, the backstop trading program is triggered.

Pursuant to 40 CFR 51.309(d)(4)(ii)–(iv), states must include requirements in the SIP that allow states to determine whether the milestone has been exceeded. These requirements include documentation of the baseline emission calculation, monitoring, recordkeeping,

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

and reporting (MRR) of SO_2 emissions, and provisions for conducting an annual evaluation to determine whether the milestone has been exceeded. SIPs must also contain requirements for implementing the backstop trading program in the event that the milestone is exceeded and the program is triggered. 40 CFR 51.309(d)(4)(v).

The WRAP, in conjunction with EPA, developed a model for a backstop trading program. In order to ensure consistency between states, states opting to participate in the 309 program need to adopt rules that are substantively equivalent to the model rules for the backstop trading program to meet the requirements of 40 CFR 51.309(d)(4). The trading program must also be implemented no later than 15 months after the end of the first year that the milestone is exceeded, require that sources hold allowances to cover their emissions, and provide a framework, including financial penalties, to ensure that the 2018 milestone is met.

2. Provisions for Stationary Source Emissions of Nitrogen Oxides and Particulate Matter

Pursuant to 40 CFR 51.309(d)(4)(vii), a section 309 SIP must contain any necessary long term strategies and BART requirements for PM and NO_X. 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 [7] 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.

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. 70 FR 39104. 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. Regardless of source size or type, a state must meet the requirements of the CAA and our regulations for selection of BART, and the state's BART analysis and determination must be reasonable in light of the overarching purpose of the regional haze program.

The process of establishing BART emission limitations can be logically broken down into three steps: first, states identify those sources which meet the definition of ''BART-eligible source'' set forth in 40 CFR 51.301; [8] second, states determine which of such sources ''emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area'' (a source which fits this description is ''subject-to-BART''); and third, for each source subject-to-BART, states then identify the best available type and level of control for reducing emissions.

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. 40 CFR part 51, appendix Y, section III.A.1.

In their SIPs, states must identify the sources that are subject-to-BART and document their BART control determination analyses for such sources. In making their BART determinations, section 169A(g)(2) of the CAA requires that states consider the following factors when evaluating potential control technologies: (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. 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. 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 MRR for the BART controls on the source. *See* CAA section 110(a). 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.

D. Mobile Sources

Under 40 CFR 51.309(d)(5), states must provide inventories of on-road and non-road mobile source emissions of VOCs, NO_X, SO_2, $PM_{2.5}$, EC, and OC for the years 2003, 2008, 2013, and 2018. The inventories must show a continuous decline in total mobile source emissions of each of the above pollutants. If the inventories show a continuous decline in total mobile source emissions of each of these pollutants over the period 2003–2018, a state is not required to take further action in their SIP. If the inventories do not show a continuous decline in mobile source emissions of one or more of these pollutants over the period 2003–2018, a state must submit a SIP that contains measures that will achieve a continuous decline.

The SIP must also contain any long-term strategies necessary to reduce emissions of SO_2 from non-road mobile

[7] The set of ''major stationary sources'' potentially subject-to-BART is listed in CAA section 169A(g)(7).

[8] BART-eligible sources are those sources that have the potential to emit 250 tons or more of a visibility-impairing air pollutant, were not in operation prior to August 7, 1962, but were in existence on August 7, 1977, and whose operations fall within one or more of 26 specifically listed source categories. 40 CFR 51.301.

sources, consistent with the goal of reasonable progress. In assessing the need for such long-term strategies, the state may consider emissions reductions achieved or anticipated from any new federal standards for sulfur in non-road diesel fuel. Section 309 SIPs must provide an update on any additional mobile source strategies implemented within the state related to the GCVTC 1996 recommendations on mobile sources.

E. Programs Related to Fire

Pursuant to 40 CFR 51.309(d)(6), SIPs must contain requirements for programs related to fire. The SIP must show that the state's smoke management program, and all federal or private programs for prescribed fire in the state, have a mechanism in place for evaluating and addressing the degree of visibility impairment from smoke in their planning and application of burning. The state must also ensure that its prescribed fire smoke management programs have at least the following seven elements: (1) Actions to minimize emissions; (2) evaluation of smoke dispersion; (3) alternatives to fire; (4) public notification; (5) air quality monitoring; (6) surveillance and enforcement; and (7) program evaluation. The state must be able to track statewide emissions of VOC, NO_X, EC, OC, and $PM_{2.5}$ emissions from prescribed burning in its state.

Other requirements states must meet in their 309 plan related to fire include the adoption of a statewide process for gathering post-burn activity information to support emissions inventory and tracking systems. States must identify existing administrative barriers to the use of non-burning alternatives and adopt a process for continuing to identify and remove administrative barriers where feasible. The SIP must include an enhanced smoke management program that considers visibility effects in addition to health objectives and is based on the criteria of efficiency, economics, law, emission reduction opportunities, land management objectives, and reduction of visibility impairment. Finally, a state must establish annual emission goals to minimize emission increases from fire.

F. Paved and Unpaved Road Dust

Under 40 CFR 51.309(d)(7), states must submit a SIP that assesses the impact of dust emissions on regional haze in the 16 Class I areas on the Colorado Plateau and to include a projection of visibility conditions through 2018 for the least and most impaired days. If dust emissions are determined to be a significant contributor to visibility impairment, the state must include emissions management strategies in the SIP to address their impact.

G. Pollution Prevention

The requirements under the RHR for pollution prevention only require the state to provide an assessment of the energy programs as outlined in 40 CFR 51.309(d)(8) and does not require a state to adopt any specific energy-related strategies or regulations for regional haze. In order to meet the requirements related to pollution prevention, the state's plan must include an initial summary of all pollution prevention programs currently in place, an inventory of all renewable energy generation capacity and production in use or planned as of the year 2002, the total energy generation capacity and production for the state, and the percent of the total that is renewable energy.

The state's plan must include a discussion of programs that provide incentives for efforts that go beyond compliance and/or achieve early compliance with air-pollution related requirements and programs to preserve and expand energy conservation efforts. The state must identify specific areas where renewable energy has the potential to supply power where it is now lacking and where renewable energy is most cost-effective. The state must include projections of the short and long-term emissions reductions, visibility improvements, cost savings, and secondary benefits associated with renewable energy goals, energy efficiency, and pollution prevention activities. The state must also provide its anticipated contribution toward the GCVTC renewable energy goals for 2005 and 2015. The GCVTC goals are that renewable energy will comprise 10 percent of the regional power needs by 2005 and 20 percent by 2015.

H. Additional Recommendations

Section 309 requires states to determine if any of the other recommendations not codified by EPA as part of 40 CFR 51.309 should be implemented in their SIP. 40 CFR 51.309(d)(9). States are not required to adopt any additional control measures unless the state determines they are appropriate and can be practicably included as enforceable measures to remedy regional haze in the 16 Class I areas. Any measures adopted by a state would need to be enforceable. States must also submit a report to EPA and the public in 2013 and 2018 showing there has been an evaluation of the additional recommendations and the progress toward developing and implementing any such recommendations.

I. Periodic Implementation Plan Revisions

Under 40 CFR 51.309(d)(10), states must submit progress reports in the form of SIP revisions in 2013 and 2018. The SIP revisions must comply with the procedural requirements of 40 CFR 51.102 for public hearings and 40 CFR 51.103 for submission of plans. The assessment in the progress report must include an evaluation of Class I areas located within the state and Class I areas outside the state that are affected by emissions from the state. EPA views these SIP revisions as a periodic check on progress, rather than a thorough revision of regional strategies. The state should focus on significant shortcomings of the original SIP from sources that were not fully accounted for or anticipated when the SIP was initially developed. The specifics of what each progress report must contain can be found at 40 CFR 51.509(d)(10)(i)(A)–(G).

At the same time that the state submits its progress report to EPA, it must also take an action based on the outcome of the assessment in the report. If the assessment shows that the SIP is adequate and requires no substantive revision, the state must submit to EPA a ''negative declaration'' statement saying that no further SIP revisions are necessary at this time. If the assessment shows that the SIP is or may be inadequate due to emissions from outside the state, the state must notify EPA and other regional planning states and work with them to develop additional control strategies. If the assessment shows that the SIP is or may be inadequate due to emissions from another country, the state must include appropriate notification to EPA in its SIP revision. In the event the assessment shows that the SIP is or may be inadequate due to emissions from within the state, the state shall develop additional strategies to address the deficiencies and revise the SIP within one year from the due date of the progress report.

J. Interstate Coordination

In complying with the requirements of 40 CFR 51.309(d)(11), states may include emission reductions strategies that are based on coordinated implementation with other states. The SIP must include documentation of the technical and policy basis for the individual state apportionment (or the procedures for apportionment throughout the trans-boundary region), the contribution addressed by the state's

plan, how it coordinates with other state plans, and compliance with any other appropriate implementation plan approvability criteria. States may rely on the relevant technical, policy, and other analyses developed by a regional entity, such as the WRAP in providing such documentation.

IV. Additional Requirements for Alternative Programs Under the Regional Haze Rule

States opting to submit an alternative program, such as the backstop trading program under section 309, must also meet requirements under 40 CFR 51.308(e)(2) and (e)(3). These requirements for alternative programs relate to the ''better-than-BART'' test and fundamental elements of any alternative program that establishes a cap on emissions.

A. ''Better-Than-BART'' Demonstration

In order to demonstrate that the alternative program achieves greater reasonable progress than source-specific BART, states must provide a demonstration in their SIP that meets the requirements in 40 CFR 51.308(e)(2)(i)–(v). States submitting section 309 SIPs or other alternative programs are required to list all BART-eligible sources and categories covered by the alternative program. States are then required to determine which BART-eligible sources are ''subject-to-BART.'' The SIP must provide an analysis of the best system of continuous emission control technology available and the associated reductions for each source subject-to-BART covered by the alternative program, or what is termed a ''BART benchmark.'' Where the alternative program, such as the 309 backstop trading program, has been designed to meet requirements other than BART, states may use simplifying assumptions in establishing a BART benchmark. These assumptions can provide the baseline to show that the alternative program achieves greater reasonable progress than BART (71 FR 60619). Under this approach, states should use the presumptive limits for EGUs in the BART Guidelines to establish the BART benchmark used in the comparison, unless the state determines that such presumptions are not appropriate for particular EGUs (70 FR 60619).

The SIP must provide an analysis of the projected emissions reductions achievable through the trading program or other alternative measure and a determination that the trading program or other alternative measure achieves greater reasonable progress than would be achieved through the installation and operation of BART pursuant to 40 CFR 51.308(e)(1). 40 CFR 308(e)(2)(i)(D)–(E). Under 40 CFR 51.308(e)(2)(iii)–(iv), all emission reductions for the alternative program must take place by 2018, and all the emission reductions resulting from the alternative program must be surplus to those reductions resulting from measures adopted to meet requirements of the CAA as of the baseline date of the SIP. Pursuant to 40 CFR 51.309(e)(2)(v), states have the option of including a provision that the emissions trading program or other alternative measure include a geographic enhancement to the program to address the requirement under 40 CFR 51.302(c) related to BART for reasonably attributable visibility impairment from the pollutants covered under the emissions trading program or other alternative measure.

States must also address the distribution of emissions under the BART alternative as part of the better-than-BART demonstration. 40 CFR 51.308(e)(3). If a state can show that with the alternative program the distribution of emissions is not substantially different from source-specific BART, and the alternative program results in greater emission reductions than source-specific BART, then the alternative measure may be deemed to achieve greater reasonable progress. If the distribution of emissions is significantly different, the state must conduct dispersion modeling to determine differences in visibility between source-specific BART and the alternative program for each impacted Class I area for the 20% worst and best days. The modeling must show that visibility does not decline at any Class I area and that visibility overall is greater than what would be achieved with source-specific BART.

B. Elements Required for All Alternative Programs That Have an Emissions Cap

Under 40 CFR 51.308(e)(2)(vi)(A)–(L), EPA established fundamental requirements for trading or alternative programs that have an emissions cap and require sources to hold allowances that they can sell, buy, or trade, as in the case for the 309 backstop trading program. These requirements are summarized below.

1. Applicability

The alternative program must have applicability provisions that define the sources subject to the program. In the case of a program covering sources in multiple states, the states must demonstrate that the applicability provisions in each state cover essentially the same size facilities and, if source categories are specified, cover the same source categories.

2. Allowances

Allowances are a key feature of a cap and trade program. An allowance is a limited authorization for a source to emit a specified amount of a pollutant, as defined by the specific trading program, during a specified period. Allowances are fully marketable commodities. Once allocated, allowances may be bought, sold, traded, or banked for use in future years. EPA has not included in the rule detailed requirements on how states and tribes can allocate allowances. A state or tribe can determine how to allocate allowances as long as the allocation of the tonnage value of allowances does not exceed the total number of tons of emissions capped by the budget. The trading program must include allowance provisions ensuring that the total value of allowances issued each year under the program will not exceed the emissions cap on total annual emissions from the sources in the program.

3. Monitoring, Recordkeeping, and Reporting

MRR of a source's emissions are integral parts of any cap and trade program. Consistent and accurate measurement of emissions ensures that each allowance actually represents its specified tonnage value of emissions and that one ton of reported emissions from one source is equivalent to one ton of reported emissions at another source. The MRR provisions must require that boilers, combustion turbines, and cement kilns in the alternative program that are allowed to sell or transfer allowances comply with the requirements of 40 CFR part 75. The MRR provisions must require that other sources in the program allowed to sell or transfer allowances provide emissions information with the same precision, reliability, accessibility, and timeliness as information required by 40 CFR part 75.

4. Tracking System

An accurate and efficient tracking system is critical to the functioning of an emissions trading market. The tracking system must also be transparent, allowing all interested parties access to the information contained in the accounting system. Thus, alternative programs must have requirements for a tracking system that is publicly available in a secure, centralized database to track in a consistent manner all allowances and emissions in the program.

5. Account Representative

Each source owner or operator covered by the alternative program must designate an individual account representative who is authorized to represent the owner or operator in all matters pertaining to the trading program and who is responsible for the data reported for that source. The account representative will be responsible for, among other things, permitting, compliance, and allowance related actions.

6. Allowance Transfer

SIPs must contain provisions detailing a uniform process for transferring allowances among all sources covered by the program and other possible participants. The provisions must provide procedures for sources to request an allowance transfer, for the request and transfer to be recorded in the allowance tracking system, for notification to the source that the transfer has occurred, and for notification to the public of each transfer and request.

7. Compliance Provisions

Cap and trade programs must include compliance provisions that prohibit a source from emitting more emissions than the total tonnage value of allowances the source holds for that year. A cap and trade program must also contain the specific methods and procedures for determining compliance on an annual basis.

8. Penalty Provisions

In order to provide sources with a strong incentive to comply with the requirement to hold sufficient allowances for their emissions on an annual basis and to establish an immediate minimum economic consequence for non-compliance, the program must include a system for mandatory allowance deductions. SIPs must contain a provision that if a source has excess emissions in a given year, allowances allocated for the subsequent year will be deducted from the source's account in an amount at least equal to three times the excess emissions.

9. Banking of Allowances

The banking of allowances occurs when allowances that have not been used for compliance are set aside for use in a later compliance period. Alternative programs can include provisions for banked allowances, so long as the SIP clearly identifies how unused allowances may be used in future years and whether there are any restrictions on the use of any such banked allowances.

10. Program Assessment

The alternative program must include provisions for periodic assessment of the program. Such periodic assessments are a way to retrospectively assess the performance of the trading program in meeting the goals of the regional haze program and determining whether the trading program needs any adjustments or changes. At a minimum, the program evaluation must be conducted every five years to coincide with the periodic report describing progress towards the reasonable progress goals required under 40 CFR 51.308(g) and must be submitted to EPA.

V. Our Analysis of Utah's Submittal

The following summarizes how we are proposing that Utah's May 26, 2011 and September 9, 2008 SIP submittals meet and do not meet the requirements of the RHR, sections 169A(g)(2) and 110(a)(2) of the CAA, and Appendix V to part 51.

A. Projection of Visibility Improvement

Pursuant to 40 CFR 51.309(d)(2), Utah provided a comparison of the monitored 2000–2004 baseline visibility conditions in deciviews for the 20 percent best and 20 percent worst days to the projected visibility improvement for 2018 for the Class I areas on the Colorado Plateau (see section K.2 of the SIP). Table 1 shows the State's baseline monitoring data and projected visibility improvement for 2018 from the WRAP photochemical modeling (for details on the WRAP emission inventories and photochemical modeling refer to the WRAP Technical Support Document (TSD) [9] and our review of the technical products developed by the WRAP for the states in the western region, in support of their regional haze SIPs).[10] The projected visibility improvement for the 2018 Base Case (referred to as the Base18b emission inventory and modeled projections) reflects growth plus all controls ''on the books'' as of December 2004. The projected visibility improvement for the Preliminary Reasonable Progress Case (referred to as the PRP18b emission inventory and modeled projections) reflects refined growth estimates, all controls ''on the books'' as of 2007, and includes presumptive or known SO_2 BART controls. The modeling results show projected visibility improvement for the 20 percent worst days in 2018 and no degradation in visibility conditions on the 20 percent best days at all 16 Class I areas on the Colorado Plateau. We are proposing to determine the State's SIP satisfies the requirements of 40 CFR 51.309(d)(2).

TABLE 1—BASELINE AND 2018 VISIBILITY AT THE COLORADO PLATEAU CLASS I AREAS

Class I area	State	20 Percent worst visibility days			20 Percent best visibility days		
		2000–2004 Baseline monitoring data (deciview)	2018 Base case (deciview)	2018 Preliminary reasonable progress case (deciview)	2000–2004 Baseline monitoring data (deciview)	2018 Base case (deciview)	2018 Preliminary reasonable progress case (deciview)
Grand Canyon National Park	AZ	11.7	11.4	11.3	2.2	2.2	2.1
Mount Baldy Wilderness	AZ	11.9	11.5	11.4	3.0	2.9	2.8
Petrified Forest National Park	AZ	13.2	12.9	12.9	5.0	4.9	4.8
Sycamore Canyon Wilderness	AZ	15.3	15.1	15.1	5.6	5.6	5.6
Black Canyon of the Gunnison National Park Wilderness.	CO	10.3	10.1	9.9	3.1	2.9	2.9
Flat Tops Wilderness	CO	9.6	9.2	9.0	0.7	0.6	0.5
Maroon Bells Wilderness	CO	9.6	9.2	9.0	0.7	0.6	0.5

[9] *WRAP Regional Technical Support Document for the Requirements of § 309 of the Regional Haze Rule (64* ***Federal Register*** *35714—July 1, 1999),* revised May 7, 2008, which can be found in the State's TSD included in the docket for this action.

[10] Our review of the technical products developed by the WRAP is available as *Technical Support Document for Technical Products Prepared by the Western Regional Air Partnership (WRAP) in Support of Western Regional Haze Plans,* February 28, 2011, which can be found in the Supporting and Related Materials section of the docket for this action.

TABLE 1—BASELINE AND 2018 VISIBILITY AT THE COLORADO PLATEAU CLASS I AREAS—Continued

Class I area	State	20 Percent worst visibility days			20 Percent best visibility days		
		2000–2004 Baseline monitoring data (deciview)	2018 Base case (deciview)	2018 Preliminary reasonable progress case (deciview)	2000–2004 Baseline monitoring data (deciview)	2018 Base case (deciview)	2018 Preliminary reasonable progress case (deciview)
Mesa Verde National Park	CO	13.0	12.8	12.6	4.3	4.1	4.0
Weminuche Wilderness	CO	10.3	10.1	9.9	3.1	2.9	2.9
West Elk Wilderness	CO	9.6	9.2	9.0	0.7	0.6	0.5
San Pedro Parks Wilderness	NM	10.2	10.0	9.8	1.5	1.3	1.2
Arches National Park	UT	11.2	11.0	10.9	3.8	3.6	3.5
Bryce Canyon National Park	UT	11.6	11.3	11.2	2.8	2.7	2.6
Canyonlands National Park	UT	11.2	11.0	10.9	3.8	3.6	3.5
Capitol Reef National Park	UT	10.9	10.6	10.5	4.1	4.0	3.9
Zion National Park	UT	13.2	13.0	13.0	5.0	4.7	4.7

B. Clean Air Corridors

1. Comprehensive Emissions Tracking Program

Pursuant to 40 CFR 51.309(d)(3), Utah is using a comprehensive emissions tracking system established by WRAP to track emissions within portions of Oregon, Idaho, Nevada and Utah that have been identified as part of the CAC (see section C.3.a of the SIP). The emission tracking is to ensure that visibility does not degrade on the least-impaired days in any of the 16 Class I areas of the Colorado Plateau. For a complete description of the emission tracking system and the process by which the annual emission trends will be summarized in order to identify any significant emissions growth that could lead to visibility degradation in the 16 Class I areas, see section C of the State's TSD.

2. Identification of Clean Air Corridors

Pursuant to 40 CFR 51.309(d)(3)(i), the State has provided the geographic boundaries of the CAC (a map of the CAC can be found in section C, Figure 1 of the SIP). The WRAP identified the CAC using studies conducted by the Meteorological Subcommittee of the GCVTC and then updated the CAC based on an assessment described in the *WRAP Policy on Clean Air Corridors.* The policy is included in section C of the State's TSD. The technical studies and findings supporting the *WRAP Policy on Clean Air Corridors* are located in Chapter 3 of the WRAP TSD.

3. Patterns of Growth Within and Outside of the Clean Air Corridor

Pursuant to 40 CFR 51.309(d)(3)(ii)–(iii), the State has determined, based on the *WRAP Policy on Clean Air Corridors* and technical analysis conducted by the WRAP, that inside and outside the CAC there is no significant emissions growth occurring at this time that is causing visibility impairment in the 16 Class I areas of the Colorado Plateau. The WRAP will summarize annual emission trends within and outside of the CAC and will assess whether any significant emissions growth is occurring that could result in visibility impairment in any of the 16 Class I areas (see section C.3.b of the SIP).

4. Actions if Impairment Inside or Outside the Clean Air Corridor Occurs

The State, in coordination with other transport region states and tribes, will review the annual summary of emission trends within the CAC and determine whether any significant emissions growth has occurred. If the State identifies significant emissions growth, the State, in coordination with other transport region states and tribes, will conduct an analysis of the effects of this emissions growth. Pursuant to 40 CFR 51.309(d)(3)(iv), if this analysis finds that the emissions growth is causing visibility impairment in the 16 Class I areas, the State will evaluate the need for additional emission reduction measures and identify an implementation schedule for such measures. The State will report on the need for additional reduction measures to EPA in accordance with the periodic progress reports required under 40 CFR 51.309(d)(10)(i) (see section C.3.d of the SIP).

5. Other Clean Air Corridors

Pursuant to 40 CFR 51.309(d)(3)(v), the State has concluded that no other CACs can be identified at this time. The State's conclusion is based on the *WRAP Policy on Clean Air Corridors,* which determined that no other CACs could be identified (see section C.2 of the SIP).

We are proposing to determine that the State's SIP meets the requirements of 40 CFR 51.309(d)(3).

C. Stationary Source Reductions

1. Provisions for Stationary Source Emissions of Sulfur Dioxide

As required by 40 CFR 51.309(d)(4)(i), the State has adopted SO_2 milestone numbers for each year of the program until 2018 (see section E.1.a of the SIP).[11] Table 2 shows the milestone numbers and how compliance with the annual milestones will be determined.

TABLE 2—SO_2 EMISSIONS MILESTONES

Year	Regional sulfur dioxide milestone (tons per year (tpy))	Annual SO_2 emissions used to determine compliance with the annual milestones
2008	269,083 tons SO_2	Average of 2006, 2007 and 2008.
2009	234,903 tons SO_2	Average of 2007, 2008 and 2009.
2010	200,722 tons SO_2	Average of 2008, 2009 and 2010.
2011	200,722 tons SO_2	Average of 2009, 2010 and 2011.
2012	200,722 tons SO_2	Average of 2010, 2011 and 2012.

[11] The milestone numbers reflect the participation of Wyoming, Utah, and New Mexico, including Albuquerque-Bernalillo County in the 309 backstop trading program.

TABLE 2—SO_2 EMISSIONS MILESTONES—Continued

Year	Regional sulfur dioxide milestone (tons per year (tpy))	Annual SO_2 emissions used to determine compliance with the annual milestones
2013	185,795 tons SO_2	Average of 2011, 2012 and 2013.
2014	170,868 tons SO_2	Average of 2012, 2013 and 2014.
2015	155,940 tons SO_2	Average of 2013, 2014 and 2015.
2016	155,940 tons SO_2	Average of 2014, 2015 and 2016.
2017	155,940 tons SO_2	Average of 2015, 2016 and 2017.
2018	141,849 tons SO_2	Year 2018 only.
2019 forward, until replaced by an approved SIP	141,849 tons SO_2	Annual; no multiyear averaging.

SO_2 emissions from sources in 1990 totaled 358,364 tpy and the 2018 milestone is 141,849 tpy.[12] The difference is a 60 percent reduction in SO_2 emissions from 1990 to 2018. Pursuant to 40 CFR 51.309(d)(4)(i), the State has concluded that the emission reductions are on target to achieve the GCVTC goal of a 50 to 70 percent reduction of SO_2 emissions by 2040.

We are proposing to determine the State's SIP meets the requirements of 40 CFR 51.309(d)4)(i).

2. Documentation of Emissions Calculation Methods for Sulfur Dioxide

Pursuant to 40 CFR 51.309(d)(4)(ii), the SIP includes documentation of the specific methodology used to calculate SO_2 emissions during the 2006 base year for each emitting unit included in the program. A detailed spreadsheet report that provides the baseline numbers and methodology used to calculate emissions for sources covered by the program is included in section E of the State's TSD.

Pursuant to 40 CFR 51.309(d)(4)(ii), the SIP requires the State to document any change to the specific methodology used to calculate emissions at any emitting unit for any year after the base year. Until the program has been triggered and source compliance is required, the State will submit an annual emissions report to EPA that documents prior year emissions for Utah sources covered by the 309 program to all participating states by September 30 of each year. The State will adjust actual emission inventories for sources that change the method of monitoring or calculating their emissions to be comparable to the emission monitoring or calculation method used to calculate the 2006 base year inventory (see section E.1.c of the SIP).

We are proposing to determine the State's SIP meets the requirements of 40 CFR 51.309(d)(4)(ii).

3. Monitoring, Recordkeeping, and Reporting of Sulfur Dioxide Emissions

In order to meet the emission reporting requirements of 40 CFR 51.309(d)(4)(iii), the SIP includes provisions requiring the reporting of actual stationary source SO_2 emissions within the State to determine if the milestone has been exceeded. The State revised and submitted as part of their regional haze SIP changes to UAR R307–150, *Emission Inventories,* to meet this requirement. The SO_2 inventory requirements of R307–150 require all stationary sources with actual emissions of 100 tons per year or more of SO_2 in the year 2000, or in any subsequent year, to submit an annual inventory of SO_2 emissions, beginning with the 2003 emission inventory. A source that meets these criteria and then emits less than 100 tons per year in a later year must continue to submit an SO_2 inventory for tracking compliance with the regional SO_2 milestones until 2018 or until the trading program has been fully implemented and emission tracking is occurring under UAR R307–250–9.

We are proposing to determine that the State's SIP meets the requirements of 40 CFR 51.309(d)(4)(iii).

4. Criteria and Procedures for a Market Trading Program

Until the backstop trading program has been triggered and source compliance is required, the State shall submit an annual emissions report for Utah sources to all participating states by September 30 of each year. The report shall document actual SO_2 emissions during the previous calendar year for all sources subject to the section 309 program. The WRAP will compile reports from all participating states into a draft regional emission report for SO_2 by December 31 of each year. This report will include actual regional SO_2 emissions, adjustments to account for changes in monitoring/calculation methods or enforcement/settlement agreements, and adjusted average emissions for the last three years for comparison to the regional milestone. As required by 40 CFR 51.309(d)(4)(iv), based on this compilation of reports from all states participating in the 309 program, states will determine if the milestone has been exceeded and will include a determination in a final regional emissions report that is submitted to EPA. This final report and determination will be submitted to EPA by the end of March, 15 months following the milestone year (see section E.1.c of the SIP).

We are proposing to determine the State's SIP meets the requirements of 40 CFR 51.309(d)(4)(iv).

5. Market Trading Program

Per 40 CFR 51.309(d)(4)(v), the SIP provides that if the 309 backstop trading program is triggered, the regional emissions report will contain a common trigger date. In the absence of a common trigger date, the default date will be March 31st of the applicable year, but no later than 15 months after the end of the milestone year where the milestone was exceeded (see section E.1.c of the SIP). The State's SIP requires that sources comply, as soon as practicable, with the requirement to hold allowances covering their emissions. Because the backstop trading program does not allow allocations to exceed the milestone, the program is sufficient to achieve the milestones adopted pursuant to 40 CFR 51.309(d)(4)(i) as discussed above. The backstop trading program is also consistent with the elements for such programs outlined in 40 CFR 51.308(e)(2)(vi). The analysis found in Section V.E. of this notice shows that the backstop trading program is consistent with the elements for trading programs outlined in 40 CFR 51.308(e)(2)(vi).

Pursuant to 40 CFR 51.309(d)(4)(v), the State has provided the requirements for the backstop trading program in the event that a milestone is not achieved. The State adopted and submitted as part of its regional haze SIP UAR R307–250—*Western Backstop Sulfur Dioxide Trading Program.* R307–250 contains the backstop trading program requirements applicable to sources covered by the program. R307–250, in

[12] See *Demonstration that the SO_2 Milestones Provide Greater Reasonable Progress than BART* in section D of the State's TSD.

conjunction with section E of the SIP, implements the backstop trading program provisions (the requirements and provisions for the backstop trading program are discussed in this section and section E below).

We are proposing to determine the State's SIP meets the requirements of 40 CFR 309(d)(4)(v).

6. Provisions for the 2018 Milestone

Pursuant to 40 CFR 51.309(d)(vi)(A), the SIP has provisions to ensure that, until a revised implementation plan is submitted in accordance with 40 CFR 51.308(f) and approved by EPA, emissions from covered stationary sources in any year beginning in 2018 do not exceed the 2018 milestone. In order to meet this requirement, the State has included special provisions for what will be required as part of their 2013 SIP revision required under 40 CFR 51.309(d)(10). The State's SIP provides that the 2013 SIP revision required by 40 CFR 51.309(d)(10) will contain either the provisions of a program designed to achieve reasonable progress for stationary sources of SO_2 beyond 2018 or a commitment to submit a SIP revision containing the provisions of such a program no later than December 31, 2016 (see section E.4 of the SIP).

We are proposing to determine the State's SIP meets the requirements of 40 CFR 51.309(d)(4)(vi)(A).

7. Special Penalty Provision for 2018

Pursuant to 40 CFR 51.309(d)(vi)(B), the SIP includes special penalty provisions to ensure that the 2018 milestone is met. If the backstop trading is triggered and it will not start until after the year 2018, a special penalty shall be assessed to sources that exceed the 2018 milestone. Utah shall seek at least the minimum financial penalty of $5,000 per ton of SO_2 emissions in excess of a source's allowance limitation. Any source may resolve its excess emissions violation by agreeing to a streamlined settlement approach where the source pays a penalty of $5,000 per ton or partial ton of excess emissions and the source makes the payment within 90 calendar days after the issuance of a notice of violation.

Any source that does not resolve its excess emissions violation in accordance with the streamlined settlement approach will be subject to civil enforcement action, in which the State shall seek a financial penalty for the excess emissions based on the State's statutory maximum civil penalties. The special penalty provisions for 2018 will apply for each year after 2018 until the State determines that the 2018 milestone has been met. The State will evaluate the amount of the minimum monetary penalty during each five-year SIP review and the penalty will be adjusted to ensure that penalties per ton substantially exceed the expected cost of allowances, and are thus stringent penalties (see R307–250–13 and section E.1.e of the SIP).

We are proposing to determine the State's SIP meets the requirements of 40 CFR 51.309(d)(4)(vi)(B).

D. ''Better-Than-BART'' Demonstration

As discussed in Section IV.A of this preamble, if a state adopts an alternative program designed to replace source-specific BART controls, the state must be able to demonstrate that the alternative program achieves greater reasonable progress than would be achieved by BART. Utah has included a demonstration of how the 309 program achieves greater reasonable progress than BART as discussed in the document titled *Demonstration that the SO_2 Milestones Provide for Greater Reasonable Progress than BART* (''better-than-BART'' demonstration). Section V.D.5 below contains a discussion on how the 309 backstop trading program achieves greater reasonable progress than BART. New Mexico and Wyoming have also submitted SIPs with the same better-than-BART demonstration as Utah, and thus are relying on a consistent demonstration across the states.

1. List of BART-Eligible Sources

Pursuant to 40 CFR 51.308(e)(2)(i)(A), the State's better-than-BART demonstration lists the BART-eligible sources covered by the program (see Table 3 below). BART eligible sources are identified as those sources that fall within one of the 26 specific source categories, were built between 1962 and 1977 and have potential emissions of 250 tons per year of any visibility impairing air pollutant. The State identified the following BART-eligible sources in Utah: PacifiCorp Hunter Units 1 and 2 and PacifiCorp Huntington Units 1 and 2.

We are proposing that this satisfies the requirements of 40 CFR 51.308(e)(2)(i)(A).

2. Subject-to-BART Determination

Pursuant to 40 CFR 51.308(e)(2)(i)(B), the State has determined which sources are subject-to-BART. Each of the section 309 states provided source modeling that determined which of the BART-eligible sources within their states cause or contribute to visibility impairment and are thus subject-to-BART (more information on subject-to-BART sources and modeling can be found in section V.F of this notice). The State of New Mexico and Utah relied on modeling by the WRAP to identify sources subject-to-BART. The procedures used are outlined in the WRAP Regional Modeling Center (RMC) BART Modeling Protocol.[13] The State of Wyoming performed separate modeling to identify sources subject-to-BART.[14]

The states established a contribution threshold of 0.5 deciviews for determining if a single source causes or contributes to visibility impairment (see section V.F.1.b of this notice for further discussion on the contribution threshold). If the modeling shows that a source has a 0.5 deciview impact at any Class I area, that source causes or contributes to visibility impairment and is subject-to-BART. Table 3 shows the BART-eligible sources covered by the 309 backstop program and whether they are subject-to-BART.

We are proposing to determine that the State's SIP meets the requirements of 40 CFR 51.308(e)(2)(i)(B).

TABLE 3—SUBJECT-TO-BART STATUS FOR SECTION 309 BART-ELIGIBLE SOURCES

State	Company	Facility	Subject-to-BART?
New Mexico	Frontier	Empire Abo	No.
New Mexico	Xcel Energy	SWPS Cunningham Station	No.
New Mexico	Duke Energy	Artesia Gas Plant	No.
New Mexico	Duke Energy	Linam Ranch Gas Plant	No.

[13] *CALMET/CALPUFF Protocol for BART Exemption Screening Analysis for Class I Areas in the Western United States,* Western Regional Air Partnership (WRAP); Gail Tonnesen, Zion Wang; Ralph Morris, Abby Hoats and Yiqin Jia, August 15, 2006. Available at: *http://pah.cert.ucr.edu/aqm/308/bart/WRAP_RMC_BART_Protocol_Aug15_2006.pdf.*

[14] *BART Air Modeling Protocol, Individual Source Visibility Assessments for BART Control Analyses,* State of Wyoming, Department of Environmental Quality, Air Quality Division, Cheyenne, WY September 2006.

TABLE 3—SUBJECT-TO-BART STATUS FOR SECTION 309 BART-ELIGIBLE SOURCES—Continued

State	Company	Facility	Subject-to-BART?
New Mexico	Dynegy	Saunders	No.
New Mexico	Giant Refining	San Juan Refinery	No.
New Mexico	Giant Refining	Ciniza Refinery	No.
New Mexico	Xcel Energy	SWPS Maddox Station	No.
New Mexico	Marathon	Indian Basin Gas Plant	No.
New Mexico	Public Service of New Mexico	San Juan Generating Station	Yes.
New Mexico		Rio Grande Station	No.
New Mexico	Western Gas Resources	San Juan River Gas Plant	No.
Utah	Pacificorp	Hunter	Yes.
Utah	Pacificorp	Huntington	Yes.
Wyoming	Basin Electric	Laramie River	Yes.
Wyoming	Black Hills Power & Light	Neil Simpson I	No.
Wyoming	Dyno Nobel	Dyno Nobel	No.
Wyoming	FMC Corp	Green River Soda Ash Plant	Yes.
Wyoming	FMC Corp	Granger River Soda Ash Plant	No.
Wyoming	General Chemical	Green River Soda Ash Plant	Yes.
Wyoming	P4 Production	Rock Springs Coking Plant	No.
Wyoming	Pacificorp	Dave Johnston	Yes.
Wyoming	Pacificorp	Jim Bridger	Yes.
Wyoming	Pacificorp	Naughton	Yes.
Wyoming	Pacificorp	Wyodak	Yes.
Wyoming	Sinclair Oil Corp	Sinclair Refinery	No.
Wyoming	Sinclair Refinery	Casper	No.

3. Best System of Continuous Emission Control Technology

As required by 40 CFR 51.308(e)(2)(i)(C), the State determined what BART would be for each subject-to-BART source covered by the 309 backstop trading program. In the State's better-than-BART demonstration, all subject-to-BART EGUs were assumed to be operating at the presumptive SO_2 emission rate of 0.15 lb/MMBtu established in the BART Guidelines (70 FR 39171). The 309 program also includes non-EGU subject-to-BART units. As explained in the better-than-BART demonstration, the non-EGU subject-to-BART units are four boilers located at two trona plants in Wyoming: FMC Westvaco and General Chemical Green River. Wyoming made a determination of what BART would be for these non-EGU units. FMC Westvaco recently installed pollution control projects achieving a 63% reduction in SO_2 from its two boilers. Wyoming determined this control level would serve as a BART benchmark for all trona boilers. Thus, a 63% reduction in emissions from these sources was included in the BART benchmark in calculating emission reductions assuming the application of BART at these sources. Emission reductions or the BART benchmark for all subject-to-BART sources covered by the 309 program was calculated to be 48,807 tons of SO_2 (all supporting calculations for the ''better-than-BART'' demonstration are located in section D of the State's TSD under the title *10-6-10_milestone.xls*).

We are proposing to determine the State's SIP meets the requirements of 40 CFR 51.308(e)(2)(i)(C).

4. Projected Emissions Reductions

As required by 40 CFR 51.308(e)(2)(i)(D), the State has provided the expected emission reductions that would result from the 309 backstop trading program. The better-than-BART demonstration projects that 2018 baseline emissions would be 190,656 tpy of SO_2 for the sources covered by the 309 program in the participating states. The reductions achieved by the program are 48,807 tpy of SO_2, resulting in remaining emissions of 141,849 tpy of SO_2 in 2018.

We are proposing to determine the State's SIP meets the requirements of 40 CFR 51.308(e)(2)(i)(D).

5. Evidence That the Trading Program Achieves Greater Reasonable Progress Than BART

The State's better-than-BART demonstration provides numerous reasons why the SO_2 backstop trading program is better than BART. First, additional sources beyond BART sources are included. The backstop trading program includes all stationary sources with emissions greater than 100 tpy of SO_2, and thus, encompasses 63 non-subject-to-BART sources, which are identified in the better-than-BART demonstration. BART applied on a source-specific basis would not affect these sources, and there would be no limitation on their future operations under their existing permit conditions, or allowable emissions. The milestones will cap these sources at 2002 actual emissions, which are less than current allowable emissions.

The program also provides for a cap on new source growth. Future impairment is prevented by capping emissions growth from sources covered by the program, and also by including entirely new sources in the region under the cap. BART applied on a source-specific basis would have no impact on future growth. The backstop trading program also provides a mass-based cap that has inherent advantages over applying BART to each individual source. The baseline emission projections and assumed reductions due to the assumption of BART-level emission rates on all sources subject-to-BART are all based on actual emissions, using 2006 as the baseline. If the BART process were applied on a source-specific basis to individual sources, emission limitations would typically be established as an emission rate (lbs/hr or lbs/MMBtu) that would account for variations in the sulfur content of fuel and alternative operating scenarios, or allowable emissions. A mass-based cap that is based on actual emissions is more stringent because it does not allow a source to consistently use this difference between current actual and allowable emissions.

We are proposing to determine the State's 309 backstop trading program achieves greater reasonable progress than would be achieved through the installation and operation of BART and thus meets the requirements of 40 CFR 51.308(e)(2)(i)(E).

6. All Emission Reductions Must Take Place During the First Planning Period

The first planning period ends in 2018. As discussed above, the reductions from the 309 program will occur by 2018. We are therefore proposing to determine the State's SIP meets the requirements of 40 CFR 51.308(e)(2)(iii).

7. Detailed Description of the Alternative Program

The detailed description of the backstop trading program is provided in Section E—*Sulfur Dioxide Milestones and Backstop Trading Program* of the State's SIP and R307–250, which we are proposing to approve. We are proposing to determine that the State's SIP meets the detailed description requirement in 40 CFR 51.308(e)(2)(iii).

8. Surplus Reductions

We propose to approve the determination in the State's 309 SIP submittal that all emission reductions resulting from the emissions trading program are surplus as of the baseline date of the SIP, as required by 40 CFR 51.308(e)(2)(iv).

9. Geographic Distribution of Emissions

Pursuant to 40 CFR 51.308(e)(3), the State used modeling conducted by the WRAP to compare the visibility improvement expected from source-by source BART to the backstop trading program for the Class I areas on the Colorado Plateau. A summary of the modeling results can be found in Section K of the State's SIP, which refers to data from modeling included in Tables 2 and 3 of Attachment C to the Annex.[15] [16] This modeling was conducted during the development of the Annex to examine if the geographic distribution of emissions under the trading program would be substantially different and disproportionately impact any Class I area due to a geographic concentration of emissions. The modeled visibility improvement for the best and worst days at the Class I areas for the 309 program is similar to improvement anticipated from the BART scenario (within 0.1 deciview) on the worst and best visibility days. Thus, if we assume participation and milestones consistent with the model, the model demonstrates that the distribution of emissions between the BART scenario and the 309 trading program are not substantially different. We note this modeling demonstration included nine states, many of which are not participating in the backstop trading program. This modeling demonstration adds support to our proposed determination discussed above in this section that the regional haze 309 SIP submittal appropriately shows the trading program will achieve greater reasonable progress than would be achieved through the installation and operation of BART, as required by 40 CFR 51.308(e)(2)(i)(E).

E. Requirements for Alternative Programs With an Emissions Cap

The following analysis shows that the State's SIP is consistent with the elements for trading programs required by 40 CFR 51.308(e)(2)(vi). The backstop trading program contains milestones, which are in effect a cap. Under a backstop trading program, the provisions of a trading program are enacted only if the milestone has been exceeded. Since the 309 trading program is a backstop trading program, the provisions outlined below will only apply if the milestone is exceeded and the program is triggered.

1. Applicability Provisions

Pursuant to 40 CFR 51.308(e)(2)(vi)(A), the backstop trading program has the same applicability requirements in all states opting to participate in the program. R307–250–3 contains the applicability provisions and provides that the backstop trading program applies to all stationary sources that emit 100 tons per year or more of SO_2 in the program trigger year.

We are proposing to approve that the State's SIP meets the requirements of 40 CFR 51.308(e)(2)(vi)(A).

2. Allowance Provisions

Section E.3.a of the SIP and R307–250–8 contain the allowance allocation provisions as required by 40 CFR 51.308(e)(2)(vi)(B). R307–250–8 requires sources to open a compliance account in order to track allowances and contains other requirements associated with those accounts. The SIP contains the provisions on how the State will allocate allowances and requires that the total number of allowances distributed cannot exceed the milestone for any given year.

We are proposing to determine the State's SIP meets the requirements of 40 CFR 51.308(e)(2)(vi)(B).

3. Monitoring, Recordkeeping and Reporting Provisions

Pursuant to 40 CFR 51.308(e)(2)(vi)(C)–(E), R307–250–9 provides that sources subject to 40 CFR part 75 under a separate requirement from the backstop trading program shall meet the requirements contained in 40 CFR part 75 with respect to MRR of SO_2 emissions. If a unit is not subject to 40 CFR part 75 under a requirement separate from the trading program, the State requires that a source use one of the following monitoring methods: (1) Continuous emission monitoring system for SO_2 and flow that complies with all applicable monitoring provisions in 40 CFR part 75; (2) if the unit is a gas- or oil-fired combustion device, the monitoring methodology in Appendix D to 40 CFR part 75, or, if applicable, the low mass emissions provisions (with respect to SO_2 mass emissions only) of section 75.19(c) of 40 CFR part 75; (3) one of the optional protocols, if applicable, in Appendix B to the SIP;[17] or (4) a petition for site-specific monitoring that the source submits for approval by the State and EPA. All the above sources are required to comply with the reporting and recordkeeping requirements in 40 CFR part 75.

Although most sources covered by the backstop trading program will be able to meet the monitoring requirements stated above, there are some emission units that are either not physically able to install the needed equipment or do not emit enough SO_2 to justify the expense of installing these systems. As discussed in the SIP, the trading program allows these emission units to continue to use their pre-trigger monitoring methodology, but does not allow the source to transfer any allocation associated with that unit to another source. The program requires that the allowances associated with emission units that continue to use their pre-trigger monitoring methodology be placed in a special reserve compliance account, while allowances for other emission units are placed in a regular compliance account. Sources may not trade allowances out of a special reserve compliance account, even for use by

[15] *Voluntary Emissions Reduction Program for Major Industrial Sources of Sulfur Dioxide in Nine Western States and A Backstop Market Trading Program,* an Annex to the Report of the Grand Canyon Visibility Transport Commission (September 2000) at C–15 and 16.

[16] WRAP conducted modeling of the degree of visibility improvement that would occur on average and for the 20% best and worst visibility days. The WRAP used the transfer coefficients developed as part of the Integrated Assessment System and used by the GCVTC. As noted in the Annex, this modeling has limitations which must be considered when interpreting the results.

[17] Appendix B of the SIP contains monitoring requirements for fuel gas combustion devices at petroleum refineries and kilns with positive pressure fabric filters. Appendix B specifies the installation of a continuous fuel gas monitoring system and predictive flow monitoring system, respectively. Appendix B also specifies requirements under 40 CFR part 75 sources must follow in regards to this equipment.

emission units at the same source, but can use the allowances to show compliance for that particular unit (see section E.3.i of the SIP).

R307–250–9(1)(b) allows sources with any of the following emission units to apply for the establishment of a special reserve compliance account: (1) Any smelting operation where all of the emissions from the operation are not ducted to a stack; (2) any flare, except to the extent such flares are used as a fuel gas combustion device at a petroleum refinery; or (3) any other type of unit without add-on SO_2 control equipment, if the unit belongs to one of the following source categories: cement kilns, pulp and paper recovery furnaces, lime kilns, or glass manufacturing. Pursuant to 40 CFR 51.308(e)(2)(vi)(E), sources with a special reserve compliance account are required to submit to the State an annual emissions statement and sources are required to maintain operating records sufficient to estimate annual emissions consistent with the baseline emission inventory submitted in 1998.

We are proposing to determine the State's SIP meets the requirements of 40 CFR 51.308(e)(2)(vi)(C)–(E).

4. Tracking System

As required by 40 CFR 51.308(e)(2)(vi)(F), section E.2.f of the SIP provides the overarching specifications for an Emissions and Allowance Tracking System (EATS). According to the SIP, the EATS must provide that all necessary information regarding emissions, allowances, and transactions is publicly available in a secure, centralized database. The EATS must ensure that each allowance is uniquely identified, allow for frequent updates, and include enforceable procedures for recording data. If the program is triggered, the State will work with other states and tribes participating in the trading program to implement this system. More detailed specifications for the EATS are provided in the *WEB Emission and Allowance Tracking System (EATS) Analysis* in section E of the State's TSD. The State assumes responsibility for ensuring that all the EATS provisions are completed as described in its SIP and TSD.

In addition, the State will work with the other participating states to designate one tracking system administrator (TSA). The SIP provides that the TSA shall be designated as expeditiously as possible, but no later than six months after the program trigger date. The State will enter into a binding contract with the TSA that shall require the TSA to perform all TSA functions described in the SIP, such as transferring and recording allowances (see section E.1.b(2) of the SIP).

We are proposing to determine that the State's SIP meets the requirements of 40 CFR 51.308(e)(2)(iv)(F).

5. Account Representative

Pursuant to 40 CFR 51.308(e)(2)(vi)(G), R307–250–5 contains provisions for the establishment of an account representative. The rule requires each source to identify one account representative. The account representative shall submit to the State and the TSA a signed and dated certificate that contains a certification statement verifying that the account representative has all the necessary authority to carry out the account representative responsibilities under the trading program on behalf of the owners and operators of the sources. The certification statement also needs to indicate that each such owner and operator shall be fully bound by the account representatives representations, actions, inactions, or submissions and by any decision or order issued to the account representative by the State regarding the trading program.

We are proposing to determine the State's SIP meets the requirements of 40 CFR 51.308(e)(2)(vi)(G).

6. Allowance Transfers

Section E.3.g of the State's SIP and R307–250–10 have established procedures pertaining to allowance transfers to meet the requirements of 40 CFR 51.308(e)(2)(vi)(H). R307–250–10 contains requirements sources must follow for allowance transfers. To transfer or retire allowances, the account representative shall submit the transfer account number(s) identifying the transferor account, the serial number of each allowance to be transferred, the transferor's account representative's name and signature, and date of submission. The allowance transfer deadline is midnight Pacific Standard Time on March 1st of each year following the end of the control period. Sources must correctly submit transfers by this time in order for a source to be able to use the allowance to demonstrate compliance.

The SIP provides the procedures the TSA must follow to transfer allowances. The TSA will record an allowance transfer by moving each allowance from the transferor account to the transferee account as specified by the request from the source, if the transfer is correctly submitted, and the transferor account includes each allowance identified in the transfer. Within five business days of the recording of an allowance transfer, the TSA shall notify the account representatives of both the transferor and transferee accounts, and make the transfer information publicly available on the Internet. Within five business days of receipt of an allowance transfer that fails to meet the requirements for transfer, the TSA will notify the account representatives of both accounts of the decision not to record the transfer, and the reasons for not recording the transfer.

We are proposing to determine that the State's SIP meets the requirements of 40 CFR 51.308(e)(2)(vi)(H).

7. Compliance Provisions

Pursuant to 40 CFR 51.308(e)(2)(vi)(I), the State has provided the procedures for determining compliance in R307–250–12. Per this section, the source must hold allowances as of the allowance transfer deadline in the source's compliance account (together with any current control year allowances held in the source's special reserve compliance account) in an amount not less than the total SO_2 emissions for the control period from the source. The State determines compliance by comparing allowances held by the source in their compliance account(s) with the total annual SO_2 emissions reported by the source. If the comparison of the allowances to emissions results in emissions exceeding allowances, the source's excess emissions are subject to the allowance deduction penalty discussed in further detail below.

We are proposing to determine that the State's SIP meets the requirements of 40 CFR 51.308(e)(2)(vi)(I).

8. Penalty Provisions

R307–250–12(3) provides the penalty provisions required by 40 CFR 51.308(e)(2)(vi)(J). Per this section, a source's allowances will be reduced by an amount equal to three times the source's tons of excess emissions if they are unable to show compliance. Allowances allocated for the following control period will be the original allowance minus the allowance penalty. If the compliance account does not have sufficient allowances allocated for that control period, the required number of allowances will be deducted from the source's compliance account regardless of the control period for which they were allocated.

We are proposing to determine that the State's SIP meets the requirements of 40 CFR 51.308(e)(2)(vi)(J).

9. Banking of Allowances

As allowed by 40 CFR 51.308(e)(2)(vi)(K), R307–250–11 allows

sources to use allowances from current and prior years to demonstrate compliance, with some restrictions. Sources can only use 2018 allowances to show compliance with the 2018 milestone and may not use allowances from prior years. In order to ensure that the use of banked allowances does not interfere with the attainment or maintenance of reasonable progress goals, the backstop trading program includes flow-control provisions. The flow control provisions are triggered if the TSA determines that the banked allowances exceed ten percent of the milestone for the next control year, and thereby ensure that too many banked emissions are not used in any one year (see section E.3.h(2) of the SIP).

We are proposing to determine that the State's SIP meets the requirements of 40 CFR 51.309(e)(2)(vi)(J).

10. Program Assessment

Pursuant to 40 CFR 51.308(e)(2)(vi)(L), the SIP contains provisions for a 2013 assessment and SIP revision. For the 2013 assessment, the State will work with other participating states to develop a projected emission inventory for SO_2 through the year 2018. The State will then evaluate the projected inventory and assess the likelihood of meeting the regional milestone for the year 2018. The State shall include this assessment as part of the 2013 progress report that must be submitted under 40 CFR 51.309(d)(10) (see section E.1.d of the SIP).

We are proposing to determine the State's SIP meets the requirements of 40 CFR 308(e)(2)(vi)(L).

F. Provisions for Stationary Source Emissions of Nitrogen Oxides and Particulate Matter

Pursuant to 40 CFR 51.309(d)(4)(vii), states must evaluate certain stationary sources for NO_X and PM BART. BART for SO_2 is addressed by the backstop trading program described above. BART requirements can be addressed through a case-by-case review under 40 CFR 51.308(e)(1) or through an alternative program under 40 CFR 51.308(e)(2). The State chose to evaluate BART for NO_X and PM under the case-by-case provisions of 40 CFR 51.308(e)(1). We are proposing to disapprove the State's BART determinations because we find that the State's determinations do not meet the requirements of 40 CFR 51.308(e)(1), section 110(a)(2) of the CAA, and Appendix V of part 51, as described below.

1. BART-Eligible Sources

The first step of a BART evaluation is to identify all the BART-eligible sources within the state's boundaries. Utah identified the BART-eligible sources in Utah by utilizing the approach set out in the BART Guidelines (70 FR 39158). This approach provides the following three criteria for identifying BART-eligible sources: (1) One or more emission units at the facility fit within one of the 26 categories listed in the BART Guidelines; (2) the emission unit(s) began operation on or after August 6, 1962, and was in existence on August 6, 1977; and (3) potential emissions of any visibility-impairing pollutant from subject units are 250 tons or more per year. Utah used its permits and 2001–2003 emission inventory records to identify facilities in the BART source categories with potential emissions of 250 tons per year or more for any visibility-impairing pollutant from any unit that was in existence on August 7, 1977 and began operation on or after August 7, 1962. Utah determined that PacifiCorp Hunter Unit 1 and Unit 2 and PacifiCorp Huntington Unit 1 and Unit 2 are BART-eligible.

2. Sources Subject-to-BART

The second step of the BART evaluation is to identify those BART-eligible sources that may reasonably be anticipated to cause or contribute to any visibility impairment at any Class I area, i.e. those sources that are subject-to-BART. The BART Guidelines allow states to consider exempting some BART-eligible sources from further BART review because they may not reasonably be anticipated to cause or contribute to any visibility impairment in a Class I area. Consistent with the BART Guidelines, Utah used dispersion modeling performed by the WRAP RMC on the BART-eligible sources to assess the extent of their contribution to visibility impairment at surrounding Class I areas.

a. Modeling Methodology

The BART Guidelines provide that states may use the CALPUFF [18] modeling system or another appropriate model to predict the visibility impacts from a single source on a Class I area and to, therefore, determine whether an individual source is anticipated to cause or contribute to impairment of visibility in Class I areas, i.e., ''is subject-to-BART.'' The Guidelines state that we find CALPUFF is the best regulatory modeling application currently available for predicting a single source's contribution to visibility impairment (70 FR 39162).

To determine if each BART-eligible source has a significant impact on visibility, Utah used the RMC CALPUFF modeling results to estimate daily visibility impacts above estimated natural conditions at each Class I area within 300 km of any BART-eligible facility, based on maximum actual 24-hour emissions over a three year period (2001–2003) (see section D.6.c of the SIP). The RMC used the CALPUFF model for Utah BART sources in accordance with a modeling protocol it developed. The RMC protocol follows recommendations for long-range transport described in appendix W to 40 CFR part 51, *Guideline on Air Quality Models,* and in EPA's *Interagency Workgroup on Air Quality Modeling (IWAQM) Phase 2 Summary Report and Recommendations for Modeling Long Range Transport Impacts* as recommended by the BART Guidelines. (40 CFR part 51, appendix Y, section III.A.3).

b. Contribution Threshold

For states using modeling to determine the applicability of BART to single sources, the BART Guidelines note that the first step is to set a contribution threshold to assess whether the impact of a single source is sufficient to cause or contribute to visibility impairment at a Class I area. The BART Guidelines state that, ''[a] single source that is responsible for a 1.0 deciview change or more should be considered to 'cause' visibility impairment.'' (70 FR 39104, 39161). The BART Guidelines also state that ''the appropriate threshold for determining whether a source contributes to visibility impairment may reasonably differ across states,'' but, ''[a]s a general matter, any threshold that you use for determining whether a source ''contributes'' to visibility impairment should not be higher than 0.5 deciviews.'' *Id.* Further, in setting a contribution threshold, states should ''consider the number of emissions sources affecting the Class I areas at issue and the magnitude of the individual sources' impacts.'' The Guidelines affirm that states are free to use a lower threshold if they conclude that the location of a large number of

[18] Note that our reference to CALPUFF encompasses the entire CALPUFF modeling system, which includes the CALMET, CALPUFF, and CALPOST models and other pre and post processors. The different versions of CALPUFF have corresponding versions of CALMET, CALPOST, etc. which may not be compatible with previous versions (e.g., the output from a newer version of CALMET may not be compatible with an older version of CALPUFF). The different versions of the CALPUFF modeling system are available from the model developer at *http://www.src.com/verio/download/download.htm.*

BART-eligible sources in proximity to a Class I area justifies this approach.

Utah used a contribution threshold of 0.5 deciviews for determining which sources are subject-to-BART (see section D.6.3 of the SIP). Using a threshold of 0.5 deciviews, the State determined that all its BART-eligible sources were subject-to-BART. We propose to approve the State's threshold of 0.5 deciviews.

The State determined that the following units were BART-eligible and subject-to-BART: PacifiCorp Hunter Unit 1 and Hunter Unit 2 and PacifiCorp Huntington Unit1 and Huntington Unit 2 (see section D.6.3 of the SIP). All four units are tangentially fired fossil fuel fired EGUs each with a net generating capacity of 430 MW, permitted to burn bituminous coal.

We are proposing that the State has correctly determined of the BART eligible and subject-to-BART units in the State.

3. BART Determinations and Limits

The third step of a BART evaluation is to perform the BART analysis. BART is a source-specific control determination, based on consideration of several factors set out in section 169A(g)(2) of the CAA. These factors include the costs of compliance and the degree of improvement in visibility associated with the use of possible control technologies. EPA issued BART Guidelines (Appendix Y to Part 51) in 2005 to clarify the BART provisions based on the statutory and regulatory BART requirements (70 FR 39164). The BART Guidelines describe the BART analysis as consisting of the following five basic steps:

- Step 1: Identify All Available Retrofit Control Technologies;
- Step 2: Eliminate Technically Infeasible Options;
- Step 3: Evaluate Control Effectiveness of Remaining Control Technologies;
- Step 4: Evaluate Impacts and Document the Results; and
- Step 5: Evaluate Visibility Impacts.

In determining BART, the State must consider the five statutory factors in section 169A of the CAA: (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. *See also* 40 CFR 51.308(e)(1)(ii)(A). The five-factor analysis occurs during steps 4 and 5 of the BART analysis. We note the BART Guidelines (Appendix Y to part 51) provide that states must follow the guidelines in making BART determinations on a source-by-source basis for 750 MW power plants but are not required to use the process in the guidelines when making BART determinations for other types of sources. States with subject-to-BART units with a generating capacity less than 750 MW are strongly encouraged to follow the BART Guidelines in making BART determinations, but they are not required to do so. However, the requirement to perform a BART analysis that considers ''the technology available, the costs 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,'' is found in section 51.308(e)(1)(ii)(A) of the RHR, and applies to all subject-to-BART sources.

We have found issues, as discussed below, with the State's BART determinations that lead us to propose disapproval. For all of the subject-to-BART units, the State did not properly determine BART, but instead concluded that a slightly lower limit than the presumptive limits in the BART Guidelines could be adopted in place of a detailed source-specific analysis of the appropriate level of controls. As noted above, EPA issued BART Guidelines in 2005 that address the BART determination process by laying out a step by step process for taking into consideration the factors relevant to a BART determination.

EPA's 2005 rulemaking also established presumptive BART limits for certain EGUs located at power plants 750 MW or greater in size based on the size of the unit, the type of unit, the type of fuel used, and the presence or absence of controls (70 FR 39131–39136). Having identified controls that the Agency considered to be generally cost-effective across all affected units, EPA took into account the substantial degree of visibility improvement anticipated to result from the use of such controls on these EGUs and concluded that such BART-eligible sources should at least meet the presumptive limits. The presumptive limits accordingly are the starting point in a BART determination for these units, unless the state determines that the general assumptions underlying EPA's analysis are not applicable in a particular case. EPA did not provide that states could avoid a source-specific BART determination by adopting the presumptive limits. In fact, nothing in the State's record would support the conclusion that the presumptive limits represent the ''best available retrofit controls'' for all EGUs at these large power plants. EPA did not address the question of whether in specific cases more stringent controls would be called for, but rather simply concluded that it could not reach a generalized conclusion as to the appropriateness of more stringent controls for categories of EGUs. As a result, the BART Rule does not establish a ''safe harbor'' from more stringent regulation under the BART provisions.

Regarding BART for PM and NO_X, neither PacifiCorp nor the State performed a BART analysis taking into account the statutory factors that states are required to consider in determining what retrofit controls are BART for PacifiCorp Hunter Unit 1 and Unit 2 and PacifiCorp Huntington Unit 1 and Unit 2 (information on the State's BART determination as summarized in this paragraph can be found in section D.6.d of the SIP). The State determined that it could rely on the presumptive limits to determine what NO_X BART is for the subject-to-BART sources. PacifiCorp proposed and the State determined, without any analysis, that the NO_X BART limit for all the subject-to-BART units was 0.26 lb/MMBtu (30-day rolling average), which is the current operating permit limit for the source and which the State assumes can be achieved by the installation and operation of low NO_X burners (LNBs) and separated overfire air (SOFA). The State reasoned that since this limit is slightly lower than the presumptive limit, which is 0.28 lb/MMBtu (30-day rolling average), it constituted NO_X BART for these sources. There are no presumptive limits established for PM. PacifiCorp proposed and the State agreed, without any analysis, that the PM BART limits for all subject-to-BART units was the current operating permit limit of 0.05 lb/MMBtu (30-day rolling average), which the State assumes can be achieved by the installation and operation of fabric filter baghouses.[19]

Because PacifiCorp units have a 430 MW generating capacity, the State is not required to follow the BART Guidelines in making BART determinations for the units. However, neither the State nor PacifiCorp have completed a BART analysis that considers the statutory factors under 40 CFR 51.308(e)(1)(ii)(A),

[19] These are new emission limits, and in accordance with the SIP, PacifiCorp is required to install and operate BART no later than five years after EPA approval of the plan.

which provides that: ''The determination of BART must be based on an analysis of the best system of continuous emission control technology available and associated emission reductions achievable for each BART-eligible source that is subject-to-BART within the State. In this analysis, the State must take into consideration the technology available, the costs 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.''

Furthermore, the State's regional haze SIP does not contain the elements necessary to make the proposed emission limits practically enforceable. Utah's SIP section D.6.d contains controls, emission limits and general compliance schedules, but does not include SIP provisions specifying averaging times, record-keeping, monitoring, and specific schedules for compliance. The CAA requires that SIPs, including the regional haze SIP, contain elements sufficient to ensure emission limits are practically enforceable.[20] Other applicable regulatory provisions are contained in Appendix V to part 51—Criteria for Determining the Completeness of Plan Submissions.[21] Utah suggests that including averaging times, recordkeeping, monitoring, and specific schedules for compliance in the source's operating permits,[22] and not as part of the SIP, is sufficient to meet the statutory and regulatory requirements discussed above.[23] It is not sufficient to include these elements in a permit or agreement that is not made part of the SIP. EPA does not consider operating permit conditions adequate to meet this enforceability requirement, as permit conditions may be modified without going through the SIP approval process.

During the State's development of its regional haze SIP, we consistently informed in comment letters and in conversations that foregoing a BART analysis is not acceptable and that the SIP must contain the necessary elements to ensure emission limits, including BART emission limits, are practicably enforceable. EPA sent letters to the State in 2008 and 2011 outlining our concerns with the State's proposed SIP as discussed above.[24]

Therefore, we are proposing to find that the State did not properly follow the requirements of 40 CFR 51.308(e)(1)(ii)(A) and section 169A(g)(2) of the CAA in determining PM and NO_X BART for PacifiCorp Hunter Unit 1 and Unit 2 and PacifiCorp Huntington Unit 1 and Unit 2. Specifically, neither the State nor PacifiCorp, conducted a BART analyses for each of the units that took into account the five BART factors. We are also proposing to partially disapprove the State's SIP because it does not contain the elements necessary to make the BART limits practically enforceable as required by section 110(a)(2) of the CAA and Appendix V to part 51. For these reasons, we are proposing to disapprove the State's determination that BART for NO_X for PacifiCorp Hunter Unit 1 and Unit 2 and PacifiCorp Huntington Unit 1 and Unit 2 is a NO_X emission limit of 0.26 lb/MMBtu (30-day rolling average) (assumed to be achieved by LNBs plus SOFA). We are also proposing to disapprove the State's determination that BART for PM for PacifiCorp Hunter Unit 1 and Unit 2 and PacifiCorp Huntington Unit 1 and Unit 2 is an emission limit of 0.05 lb/MMBtu (30-day rolling average) (assumed to be achieved by fabric filter baghouses).

G. Mobile Sources

Pursuant to 40 CFR 51.309(d)(5)(i), the State, in collaboration with the WRAP, assembled a comprehensive statewide inventory of mobile source emissions. The inventory included on-road and non-road mobile source emissions inventories for western states for the 2003 base year and emission projections for the year 2018.[25] The inventory shows a continuous decline in emissions from mobile sources from VOC, NO_X, $PM_{2.5}$, EC, and OC emissions over the period of 2003–2018. Between 2003 and 2018, the inventory shows that there will be a 54 percent decrease in NO_X emissions, a 39 percent decrease in OC, a 24 percent decrease in EC, a 38 percent decrease of $PM_{2.5}$, and a 56 percent decrease of VOC. Per 40 CFR 51.309(d)(5)(i)(A), the inventory shows a decline in the required mobile source emissions categories, and therefore, no further action is required by the State to address mobile source emissions (see section F.2.a of the SIP).

Pursuant to 40 CFR 51.309(d)(5)(i)(B), emission inventory projections show that there will be a 99 percent decrease in SO_2 emissions from non-road mobile sources for 2003–2018. The reduction will result from the implementation of EPA's rule titled *Control of Emissions of Air Pollution from Non-road Diesel Engines and Fuel* (see 69 FR 38958). A 99 percent reduction in SO_2 from non-road mobile sources is consistent with the goal of reasonable progress and that no other long-term strategies are necessary to address SO_2 emissions from non-road mobile sources.

We are proposing to determine the State's SIP meets the requirements of 40 CFR 51.309(d)(5).

H. Programs Related to Fire

EPA has proposed approval of the requirements related to fire under 40 CFR 51.309(d)(6) in a separate action (76 FR 69217).

I. Paved and Unpaved Road Dust

WRAP performed an assessment of the impact of dust emissions from paved and unpaved roads on the 16 Class I areas of the Colorado Plateau. The WRAP modeled and calculated the significance of road dust in terms of the impact on visibility on the worst 20 percent days. The modeled regional impact of road dust emissions ranged from 0.31 deciviews at the Black Canyon of the Gunnison National Park

[20] CAA Section 110(a)(2) states that SIPs ''shall (A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter; (C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter; (F) require, as may be prescribed by the Administrator—(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and (iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection''

[21] Appendix V part 51 states in section 2.2 that complete SIPs contain: ''(g) Evidence that the plan contains emission limitations, work practice standards and recordkeeping/reporting requirements, where necessary, to ensure emission levels''; and ''(h) Compliance/enforcement strategies, including how compliance will be determined in practice.''

[22] Utah Division of Air Quality Approval Orders: Huntington Unit 2—AN0238012–05, Huntington Unit 1—AN0102380019–09; and Hunter Units 1 and 2—AN0102370012–08.

[23] See response to EPA comments in the State's September 9, 2008 regional haze SIP submittal.

[24] See August 4, 2008 letter from Callie A. Videtich, EPA Region 8, to Cheryl Heying, Utah Air Quality Division and February 4, 2011 letter from Deborah Lebow-Aal, EPA Region 8, to Cheryl Heying, Utah Air Quality Division in the Supporting and Related Materials section of this docket.

[25] Detailed information on the emission inventory is contained in the ENVIRON Report *WRAP Mobile Source Emission Inventories Update,* May 2006. This report is included in the Supporting and Related Materials section of the docket.

to 0.08 deciviews at the Weminuche Wilderness Area. (For more information on the WRAP modeling and assessment of road dust impacts, see Chapter 7 of the WRAP TSD). Based on the WRAP modeling, the State has concluded that road dust is not a significant contributor to visibility impairment in the 16 Class I areas. Since the State has found that road dust is not a significant contributor to visibility impairment, the State did not include road dust control strategies in the SIP pursuant to 40 CFR 51.309(d)(7) (see section H.2.b of the SIP).

The State will track road dust emissions with the assistance of the WRAP and provide an update on paved and unpaved road dust emission trends, including any modeling or monitoring information regarding the impact of these emissions on visibility in the 16 Colorado Plateau Class I Areas. These updates will include a reevaluation of whether road dust is a significant contributor to visibility impairment. These updates shall be part of the periodic implementation plan revisions pursuant to 40 CFR 51.309(d)(10) (see section H.2.a of the SIP).

We propose to determine the State's SIP meets the requirements of 40 CFR 51.309(d)(7).

J. Pollution Prevention

Under 40 CFR 51.309(d)(8), states must provide information on renewable energy and other pollution prevention efforts in the state. 40 CFR 51.309(d)(8) does not require states to adopt any new measures or regulations. Thus, we find the information Utah provided adequate to meet the requirements of 40 CFR 51.309(d)(8) as discussed below (see section I of the SIP).

1. Description of Existing Pollution Prevention Programs

Pursuant to 40 CFR 51.309(d)(8)(i), section I of the State's TSD summarizes all pollution prevention and renewable energy programs currently in place in Utah. The State's SIP provides an estimate of renewable energy generating capacity in megawatts for each of the renewable energy categories (see Table 12 of the SIP). Total installed generation capacity within Utah in 2002 was 5,485 MW. Renewable energy generation capacity represented 0.77 percent of the total installed capacity.

2. Incentive Programs

Per 40 CFR 51.309(d)(8)(ii), the State has provided incentives for early compliance by participating in the 309 regional SO_2 backstop trading program. The backstop trading program allows for early reduction credits. Sources of SO_2 subject to the trading program that reduce emissions prior to the program trigger date shall receive additional emission allowances. The source may use such allowances for compliance purposes or may sell them to other parties.

3. Programs To Preserve and Expand Energy Conservation Efforts

Per 40 CFR 51.309(d)(8)(iii), the State provided a table that discusses the programs within the State that preserve and expand energy conservation efforts (see Table 17 in the SIP). Such programs include the *Residential Energy Efficiency Program* and *Salt Lake City Climate Action Plan Program*.

4. Potential for Renewable Energy

Pursuant to 40 CFR 51.309(d)(8)(iv), the renewable energy resource potential in Utah and its geographic distribution across the State have been characterized succinctly in the *Renewable Energy Atlas of the West*.[26] The *Renewable Energy Atlas of the West* was assembled using best available renewable energy resource maps and data. The State used the *Renewable Energy Atlas of the West* to determine the potential for renewable energy across the State. The State has summarized the potential for renewable energy development in section I.10.B of the SIP.

5. Projections of Renewable Energy Goals, Energy Efficiency, and Pollution Prevention Activities

Pursuant to 40 CFR 51.309(d)(8)(v), the State has used projections made by the WRAP of the short and long-term emissions reductions, visibility improvements, cost savings, and secondary benefits associated with renewable energy goals, energy efficiency, and pollution prevention activities.[27] The document referenced in the prior sentence provides overall projections of visibility improvements for the 16 Class I areas. These projections include the combined effects of all measures in this SIP, including air pollution prevention programs. Although emission reductions and visibility improvements from air-pollution prevention programs are expected at some level, they were not explicitly calculated because the resolution of the regional air quality modeling system is not currently sufficient to show any significant visibility changes resulting from the marginal NO_X emission reductions expected from air pollution prevention programs.

6. Programs To Achieve the GCVTC Renewable Energy Goal

Pursuant to 40 CFR 51.309(d)(8)(vi), the State will rely on current renewable energy programs as described in section I.10.a of the SIP to demonstrate progress in achieving the renewable energy goal of the GCVTC. The GCVTC's goal is that that renewable energy will comprise 10 percent of the regional power needs by 2005 and 20 percent by 2015. The State will submit progress reports in 2013 and 2018, describing the State's contribution toward meeting the GCVTC renewable energy goals. To the extent that it is not feasible for the State to meet its contribution to these goals, the State will identify what measures were implemented to achieve its contribution, and explain why meeting its contribution was not feasible.

K. Additional Recommendations

As part of the 1996 GCVTC report to EPA, the Commission included additional recommendations that EPA did not adopt as part of 40 CFR 51.309. Pursuant to 40 CFR 51.309(d)(9), the State has evaluated the additional recommendations of the GCVTC to determine if any of these recommendations could be practicably included in the SIP.[28] Based on this evaluation, the State determined no additional measures were practicable or necessary to demonstrate reasonable progress (see section J of the SIP).

We are proposing to determine that the State's SIP meets the requirements of 40 CFR 51.309(d)(9).

L. Periodic Implementation Plan Revisions

Pursuant to 40 CFR 51.309(d)(10)(i), section L of the SIP requires the State to submit to EPA, as a SIP revision, periodic progress reports for the years 2013 and 2018. The State will assess whether current programs are achieving reasonable progress in Class I areas within Utah, and Class I areas outside Utah that are affected by emissions from Utah. The State will address the elements listed under 40 CFR 51.309(d)(10)(i)(A) through (G) as

[26] Land and Water Fund of the Rockies, Northwest Sustainable Energy for Economic Development, and Green Info Network with support from the Hewlett Foundation and the Energy Foundation. *Renewable Energy Atlas of the West: A Guide to the Region's Resource Potential*. Available in section I of the State's TSD.

[27] A complete description of these projections can be found in section I of the Utah TSD in a document titled *Economic Assessment of Implementing the 10/20 Goals and Energy Efficiency Recommendations*.

[28] The State's complete evaluation is included in the State's *Report to the Environmental Protection Agency and the Public to Satisfy the Requirements of 40 CFR 51.309(d)(9)* in section J of the State's TSD.

summarized below: (1) Implementation status of 2003 SIP measures; (2) summary of emissions reductions; (3) assessment of most/least impaired days; (4) analysis of emission reductions by pollutant; (5) significant changes in anthropogenic emissions; (6) assessment of 2003 SIP sufficiency; and (7) assessment of visibility monitoring strategy.

Pursuant to 40 CFR 51.309(d)(10)(ii), the State will take one of the following actions based upon information contained in each periodic progress report. The State will provide a negative declaration statement to EPA saying that no SIP revision is needed if the State determines reasonable progress is being achieved. If the State finds that the SIP is inadequate to ensure reasonable progress due to emissions from outside the State, the State will notify EPA and the other contributing state(s), and initiate efforts through a regional planning process to address the emissions in question. If the State finds that the SIP is inadequate to ensure reasonable progress due to emissions from another country, Utah will notify EPA and provide information on the impairment being caused by these emissions. If the State finds that the SIP is inadequate to ensure reasonable progress due to emissions from within the State, the State will develop emission reduction strategies to address the emissions and revise the SIP no later than one year from the date that the progress report was due.

We propose to determine that the State's SIP meets the requirements of 40 CFR 51.309(d)(10).

M. Interstate Coordination

Pursuant to 40 CFR 51.309(d)(11), the State has participated in regional planning and coordination with other states by participating in the WRAP while developing its emission reduction strategies under 40 CFR 51.309. Appendix D of the SIP contains detailed information on the interstate coordination programs developed by the WRAP and the State's participation in those programs. The backstop trading program in the SIP and companion rules involved coordination of the three states (Wyoming, Utah, and New Mexico, including Albuquerque) in its development and will continue to involve coordination of the participants once it is implemented.

We propose to determine the State's SIP is consistent with the 40 CFR 51.309(d)(11).

N. Additional Class I Areas

The five Class I areas in Utah (Zion National Park, Bryce Canyon National Park, Arches National Park, Capitol Reef National Park, and Canyonlands National Park) are located on the Colorado Plateau. Since the State does not have Class I areas off the Colorado Plateau, the State of Utah is not required to take action pursuant to 40 CFR 51.309(g)(1).

VI. Proposed Action

In this action, EPA is proposing to partially approve and partially disapprove a Utah SIP revision submitted on May 26, 2011 that addresses the RHR requirements for the mandatory Class I areas under 40 CFR 51.309. Specifically, EPA is proposing to approve all sections of the SIP submittal as meeting the requirements under 40 CFR 51.309, with the exception of the requirements under 40 CFR 51.309(d)(4)(vii) pertaining to NO_X and PM BART. EPA is proposing to disapprove the State's NO_X and PM BART determinations and limits in section D.6.d of the SIP for the following four subject-to-BART EGUs: Pacificorp Hunter Unit 1 and Hunter Unit 2 and PacifiCorp Huntington Unit 1 and Huntington Unit 2. EPA is proposing to disapprove these BART determinations because they do not comply with our regulations under 40 CFR 51.308(e)(1) or sections 110(a)(2) and 169A(g)(2) of the CAA.

We are proposing to approve specific sections of the State's September 9, 2008 SIP submittal. Specifically, we are proposing to approve UAR R307–250, *Western Backstop Sulfur Dioxide Trading Program* and R307–150, *Emission Inventories.* We are taking no action on the rest of the September 9, 2008 submittal as the May 26, 2011 submittal supersedes and replaces the remaining sections of the September 9, 2008 SIP submittal, except for the requirements pertaining to smoke management. We have taken proposed action on the smoke management requirements in a separate action (76 FR 69217).

VII. Statutory and Executive Order Reviews

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

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

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities because small entities are not subject to the requirements of this rule. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act (UMRA)

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 UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more (adjusted for inflation) in any one year. Before

promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 of UMRA do not apply when they are inconsistent with applicable law. Moreover, section 205 of UMRA allows EPA to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Under Title II of UMRA, EPA has determined that this proposed rule does not contain a federal mandate that may result in expenditures that exceed the inflation-adjusted UMRA threshold of $100 million by State, local, or Tribal governments or the private sector in any one year. In addition, this proposed rule does not contain a significant federal intergovernmental mandate as described by section 203 of UMRA nor does it contain any regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely addresses the State not fully meeting its obligation to prohibit emissions from interfering with other states measures to protect visibility established in the CAA. Thus, Executive Order 13132 does not apply to this action. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled *Consultation and Coordination With Indian Tribal Governments* (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments. Thus, Executive Order 13175 does not apply to this rule.

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

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it implements specific standards established by Congress in statutes. However, to the extent this proposed rule will limit emissions of NO_X, SO_2, and PM, the rule will have a beneficial effect on children's health by reducing air pollution.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

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

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

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

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

We have determined that this proposed action, if finalized, will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all

affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

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: April 26, 2012.

James B. Martin,

Regional Administrator, Region 8.

[FR Doc. 2012–11848 Filed 5–15–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2011–0064; 4500030114]

RIN 1018–AX40

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Astragalus lentiginosus* var. *coachellae* (Coachella Valley Milk-Vetch)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the reopening of the public comment period on the August 25, 2011, proposed revised designation of critical habitat for *Astragalus lentiginosus* var. *coachellae* (Coachella Valley milk-vetch) under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of a draft economic analysis (DEA) of the proposed revised designation of critical habitat for *A. l.* var. *coachellae* and an amended required determinations section of the proposal. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed revised designation, the associated DEA, and the amended required determinations section. We are also announcing the location and time of a public hearing to receive public comments on the proposal. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rule.

DATES: We will consider comments received or postmarked on or before June 15, 2012. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date.

Public Hearing: We will hold a public hearing on this proposed rule on May 31, 2012, from 1 p.m. to 3 p.m. and from 6 p.m. to 8 p.m.

ADDRESSES: You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* Search for Docket No. FWS–R8–ES–2011–0064, which is the docket number for this rulemaking.

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R8–ES–2011–0064; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

Public hearing: We will hold a public hearing in the Palm Springs City Hall Council Chamber, 3200 E. Tahquitz Canyon Way, Palm Springs, CA 92263.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Rd., Ste. 101, Carlsbad, CA 92011; telephone 760–431–9440; facsimile 760–431–5902. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed revised designation of critical habitat for *Astragalus lentiginosus* var. *coachellae* that was published in the **Federal Register** on August 25, 2011 (76 FR 53224), our DEA of the proposed revised designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the taxon (the term taxon, as used herein, refers to any taxonomic rank that is not a species (for example, a genus, a subspecies, or a variety); *Astragalus lentiginosus* var. *coachellae* is a variety) from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

(a) The distribution of *Astragalus lentiginosus* var. *coachellae;*

(b) The amount and distribution of *Astragalus lentiginosus* var. *coachellae* habitat;

(c) What areas within the geographical area occupied by the taxon at the time of listing that contain physical or biological features essential to the conservation of the taxon we should include in the designation and why; and

(d) What areas outside the geographical area occupied by the taxon at the time of listing are essential for the conservation of the taxon and why.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(4) Information on the projected and reasonably likely impacts associated with climate change on *Astragalus lentiginosus* var. *coachellae* and proposed critical habitat.

(5) What areas, extent, and quality of the unoccupied fluvial (water) sand transport systems in the Coachella Valley and surrounding hills and mountains are essential for the conservation of *Astragalus lentiginosus* var. *coachellae* and should be included in the designation and why.

(6) Any foreseeable economic, national security, or other relevant impacts that may result from designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities, and the benefits of including or excluding areas from the proposed designation that are subject to these impacts.

(7) Which specific areas within tribal lands proposed for critical habitat should be considered for exclusion under section 4(b)(2) of the Act, and

whether the benefits of potentially excluding any specific tribal lands outweigh the benefits of including that area, in particular for tribal lands owned or managed by the Morongo Band of Mission Indians (formerly the Morongo Band of Cahuilla Mission Indians of the Morongo Reservation) or the Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation.

(8) Which specific lands covered by the Coachella Valley Multiple Species Habitat Conservation Plan/Natural Community Conservation Plan (Coachella Valley MSHCP/NCCP) proposed as critical habitat should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area covered by the Coachella Valley MSHCP/NCCP outweigh the benefits of including that area. We are currently considering all lands covered by the Coachella Valley MSHCP/NCCP and proposed as critical habitat for exclusion under section 4(b)(2) of the Act (see the *Habitat Conservation Plan Lands—Exclusions under Section 4(b)(2) of the Act* section below).

(9) What specific actions the Coachella Valley Association of Governments (CVAG) has undertaken to meet the objectives and goals set out in the Coachella Valley MSHCP/NCCP specific to *Astragalus lentiginosus* var. *coachellae* since CVAG began implementing the MSHCP/NCCP.

(10) Whether there are any other lands covered by habitat conservation plans or other conservation actions that benefit *Astragalus lentiginosus* var. *coachellae* and should be considered for exclusion under section 4(b)(2) of the Act, where the benefits of potentially excluding any specific area outweigh the benefits of including that area.

(11) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

(12) The validity of our approach for determining the extent of the fluvial sand transport system, and differentiating between fluvial sand transport and fluvial sand source areas. We identified fluvial sand source areas (areas where sediment is eroded from parent rock by moving water) as portions of drainages where slope is 10 percent or greater and fluvial sand transport areas (corridors along which water transports sediment, but little erosion of parent rock takes place) as portions of drainages where slope is less than 10 percent. This approach was informed by Griffiths *et al.* (2002, p. 21), who found that sediment production in the drainage areas supplying sand to *Astragalus lentiginosus* var. *coachellae* habitat is much lower in areas where the ground slope is less than 10 percent.

(13) Information on the extent to which the description of economic impacts in the DEA is complete and accurate.

If you submitted comments or information on the proposed rule (76 FR 53224) during the initial comment period from August 25, 2011, to October 24, 2011, please do not resubmit them. We have incorporated them into the public record, and we will fully consider them in the preparation of our final determination. Our final determination concerning revised critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas proposed do not meet the definition of critical habitat, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials concerning the proposed rule or DEA by one of the methods listed in the **ADDRESSES** section. We request that you send comments only by the methods described in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. We will post all hardcopy comments on *http://www.regulations.gov* as well. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule and DEA, will be available for public inspection on *http://www.regulations.gov* at Docket No. FWS–R8–ES–2011–0064, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed rule and the DEA on the Internet at *http://www.regulations.gov* at Docket Number FWS–R8–ES–2011–0064, or by mail from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

Public Hearings

The public hearings will take place on May 31, 2012, from 1 p.m. to 3 p.m. and from 6 p.m. to 8 p.m. in the Palm Springs City Hall Council Chamber, 3200 E. Tahquitz Canyon Way, Palm Springs, CA 92263. The public hearing location is wheelchair-accessible. If you plan to attend the public hearing and need special assistance such as sign language interpretation or other reasonable accommodation, please notify the U.S. FWS (see **FOR FURTHER INFORMATION CONTACT**) at least 3 business days in advance. Include your contact information as well as information about your specific needs.

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for *Astragalus lentiginosus* var. *coachellae* in this document. For more information on previous Federal actions concerning *A. l.* var. *coachellae,* refer to the proposed revised designation of critical habitat published in the **Federal Register** on August 25, 2011 (76 FR 53224). For more information on *A. l.* var. *coachellae* or its habitat, refer to the final listing rule published in the **Federal Register** on October 6, 1998 (63 FR 53596), which is available online at *http://www.regulations.gov* (at Docket Number FWS–R8–ES–2011–0064) or from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

The following section summarizes the previous Federal actions since *Astragalus lentiginosus* var. *coachellae* was listed as endangered on October 6, 1998 (63 FR 53596); please refer to this final listing rule for a discussion of Federal actions that occurred prior to the taxon's listing.

At the time of listing, we determined that designation of critical habitat was ''not prudent'' (63 FR 53596). On November 15, 2001, the Center for Biological Diversity (CBD) and the California Native Plant Society (CNPS) filed a lawsuit against the Secretary of the Interior and the Service challenging our ''not prudent'' determinations for eight plant taxa, including *Astragalus lentiginosus* var. *coachellae* (*Center for Biological Diversity, et al.* v. *Norton,* case number 01–cv–2101 (S.D. Cal.)). A second lawsuit asserting the same challenge was filed on November 21, 2001, by the Building Industry Legal Defense Foundation (*Building Industry Legal Defense Foundation* v. *Norton,* case number 01–cv–2145 (S.D. Cal.)).

The parties in both cases agreed to remand the critical habitat determinations for the eight plant taxa at issue to the Service for reconsideration. On July 1, 2002, the Court directed us to reconsider our not prudent determination and if we determined that designation was prudent, submit to the **Federal Register** for publication a proposed critical habitat designation for *A. l.* var. *coachellae* by November 30, 2004, and to submit to the **Federal Register** for publication a final rule designating critical habitat by November 30, 2005. The proposed rule to designate critical habitat for *A. l.* var. *coachellae* published in the **Federal Register** on December 14, 2004 (69 FR 74468). The final rule designating critical habitat for *A. l.* var. *coachellae* published in the **Federal Register** on December 14, 2005 (70 FR 74112).

The Center for Biological Diversity filed a lawsuit on January 14, 2009, claiming the Service failed to designate adequate critical habitat for *Astragalus lentiginosus* var. *coachellae* (*CBD* v. *Kempthorne,* case number ED–cv–09–0091 VAP(AGRx) (C.D. Cal.)). In a settlement agreement dated November 14, 2009, we agreed to reconsider the critical habitat designation for *A. l.* var. *coachellae.* The settlement required the Service to submit a proposed revised critical habitat designation for *A. l.* var. *coachellae* to the **Federal Register** by August 18, 2011, and submit a final revised critical habitat designation to the **Federal Register** by February 14, 2013.

On August 25, 2011, we published a proposed rule to revise critical habitat for *Astragalus lentiginosus* var. *coachellae* (76 FR 53224). We proposed to designate approximately 25,704 acres (ac) (10,402 hectares (ha)) in 4 unit(s) located in Riverside County, California, as critical habitat. That proposal had a 60-day comment period, ending October 24, 2011. We will submit for publication in the **Federal Register** a final critical habitat designation for *A. l.* var. *coachellae* on or before February 14, 2013.

Critical Habitat

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of the designated critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions that may affect critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. In the case of *Astragalus lentiginosus* var. *coachellae,* the benefits of critical habitat include public awareness of the presence of *A. l.* var. *coachellae* and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for *A. l.* var. *coachellae* due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken by Federal agencies.

The final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis concerning the proposed revised critical habitat designation (DEA), which is available for review and comment (see **ADDRESSES** section).

Draft Economic Analysis

The purpose of the DEA is to identify and analyze the potential economic impacts associated with the proposed revised critical habitat designation for *Astragalus lentiginosus* var. *coachellae.* The DEA separates conservation measures into two distinct categories according to ''without critical habitat'' and ''with critical habitat'' scenarios. The ''without critical habitat'' scenario represents the baseline for the analysis, considering protections otherwise afforded to *A. l.* var. *coachellae* (e.g., under the Federal listing and other Federal, State, and local regulations). The ''with critical habitat'' scenario describes the incremental impacts specifically due to designation of critical habitat for the taxon. In other words, these incremental conservation measures and associated economic impacts would not occur but for the designation. Conservation measures implemented under the baseline (without critical habitat) scenario are described qualitatively within the DEA, but economic impacts associated with these measures are not quantified. Economic impacts are only quantified for conservation measures implemented specifically due to the designation of critical habitat (i.e., incremental impacts). For a further description of the methodology of the analysis, see Chapter 2, ''Framework for the Analysis,'' of the DEA.

The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed revised critical habitat designation for *Astragalus lentiginosus* var. *coachellae* over the next 20 years, which was determined to be the appropriate period for analysis because limited planning information is available for most activities to forecast activity levels for projects beyond a 20-year timeframe. It identifies potential incremental costs as a result of the proposed revised critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs attributed to listing. The DEA quantifies economic impacts of *A. l.* var. *coachellae* conservation efforts associated with the following categories of activity: (1) Residential, commercial, and industrial development; (2) water management and use; (3) transportation activities; (4)

energy development; (5) sand and gravel mining; and (6) tribal activities.

Baseline economic impacts are those impacts that result from listing and other conservation efforts for *Astragalus lentiginosus* var. *coachellae.* The DEA does not quantify baseline economic impacts, but does include a qualitative discussion of activities likely to be undertaken to protect *A. l.* var. *coachellae* absent the designation of critical habitat as a result of Federal, State, and local regulations as well as the Coachella Valley MSHCP/NCCP, the California Desert Conservation Area Plan (on BLM lands), wilderness designation (on BLM and USFS lands) and the Coachella Valley National Wildlife Refuge (on Service lands).

The DEA estimates total potential incremental economic impacts in areas proposed as revised critical habitat over the 20 years following the designation (2013 to 2032) to be $220,000 to $820,000 ($20,000 to $73,000 annualized) in present value terms applying a 7 percent discount rate (IEc 2012, p. ES–2). Conservation efforts related to residential, commercial, and industrial development projects account for the largest share of impacts under the high-end ($820,000) estimate. These costs, $590,000 in project modification costs (assuming a 7 percent discount rate) plus administrative costs resulting from the consideration of adverse modification in section 7 consultations, are projected to occur in the unoccupied portion of Unit 3, within the City of Desert Hot Springs. The DEA estimates that proponents of transportation activities, such as road and bridge construction and maintenance, are likely to experience the next largest impacts after residential, commercial, and industrial development, including approximately $1,300 in project modification costs (7 percent discount rate), plus administrative costs. Water management and use, energy development, and sand and gravel mining projects are projected to incur only administrative costs due to the critical habitat designation. The DEA predicts only administrative costs to the Agua Caliente Band of Cahuilla Indians as a result of the designation, and no incremental impacts to the Morongo Band of Mission Indians, because no future section 7 consultations are anticipated on the portion of their lands proposed as critical habitat.

The DEA considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the ''opportunity costs'' associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use). The DEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The DEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the revised critical habitat designation might unduly burden a particular group or economic sector.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of the proposed rule and our amended required determinations. We may revise the proposed rule to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this taxon.

Changes to Proposed Revised Critical Habitat

In this document, we are making a correction to the proposed revised critical habitat for *Astragalus lentiginosus* var. *coachellae* as identified and described in the preamble to the proposed rule that we published in the **Federal Register** on August 25, 2011 (76 FR 53224). The correction is in regard to the description of Unit 1 (76 FR 53240). Unit 1 contains 316 ac (128 ha) of tribal land (Morongo Band of Mission Indians) and 1,791 ac (725 ha) of private land. Of this area, we characterized 156 ac (63 ha) of tribal land and 1 ac (0.4 ha) of private land as being covered under the Western Riverside County Multiple Species Habitat Conservation Plan (Western Riverside County MSHCP), due to an incorrect interpretation of GIS data. These lands are within the boundaries of the Western Riverside County MSHCP, but they are ''inholdings'' (that is, they are not covered by or subject to the provisions of the Western Riverside County MSHCP or any other Habitat Conservation Plan). All other acreages reported in the proposed rule are correct to the best of our knowledge, and the boundaries of the proposed revised critical habitat remain the same as described in the proposed rule. No part of the proposed critical habitat for *A. l.* var. *coachellae* is covered by the Western Riverside County MSHCP.

Required Determinations—Amended

In our August 25, 2011, proposed rule (76 FR 53224), we indicated that we would defer our determination of compliance with several statutes and executive orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA data to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 12630 (Takings), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951). However, based on the DEA data, we are amending our required determination concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

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 of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed revised designation, we provide our analysis for determining whether the

proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of our final rulemaking.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the proposed revised designation of critical habitat for *Astragalus lentiginosus* var. *coachellae* would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as residential, commercial, and industrial development. In order to determine whether it is appropriate for our agency to certify that this proposed rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where *A. l.* var. *coachellae* is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the taxon. If we finalize this proposed revised critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In the DEA, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the proposed revised designation of critical habitat for *Astragalus lentiginosus* var. *coachellae.* The DEA is based on the estimated incremental impacts associated with the proposed rulemaking as described in Chapters 3 through 5 of the DEA. The SBREFA analysis evaluates the potential for economic impacts related to several categories, including: (1) Residential, commercial, and industrial development; (2) water management and use; (3) transportation activities; (4) energy development; (5) sand and gravel mining; and (6) tribal activities (IEc 2012, p. A–4). On the basis of our draft analysis, we have determined that no incremental impacts attributed to water management and use, transportation activities, energy development, sand and gravel mining, and tribal activities are expected to be borne by entities that meet the definition of small entities (IEc 2010, pp. A–4–5). Potential impacts in these sectors are expected to be borne by water management agencies, State agencies, Federal agencies, other governmental agencies, and nongovernmental agencies that are not considered to be small business entities.

However, the DEA concludes that the proposed rulemaking potentially may affect small entities in the residential, commercial, and industrial development sector (IEc 2010, p. A–6). There are 6,151 businesses involved in development activities within San Bernardino, Riverside, Orange, and Los Angeles Counties and, of these, 6,076 are considered small. Because information on the number of projects or developers likely to be affected is not available, the DEA presents a bounding analysis, assuming that a single developer bears all costs associated with growth in proposed critical habitat. Under this assumption, $52,260 in incremental costs would accrue to one developer per year. Assuming the average small entity has annual revenues of approximately $5.1 million, this annualized impact represents approximately 1 percent of annual revenues. The assumption that all costs accrue to one developer likely overstates the impact significantly; thus, the DEA estimates incremental impacts to small developers of less than 1 percent of annual revenues (IEc 2010, pp. A–8–9). For development activities, potential impacts to small development firms may also be overstated because much or all of the costs of milk-vetch conservation efforts may ultimately be borne by current landowners. Many of these landowners may be individuals or families that are not legally considered to be businesses. No NAICS code exists for landowners, and the SBA does not provide a definition of a small landowner. Additionally, the development projected for Desert Hot Springs may not occur, as those lands fall within the 100-year floodplain (IEc 2010, p. A–9). Please refer to the DEA of the proposed revised critical habitat designation for a more detailed discussion of potential economic impacts.

In summary, we have considered whether the proposed revised designation would result in a significant economic impact on a substantial number of small entities. Information for this analysis was gathered from the Small Business Administration, stakeholders, and our files. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed revised critical habitat designation would result in incremental impacts to small developers of less than 1 percent of annual revenues; and, thus, would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Authors

The primary authors of this notice are the staff members of the Carlsbad Fish and Wildlife Office, Pacific Southwest Region, U.S. Fish and Wildlife Service.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: May 7, 2012.

Rachel Jacobson,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2012–11671 Filed 5–15–12; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register
Vol. 77, No. 95
Wednesday, May 16, 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 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: Bureau of Industry and Security.

Title: Licensing Responsibilities and Enforcement.

OMB Control Number: 0694–0122.

Form Number(s): NA.

Type of Request: Regular submission (extension of a currently approved information collection).

Burden Hours: 96,618.

Number of Respondents: 2,223,226.

Average Hours per Response: 5 seconds to 2 hours.

Needs and Uses: This information collection supports the various collections, notifications, reports, and information exchanges that are needed by the Office of Export Enforcement and Customs to enforce the Export Administration Regulations and maintain the National Security of the United States. Most of these activities do not involve submission of documents to the BIS but instead involve exchange of documents among parties in the export transaction to insure that each party understands its obligations under U.S. law. Others involve writing certain export control statements on shipping documents or reporting unforeseen changes in shipping and disposition of exported commodities.

Affected Public: Businesses and other for-profit organizations.

Frequency: On occasion.

Respondent's Obligation: Required to obtain benefits.

OMB Desk Officer: Jasmeet Seehra, (202) 395–3123.

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 Jasmeet Seehra, Office of Management and Budget (OMB), by email to *Jasmeet_K._Seehra@omb.eop.gov*, or by fax to (202) 395–5167.

Dated: May 10, 2012.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–11765 Filed 5–15–12; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–37–2012]

Foreign-Trade Zone 126—Reno, NV; Notification of Proposed Production Activity; Brightpoint North America L.P. (Cell Phone Kitting and Distribution); Reno, NV

The Economic Development Authority of Western Nevada, grantee of FTZ 126, submitted a notification of proposed production activity on behalf of Brightpoint North America L.P (Brightpoint), located in Reno, Nevada. The Brightpoint facility is located within Site 23 of FTZ 126. The facility is used for cell phone kitting, warehousing and distribution operations.

Production under FTZ procedures could exempt Brightpoint from customs duty payments on the foreign status components used in export production. On its domestic sales, Brightpoint would be able to choose the duty rates during customs entry procedures that apply to cell phone kits (duty free) for the foreign status inputs noted below. Customs duties also could possibly be deferred or reduced on foreign status production equipment.

Components and materials sourced from abroad include: Power supplies; nicad batteries; lithium batteries; cellular phone sets; video phones; base stations; voice, data and image regeneration machines; microphones; answering machines; video recorders; answering machine and video recorder components; transceivers, monitors and projectors; transceiver, monitor and projector parts and accessories; thermionic, cathode and photocathode tubes; cables; connectors and plugs; decals; plastic holsters; leather carrying cases; leather pouches; plastic carrying cases; leather straps; wrist straps; key pads with connectors; external speaker sets; headsets with microphones; and, hands-free speaker kits (duty rate ranges from free to 20%).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is June 25, 2012.

A copy of the notification 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 Christopher Kemp at *Christopher.Kemp@trade.gov* or (202) 482–0862.

Dated: May 10, 2012.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–11885 Filed 5–15–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–428–840]

Lightweight Thermal Paper From Germany: Notice of Amended Final Results of the 2009–2010 Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On April 9, 2012, the Department of Commerce (the Department) published its final results of the 2009–2010 administrative review for lightweight thermal paper (LWTP) from Germany for the period from

November 1, 2009, through October 31, 2010. We are amending our final results to correct a ministerial error made to the weighted average dumping margin with respect to Papierfabrik August Koehler AG (Koehler), pursuant to section 751(h) of the Tariff Act of 1930, as amended (the Act).

DATES: *Effective Date:* May 16, 2012.

FOR FURTHER INFORMATION CONTACT: Stephanie Moore, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3692.

SUPPLEMENTARY INFORMATION:

Background

On April 9, 2012, the Department published its final results of the 2009–2010 administrative review for LWTP from Germany for the period from November 1, 2009, through October 31, 2010.[1]

On April 11, 2012, pursuant to 19 CFR 351.224(c), Appleton Papers Inc., (petitioner) alleged that the Department made a ministerial error by assigning an incorrect weighted-average margin of 3.99 percent with respect to Koehler, and requested that the Department correct the ministerial error. The Department agrees with the petitioner that it made a ministerial error by assigning an incorrect weighted-average margin of 3.99 percent with respect to Koehler. The Department has corrected this error by assigning Koehler its weighted-average margin of 4.33 percent, as released to the interested parties with the *Final Results.*[2]

Amended Final Results of Review

After analyzing petitioner's comment, we have determined, in accordance with section 751(h) of the Act and 19 CFR 351.224, that the Department has made a ministerial error in the final results calculation for Koehler in this administrative review, due to a transcription error. The Department has now corrected Koehler's final weighted-average margin. For a further discussion of the ministerial error, *see* ''Memorandum from James Terpstra to Melissa Skinner, re: Amended Final Results of the Administrative Review of the Antidumping Duty Order on Lightweight Thermal Paper from Germany (Period of Review: November 1, 2009, through October 31, 2010): Allegations of Ministerial Error,'' dated May 9, 2012 (Ministerial Error Memo).

In accordance with section 751(h) of the Act, we are amending the final results of the antidumping duty administrative review of LWTP from Germany for the period November 1, 2009 through October 31, 2010. As a result of correcting the ministerial error discussed above, the following margin applies:

Company	Final margin	Amended final margin
Papierfabrik August Koehler AG	3.99 percent	4.33 percent.

Duty Assessment

We have been enjoined from liquidating entries of the subject merchandise produced and exported by Koehler.[3] Therefore, we do not intend to issue liquidation instructions to U.S. Customs and Border Protection (CBP) for such entries covered by this administrative review, until the preliminary injunction issued on February 5, 2009, is lifted.

Upon lifting of the injunction, the Department shall determine and CBP shall assess antidumping duties on all appropriate entries. Pursuant to 19 CFR 351.212(b)(1), the Department calculates an assessment rate for each importer of the subject merchandise for each respondent. If any importer-specific assessment rates calculated in the final results are above *de minimis* (*i.e.,* at or above 0.5 percent), the Department will issue appraisement instructions directly to CBP to assess antidumping duties on appropriate entries.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the POR produced by the respondent for which it did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

Cash Deposit Requirements

The following antidumping duty deposit requirements will be effective upon publication of the amended final results of this administrative review for all shipments of lightweight thermal paper from Germany entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results, as provided for by section 751(a) of the Act: (1) For companies covered by this review, the cash deposit rate will be the rate listed above; (2) for previously reviewed or investigated companies other than those covered by this review, the cash deposit rate will be the company-specific rate established for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value investigation, but the producer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the subject merchandise; and (4) if neither the exporter nor the producer is a firm covered in this review, a prior review, or the investigation, the cash deposit rate will be 6.50 percent, the all-others rate established in the less-than-fair-value investigation. *See Antidumping Duty Orders: Lightweight Thermal Paper from Germany and the People's Republic of China,* 73 FR 70959 (November 24, 2008). These cash deposit requirements shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement

[1] *See Lightweight Thermal Paper From Germany: Notice of Final Results of the 2009–2010 Antidumping Duty Administrative Review,* 77 FR 21082 (April 9, 2012) (*Final Results*).

[2] *See* the Department's Memorandum to the File, dated May 9, 2012, titled ''Correction of the Cover Page of the Final Calculation Memorandum,'' from Stephanie Moore, Case Analyst through James Terpstra, Program Manager.

[3] On February 5, 2009, the U.S. Court of International Trade issued a preliminary injunction enjoining liquidation of certain entries which are subject to the antidumping duty order on lightweight thermal paper from Germany for entries entered or withdrawn from warehouse for consumption on or after November 20, 2008. Koehler was granted the injunction against liquidation as part of its suit against the International Trade Commission's injury determination in the investigation.

of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent increase in antidumping duties by the amount of antidumping and/or countervailing duties reimbursed.

Notification Regarding APOs

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(5). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

These amended final results of administrative review and notice are issued and published in accordance with sections 751(a)(1) and (h), and 777(i)(1) of the Act, and 19 CFR 351.224.

Dated: May 10, 2012.

Lynn Fischer Fox,

Acting Assistant Secretary for Import Administration.

[FR Doc. 2012–11851 Filed 5–15–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[Application No. 10–2A001]

Export Trade Certificate of Review

ACTION: Notice of issuance of an Export Trade Certificate of Review to Alaska Longline Cod Commission, Application no. 10–2A001.

SUMMARY: The U.S. Department of Commerce issued an amended Export Trade Certificate of Review Alaska Longline Cod Commission (''ALCC'') on May 7, 2012. This is the second amendment to the Certificate. The Alaska Longline Cod Commission's (''ALCC'') original Certificate was issued on May 13, 2010 (75 FR 29514, May 26, 2010).

FOR FURTHER INFORMATION CONTACT: Joseph E. Flynn, Director, Office of Competition and Economic Analysis, International Trade Administration, by telephone at (202) 482–5131 (this is not a toll-free number) or email at *etca@trade.gov.*

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. The regulations implementing Title III are found at 15 CFR part 325 (2010). The U.S. Department of Commerce, International Trade Administration, Office of Competition and Economic Analysis (''OCEA'') is issuing this notice pursuant to 15 CFR 325.6(b), which requires the Secretary of Commerce to publish a summary of the issuance in the **Federal Register**. Under Section 305(a) of the Export Trading Company Act (15 U.S.C. 4012(b)(1)) and 15 CFR 325.11(a), any person aggrieved by the Secretary's determination may, within 30 days of the date of this notice, bring an action in any appropriate district court of the United States to set aside the determination on the ground that the determination is erroneous.

Description of Certified Conduct

ALCC's Export Trade Certificate of Review has been amended to:

1. Add the following company as a new Member of the Certificate within the meaning of section 325.2(l) of the Regulations (15 CFR 325.2(l)): Coastal Villages Longline, LCC, #711 H Street #200, Anchorage, AK 99501.

The effective date of the amended certificate is February 14, 2012, the date on which ALCC's application to amend was deemed submitted. A copy of the amended certificate will be kept in the International Trade Administration's Freedom of Information Records Inspection Facility, Room 4001, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

Dated: May 11, 2012.

Joseph E. Flynn,

Director, Office of Competition and Economic Analysis.

[FR Doc. 2012–11866 Filed 5–15–12; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Proposed Information Collection; Comment Request; Generic Clearance for Usability Data Collections

AGENCY: National Institute of Standards and Technology (NIST), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before July 16, 2012.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *jjessup@doc.gov).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Darla Yonder, Management Analyst, NIST, 100 Bureau Drive, MS 1710, Gaithersburg, MD 20899–1710, telephone 301–975–4064, or via email to *darla.yonder@nist.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This is a request to extend the approval of this currently approved information collection.

In accordance with the Executive Order 12862, the National Institute of Standards and Technology (NIST), a non-regulatory agency of the Department of Commerce, proposes to conduct a number of data collection efforts—both quantitative and qualitative. The data collections will be designed to determine requirement and evaluate the usability and utility of NIST research for measurement and standardization work. These data collections efforts may include, but may not be limited to electronic methodologies, empirical studies, video and audio collections, interviews, and questionnaires. For example, data collection efforts may include the evaluation of the Electronic Health Records (HER) for use by the medical community. NIST will limit its inquiries to data collections that solicit strictly voluntary opinions or responses and will not collect information that is required or regulated. The results of the data collected will be used to guide NIST research. Steps will be taken to ensure anonymity of respondents in each activity covered under this request.

II. Method of Collection

NIST will collect this information by electronic means when possible, as well as by mail, fax, telephone and person-to-person interviews.

III. Data

OMB Control Number: 0693–0043.

Form Number: None.

Type of Review: Regular submission (extension of a currently approved information collection).

Affected Public: Individuals or households, State, local or tribal government, Federal government.

Estimated Number of Respondents: 8,500.

Estimated Time per Response: Varied, dependent upon the data collection method used. The possible response time to complete a questionnaire may be 15 minutes or 2 hours to participate in an empirical study.

Estimated Total Annual Burden Hours: 5,000.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: May 11, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–11844 Filed 5–15–12; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Coastal Zone Management Program Administration

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before July 16, 2012.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Patmarie Nedelka, (301) 713–3155 ext. 127 or *Patmarie.Nedelka@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for revision and extension of a currently approved information collection.

In 1972, in response to intense pressure on United States (U.S) coastal resources, and because of the importance of U.S. coastal areas, the U.S. Congress passed the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1451 et seq. The CZMA authorized a federal program to encourage coastal states and territories to develop comprehensive coastal management programs. The CZMA has been reauthorized on several occasions, most recently with the enactment of the Coastal Zone Protection Act of 1996. (CZMA as amended). The program is administered by the Secretary of Commerce, who in turn has delegated this responsibility to the National Oceanic and Atmospheric Administration's (NOAA) National Ocean Services (NOS).

The coastal zone management grants provide funds to states and territories to implement federally approved coastal management programs; complete information for the Coastal Zone Management Program (CZMP) Performance Management System; revise assessment document and multi-year strategy; submit documentation as described in the CZMA Section 306a on the approved coastal zone management programs; submit request to approve amendments or program changes; and report on the states' coastal nonpoint source pollution programs (CNPSP).

Revision: There is new competitive grant funding under CZMA Section 309a, so that funding stream and required documentation will now be part of this information collection.

II. Method of Collection

Respondents have a choice of electronic or paper formats for submitting program plans, assessment and strategy documents, project applications, performance reports and other required materials. Project applications may be submitted electronically via Grants.gov or by mail in paper form. Methods of submittal for plans, performance reports or other required materials include electronic submittal via email or NOAA Grants Online, mail and facsimile transmission of paper forms, or submittal of electronic files on compact disc.

III. Data

OMB Control Number: 0648–0119.

Form Number: None.

Type of Review: Regular submission (revision and extension of a current information collection).

Affected Public: State. Local and Tribal Governments.

Estimated Number of Respondents: 34.

Estimated Time per Response: Performance reports, 27 hours; assessment and strategy documents, 240 hours; Section 306a documentation, 5 hours; amendments and routine program changes, 16 hours; CNPSP documentation, 320 hours; CZMA Performance Management System, 27 hours.

Estimated Total Annual Burden Hours: 12,104.

Estimated Total Annual Cost to Public: $680 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: May 10, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–11777 Filed 5–15–12; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC008

Endangered and Threatened Species; Recovery Plans

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

ACTION: Notice of Availability; request for comments.

SUMMARY: We, NMFS, announce that the *Proposed Endangered Species Act (ESA) Recovery Plan for Lower Columbia River Chinook Salmon, Lower Columbia River Coho Salmon, Columbia River Chum Salmon, and Lower Columbia River Steelhead* (Proposed Plan) is available for public review and comment. The Proposed Plan addresses the Lower Columbia River Chinook salmon (*Oncoryhnchus tschawytscha*), Lower Columbia coho salmon (*O. kisutch*), and Columbia River chum salmon (*O. keta*) evolutionarily significant units (ESUs) and the Lower Columbia River steelhead (*O. mykiss*) distinct population segment (DPS), all of which are listed as threatened under the ESA. The geographic area covered by the Proposed Plan is the Lower Columbia River mainstem and tributaries downstream of (and including) the White Salmon River in Washington and the Hood River in Oregon. As required by the ESA, the Proposed Plan contains objective, measurable delisting criteria, site-specific management actions necessary to achieve the Proposed Plan's goals, and estimates of the time and costs required to implement recovery actions. We are soliciting review and comment from the public and all interested parties on the Proposed Plan.

DATES: We will consider and address, as appropriate, all substantive comments received during the comment period. Comments must be received no later than 5 p.m. Pacific daylight time on July 16, 2012.

ADDRESSES: Please send written comments and materials to Patty Dornbusch, National Marine Fisheries Service, 1201 NE. Lloyd Boulevard, Suite 1100, Portland, OR 97232. Comments may also be submitted by email to: *nmfs.nwr.lowercolumbiaplan@noaa.gov.* Please include ''Comments on Lower Columbia Recovery Plan'' in the subject line of the email. Comments may be submitted via facsimile (fax) to (503) 230–5441. Electronic copies of the Proposed Plan are available on the NMFS Web site at *http://www.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Willamette-Lower-Columbia/LC/Plan.cfm.* Persons wishing to obtain an electronic copy on CD ROM of the Proposed Plan may do so by calling Kelly Gallivan at (503) 736–4721 or by emailing a request to *kelly.gallivan@noaa.gov* with the subject line ''CD ROM Request for Lower Columbia Recovery Plan.''

FOR FURTHER INFORMATION CONTACT: Patty Dornbusch, NMFS Lower Columbia Recovery Coordinator, at (503) 230–5430, or *patty.dornbusch@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

We are responsible for developing and implementing recovery plans for Pacific salmon and steelhead listed under the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*). Recovery means that the listed species and their ecosystems are sufficiently restored, and their future secured, to a point that the protections of the ESA are no longer necessary. Section 4(f)(1) of the ESA requires that recovery plans include, to the extent practicable: (1) Objective, measurable criteria which, when met, would result in a determination that the species is no longer threatened or endangered; (2) site-specific management actions necessary to achieve the plan's goals; and (3) estimates of the time required and costs to implement recovery actions.

We believe it is essential to have local support of recovery plans by those whose activities directly affect the listed species and whose continued commitment and leadership will be needed to implement the necessary recovery actions. We therefore support and participate in locally led, collaborative efforts to develop salmon and steelhead recovery plans that involve state, tribal, and Federal entities, local communities, and other stakeholders. We review locally developed recovery plans to ensure that they satisfy the ESA requirements. We make the recovery plans, along with any additional plan elements needed to satisfy the ESA requirements, available for public review and comment before finalizing and formally adopting them as ESA recovery plans.

In the Lower Columbia River, four salmon and steelhead species are listed as threatened: Lower Columbia River Chinook salmon, Lower Columbia River coho salmon, Columbia River chum salmon, and Lower Columbia River steelhead.

Three geographically based, locally developed plans each address a different portion of these species' range. NMFS' science center and regional office staff were closely involved in the development of these local plans. We have reviewed the final versions of these local plans and have developed an ESU/DPS-level plan that synthesizes the local plans, incorporates them as appendices, and provides all additional material needed to meet the ESA requirements. We have determined that this *Proposed ESA Recovery Plan for Lower Columbia River Chinook Salmon, Lower Columbia River Coho Salmon, Columbia River Chum Salmon, and Lower Columbia River Steelhead* meets the statutory requirements for a recovery plan and are proposing to adopt it as the ESA recovery plan for these four threatened species. Section 4(f) of the ESA, as amended in 1988, requires that public notice and an opportunity for public review and comment be provided prior to final approval of a recovery plan. This notice solicits comments on this Proposed Plan.

Development of the Proposed Plan

The initial technical foundation for this Proposed Plan was developed by the Willamette-Lower Columbia Technical Recovery Team. NMFS appointed Technical Recovery Teams to provide a solid scientific foundation for recovery plans. Scientists on these teams were nominated because of their geographic and species expertise. The Willamette-Lower Columbia Technical Recovery Team included biologists from NMFS, other federal agencies, states, tribes, academic institutions, and the private sector.

A primary task for all the Technical Recovery Teams was to recommend criteria for determining when each component population with an ESU or DPS should be considered viable (*i.e.,* when they have a low risk of extinction over a 100-year period) and when ESUs and DPSs have a risk of extinction consistent with no longer needing the protections of the ESA. All Technical Recovery Teams used the same biological principles for developing these recommendations; these principles are described in the NOAA technical memorandum *Viable Salmonid Populations and the Recovery*

of Evolutionarily Significant Units (McElhany *et al.,* 2000).

We also worked with state, tribal, local, and other federal entities to develop planning forums that built on ongoing locally led recovery efforts. We defined ''management units'' for these local efforts, based on jurisdictional boundaries as well as areas where discrete local planning efforts were under way. A recovery plan was developed for each management unit, either led by local groups with strong NMFS participation, or led by NMFS with extensive local participation. Management unit recovery planners adopted and built upon the work of the Technical Recovery Teams. The management unit plans for the Lower Columbia River Basin, which are incorporated as Appendices A through C of this Proposed Plan, are as follows:

(1) *Oregon Management Unit:* The recovery plan for the Oregon management unit covers the portions of the Lower Columbia salmon ESUs and steelhead DPS that occur within Oregon. The Oregon Department of Fish and Wildlife (ODFW) led development of this plan in collaboration with NMFS and numerous stakeholders. The *Lower Columbia River Conservation and Recovery Plan for Oregon Populations of Salmon and Steelhead* (ODFW 2010) is incorporated into this Proposed Plan as Appendix A.

(2) *Washington Management Unit:* The recovery plan for the Washington management unit covers the portions of the Lower Columbia salmon ESUs and steelhead DPS that occur in Washington within the planning area of the Lower Columbia Fish Recovery Board (LCFRB). The LCFRB was established by Washington State statute in 1998 to oversee and coordinate salmon and steelhead recovery efforts in the Lower Columbia region of Washington. The LCFRB led a collaborative process to develop the *Washington Lower Columbia Salmon Recovery and Fish & Wildlife Subbasin Plan* (LCFRB 2010). In February 2006 we approved the December 2004 version of the LCFRB plan as an interim regional recovery plan for the Washington management unit of the listed Lower Columbia River salmon ESUs and steelhead DPS. In May 2010, the LCFRB completed a revision of its earlier plan. That revised version is incorporated into this Proposed Plan as Appendix B.

(3) *White Salmon Management Unit:* In the absence of an existing local planning forum for salmon recovery, we led the development of the White Salmon management unit plan in cooperation with local stakeholders. The plan covers the portions of the Lower Columbia Chinook, coho, and chum salmon ESUs that occur in the White Salmon River subbasin (Washington). The Lower Columbia steelhead DPS does not occur in the White Salmon River subbasin. (However, the White Salmon management unit plan does cover a steelhead population that is part of the Middle Columbia River Steelhead DPS, which is addressed in NMFS' *Middle Columbia River Steelhead Distinct Population Segment ESA Recovery Plan* [2009]). The *ESA Salmon Recovery Plan for the White Salmon River Subbasin* (NMFS 2011a) is incorporated into this Proposed Plan as Appendix C.

After the management unit plans were completed, we developed an ESU/DPS-level document that synthesizes material from the management unit plans to demonstrate that recovery needs are being addressed at the ESU and DPS levels. We also incorporated delisting criteria into the Proposed Plan. In addition, to address recovery needs in the Lower Columbia River mainstem and estuary, we developed and incorporated the *Columbia River Estuary ESA Recovery Plan Module for Salmon and Steelhead* (NMFS 2011b) as Appendix D of this Proposed Plan. To address recovery needs related to the Columbia River Hydropower System, we incorporated the *Recovery Plan Module: Mainstem Columbia River Hydropower Projects* (NMFS 2008) as Appendix E of this Proposed Plan.

The Proposed Plan, including the component management unit plans and recovery plan modules, is now available for public review and comment.

Contents of Proposed Plan

The ESU/DPS-level portion of the Proposed Plan contains background and contextual information that includes descriptions of the ESUs and DPS addressed, the planning area, and the context of the plan's development. It presents relevant information on ESU and DPS structure, guidelines for assessing salmonid population and ESU/DPS-level status, and brief summaries of the Willamette-Lower Columbia Technical Recovery Team's products. It also contains summaries of the management unit plans' recovery goals, presents NMFS' proposed delisting criteria for the ESUs and DPS, and describes the methods used in the management unit plans to develop the principal plan components.

For each species addressed, the Proposed Plan also summarizes the results of the management unit plan analyses and presents specific information on the following: Population status; limiting factors and threats that have contributed to population declines; estimates of the impacts of six main categories of threats on population productivity; and a scenario of reductions in each of those threats that, if achieved, would likely improve the persistence probability of each population to a level consistent with recovery goals for the ESU or DPS.

In addition, the Proposed Plan describes recovery strategies and actions for each ESU/DPS, critical uncertainties, and research, monitoring, and evaluation needs. It explains how management unit planners developed site-specific management actions and summarizes the time and costs required to implement those actions. It also describes how implementation, prioritization of actions, and adaptive management will proceed at both the ESU/DPS and management-unit scales. In addition to summary information presented in the Proposed Plan, readers are referred to specific sections of the management unit plans (Appendices A through C) and recovery plan modules (Appendices D and E) for more information on all these topics.

How NMFS and Others Expect To Use the Plan

With approval of the final Plan, we will commit to implement the actions in the Plan for which we have authority and funding; encourage other federal and state agencies and tribal governments to implement plan actions for which they have responsibility, authority, and funding; and work cooperatively with the public and local stakeholders on implementation of other actions. We expect the plan to guide us and other federal agencies in evaluating federal actions under ESA section 7, as well as in implementing other provisions of the ESA and other statutes. For example, the plan will provide greater biological context for evaluating the effects that a proposed action may have on a species by providing delisting criteria, information on priority areas for addressing specific limiting factors, and information on how populations within the ESUs and DPS can tolerate varying levels of risk.

When we are considering a species for delisting, the agency will examine whether the section 4(a)(1) listing factors have been addressed. To assist in this examination, we will use the delisting criteria described in Section 3.2 of the Proposed Plan, which include both biological criteria and criteria addressing each of the ESA section 4(a)(1) listing factors, as well as any other relevant data and policy considerations.

At the management unit level, the LCFRB, ODFW, and the Washington Gorge Implementation Team, working with us, will develop implementation schedules that provide greater specificity for recovery actions to be implemented over three- to five-year periods. These entities also will coordinate the implementation of the recovery actions identified in the management unit plans and subsequent implementation schedules, and will track and report on implementation progress. Management unit planners and NMFS staff will work together to coordinate the implementation of recovery actions among federal, state, local, and tribal entities and stakeholders.

Conclusion

Section 4(f)(1)(B) of the ESA requires that recovery plans incorporate, to the extent practicable, (1) objective, measurable criteria which, when met, would result in a determination that the species is no longer threatened or endangered; (2) site-specific management actions necessary to achieve the plan's goals; and (3) estimates of the time required and costs to implement recovery actions. We conclude that the Proposed Plan meets the requirements of ESA section 4(f) and is proposing to adopt it as the *ESA Recovery Plan for Lower Columbia River Chinook Salmon, Lower Columbia River Coho Salmon, Columbia River Chum Salmon, and Lower Columbia River Steelhead.*

Public Comments Solicited

We are soliciting written comments on the Proposed Plan. All substantive comments received by the date specified above will be considered and incorporated, as appropriate, prior to our decision whether to approve the plan. We will issue a news release announcing the adoption and availability of a final plan. We will post on the Northwest Region Web site (*www.nwr.noaa.gov*) a summary of, and responses to, the comments received, along with electronic copies of the final plan and its appendices.

Literature Cited

Lower Columbia Fish Recovery Board (LCFRB). 2010. Washington Lower Columbia Salmon Recovery and Fish & Wildlife Subbasin Plan. Lower Columbia Fish Recovery Board, Washington. May 28, 2010.

McElhany, P., M.H. Ruckelshaus, M.J. Ford, T.C. Wainwright, and E.P. Bjorkstedt. 2000. Viable salmon populations and the recovery of evolutionarily significant units. U.S. Dept. of Commerce, NOAA Tech. Memo., NMFS NWFSC 42, 156 p.

National Marine Fisheries Service (NMFS). 2009. Middle Columbia River Steelhead Distinct Population Segment ESA Recovery Plan. Northwest Region. November 30, 2009.

National Marine Fisheries Service (NMFS). 2011a. Draft ESA Recovery Plan for the White Salmon River Subbasin. Northwest Region. December 2011.

National Marine Fisheries Service (NMFS). 2011b. Columbia River Estuary ESA Recovery Plan Module for Salmon and Steelhead. Northwest Region. Prepared for NMFS by the Lower Columbia River Estuary Partnership (contractor) and PC Trask & Associates, Inc. (subcontractor). January 2011.

Oregon Department of Fish and Wildlife. 2010. Lower Columbia River Conservation and Recovery Plan for Oregon Populations of Salmon and Steelhead. August 6, 2010.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: May 10, 2012.

Dwayne Meadows,

Acting Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–11872 Filed 5–15–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

[Docket No: 120509050–1050–01]

RIN 0660–XC001

Development of the State and Local Implementation Grant Program for the Nationwide Public Safety Broadband Network

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Request for Information.

SUMMARY: The National Telecommunications and Information Administration (NTIA) is issuing a Request for Information (RFI) seeking public comment on various issues relating to the development of the State and Local Implementation grant program, which NTIA must establish pursuant to the Middle Class Tax Relief and Job Creation Act of 2012 to assist state and local governments in planning for a single, nationwide interoperable public safety broadband network. NTIA intends to use the input from this process to inform the development of programmatic requirements to govern the state and local planning grants program.

DATES: Comments must be received by June 15, 2012 at 5:00 p.m. Eastern Daylight Time.

ADDRESSES: Comments may be submitted by email to *SLIGP@ntia.doc.gov.* Comments submitted by email should be machine-searchable and should not be copy-protected. Written comments also may be submitted by mail to: National Telecommunications and Information Administration, U.S. Department of Commerce, HCHB Room 4812, 1401 Constitution Avenue NW., Washington, DC 20230. Please note that all material sent via the U.S. Postal Service (including Overnight or Express Mail) is subject to delivery delays of up to two weeks due to mail security procedures. Responders should include the name of the person or organization filing the comment, as well as a page number, on each page of their submissions. Paper submissions should also include an electronic version on CD or DVD in .txt, .pdf, or Word format (please specify version), which should be labeled with the name and organizational affiliation of the filer and the name of the word processing program used to create the document. All emails and comments received are a part of the public record and will generally be posted to the NTIA Web site (*http://www.ntia.doc.gov*) without change. All personally identifying information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Laura M. Pettus, Communications Program Specialist, Office of Telecommunications and Information Applications, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Room 4878, Washington, DC 20230; telephone: (202) 482–4509; email: *lpettus@ntia.doc.gov.* Please direct media inquiries to NTIA's Office of Public Affairs, (202) 482–7002.

SUPPLEMENTARY INFORMATION:

Background

On February 22, 2012, President Obama signed the Middle Class Tax Relief and Job Creation Act of 2012 (Act).[1] The Act meets a long-standing priority of the Obama Administration to create a single, nationwide interoperable public safety broadband network that will, for the first time, allow police officers, fire fighters, emergency medical service professionals, and other public

[1] Middle Class Tax Relief and Job Creation Act of 2012, Public Law 112–96, 126 Stat. 156 (2012) (Act).

safety officials to communicate with each other across agencies and jurisdictions. Public safety workers have long been hindered by incompatible, and often outdated, communications equipment and this Act will help them to do their jobs more safely and effectively.

The Act establishes the First Responder Network Authority (FirstNet) as an independent authority within NTIA and authorizes it to take all actions necessary to ensure the design, construction, and operation of a nationwide public safety broadband network (PSBN), based on a single, national network architecture.[2] FirstNet is responsible for, at a minimum, ensuring nationwide standards for use and access of the network; issuing open, transparent, and competitive requests for proposals (RFPs) to build, operate and maintain the network; leveraging, to the maximum extent economically desirable, existing commercial wireless infrastructure to speed deployment of the network; and overseeing contracts with non-federal entities to build, operate, and maintain the network.

Additionally, the Act charges NTIA with establishing a grant program to assist State, regional, tribal, and local jurisdictions with identifying, planning, and implementing the most efficient and effective means to use and integrate the infrastructure, equipment, and other architecture associated with the nationwide PSBN to satisfy the wireless and data services needs of their jurisdiction.[3] Up to $135 million will be available to NTIA for the State and Local Implementation grant program.[4] NTIA must establish requirements for this program not later than six months after the date of enactment (i.e., August 22, 2012). The programmatic requirements for the State and Local Implementation grant program must include, at a minimum, a determination of the scope of eligible activities that will be funded, a definition of eligible costs, and a method to prioritize grants for activities that ensure coverage in rural as well as urban areas.[5]

NTIA is requesting public comment on certain aspects of the Act's provisions relating to the establishment of the State and Local Implementation grant program.

Request for Comment

The Consultation Process

1. Section 6206(c)(2) of the Act directs FirstNet to consult with regional, State, tribal, and local jurisdictions about the distribution and expenditure of any amounts required to carry out the network policies that it is charged with establishing. This section enumerates several areas for consultation, including: (i) Construction of a core network and any radio access network build-out; (ii) placement of towers; (iii) coverage areas of the network, whether at the regional, State, tribal, or local level; (iv) adequacy of hardening, security, reliability, and resiliency requirements; (v) assignment of priority to local users; (vi) assignment of priority and selection of entities seeking access to or use of the nationwide public safety interoperable broadband network; and (vii) training needs of local users. What steps should States take to prepare to consult with FirstNet regarding these issues?

a. What data should States compile for the consultation process with FirstNet?

b. Should this activity be covered by the State and Local Implementation grant program?

2. The Act requires that each State certify in its application for grant funds that the State has designated a single officer or governmental body to serve as the coordinator of implementation of the grant funds.[6]

a. Who might serve in the role as a single officer within the State and will it or should it vary for each State?

b. Who might serve on the governmental body (*e.g.,* public partners, private partners, technical experts, Chief Information Officers, SWIC, finance officials, or legal experts)?

c. How should the States plan to involve the local entities in the State and Local Implementation grant program?

d. How should the States plan to involve the tribal entities in the grant program?

e. What requirements should be included in the grant program to ensure that local and tribal public safety entities are able to participate in the planning process?

f. How should the State and Local Implementation grant program ensure that all public safety disciplines (*e.g.,* police, sheriffs, fire, and EMS) have input into the State consultation process?

g. How should the State and Local Implementation grant program define regional (e.g., interstate or intrastate) and how might the grant program be structured to facilitate regional participation through the States?

h. How should States plan to involve the Federal users and entities located within their States in the grant program?

3. The Act contemplates that FirstNet will consult with States regarding existing infrastructure within their boundaries, tower placements, and network coverage, which FirstNet can use to develop the requests for proposals called for by the Act. The States, however, will need time and funding to collect the necessary information before they are ready to consult with FirstNet.

a. Given these interrelated activities, how should the State and Local Implementation grant program be used by States to assist in gathering the information to consult with FirstNet?

b. Should consistent standards and processes be used by all States to gather this information? If so, how should those policies and standards be established? What should those policies and standards be?

c. What time period should NTIA consider for States to perform activities allowed under the grant program as it relates to gathering the information to consult with FirstNet?

Existing Public Safety Governance and Planning Authorities

4. Over the years, States have invested resources to conduct planning and to create governance structures around interoperable communications focused primarily on Land Mobile Radio (LMR) voice communications, including the Statewide Interoperability Coordinators (SWIC) and Statewide Interoperability Governing Bodies (SIGB), often called Statewide Interoperability Executive Committees (SIEC).

a. What is the current role of these existing governance structures in the planning and development of wireless public safety broadband networks?

b. What actions have the States' governance structures (*e.g.,* SWIC, SIGB, or SIEC) taken to begin planning for the implementation of the nationwide public safety broadband network?

c. Can these existing governance structures be used for the PSBN, and if so, how might they need to change or evolve to handle issues associated with broadband access through the Long Term Evolution (LTE) technology platform?

d. What is or should be the role of the Statewide Communications Interoperability Plans (SCIPs) in a State's planning efforts for the nationwide public safety broadband network?

e. What actions do the States need to take to update the SCIPs to include broadband?

[2] *Id.* at § 6206(b)(1).

[3] *Id.* at § 6302(a).

[4] *Id.* at § 6301(c).

[5] *Id.* at § 6302(c).

[6] *Id.* at § 6302(d).

f. Should the costs to change or evolve existing governance and Statewide Plans be eligible in the new program?

g. Should the maintenance of those existing governance bodies and plans be eligible in State and Local Implementation grant program?

Leveraging Existing Infrastructure

5. How should States and local jurisdictions best leverage their existing infrastructure assets and resources for use and integration with the nationwide public safety broadband network?

a. How should States and local jurisdictions plan to use and/or determine the suitability of their existing infrastructure and equipment for integration into the public safety broadband network?

b. What technical resources do States have available to assist with deployment of the nationwide public safety broadband network?

c. How will States include utilities or other interested third parties in their planning activities?

d. Should NTIA encourage planning for the formation and use of public/private partnerships in the deployment of the nationwide public safety broadband network? If so, how?

6. Section 6206(b)(1)(B) of the Act directs FirstNet to issue open, transparent, and competitive requests for proposals (RFPs) to private sector entities for the purposes of building, operating, and maintaining the network. How can Federal, State, tribal, and local infrastructure get incorporated into this model?

a. How would States plan for this integration?

b. Should States serve as clearinghouses or one-stop shops where entities bidding to build and operate portions of the FirstNet network can obtain access to resources such as towers and backhaul networks? If so, what would be involved in setting up such clearinghouses?

c. Should setting up a clearinghouse be an eligible cost of the grant program?

State and Local Implementation Grant Activities

7. What are some of the best practices, if any, from existing telecommunications or public safety grant programs that NTIA should consider adopting for the State and Local Implementation grant program?

8. What type of activities should be allowable under the State and Local Implementation grant program?

9. What types of costs should be eligible for funding under the State and Local Implementation grant program (*e.g.,* personnel, planning meetings, development/upgrades of plans, or assessments)?

a. Should data gathering on current broadband and mobile data infrastructure be considered an allowable cost?

b. Should the State and Local Implementation grant program fund any new positions at the State, local, or tribal level that may be needed to support the work to plan for the nationwide public safety broadband network? If so, what, if any, restrictions should NTIA consider placing on the scope of hiring and the type of positions that may be funded under the grant program?

10. What factors should NTIA consider in prioritizing grants for activities that ensure coverage in rural as well as urban areas?

11. Are there best practices used in other telecommunications or public safety grant programs to ensure investments in rural areas that could be used in the State and Local Implementation grant program?

12. In 2009, NTIA launched the State Broadband Initiative (SBI) grant program to facilitate the integration of broadband and information technology into state and local economies.

a. Do States envision SBI state designated entities participating or assisting this new State and Local Implementation grant program?

b. How can the SBI state designated entities work with States in planning for the nationwide public safety broadband network?

13. What outcomes should be achieved by the State and Local Implementation grant program?

a. Are there data that the States and local jurisdictions should deliver to document the outcomes of the grant program?

b. If so, how should they be measured?

c. Who should collect this information and in what format?

d. What data already exist and what new data could be gathered as part of the program?

14. The U.S. Department of Homeland Security's Office of Emergency Communications (OEC) has developed the following tools through its Technical Assistance Program available at *http://www.publicsafetytools.info,* including: (1) Mobile Data Usage and Survey Tool—Survey process to document the current-state mobile data environment, in preparation for a migration to LTE; (2) Statewide Broadband Planning Tool—Template and support on Statewide strategic broadband planning issues designed to serve as an addendum to the SCIP; (3) Frequency Mapping Tool—Graphical tool to display FCC license information and locations including cellular sites within a jurisdiction; and (4) Communications Assets Survey and Mapping Tool (CASM)—Data collection and analysis tool for existing land mobile radio assets. Should States be encouraged to utilize tools and support available from Federal programs such as those developed by OEC? Are there other programs or tools that should be considered?

15. Do the States have a preferred methodology for NTIA to use to distribute the grant funds available under the State and Local Implementation grant program?

a. Should NTIA consider allocating the grant funds based on population?

b. What other targeted allocation methods might be appropriate to use?

c. Should NTIA consider phasing the distribution of grant funds in the new program?

State Funding and Performance Requirements

16. What role, if any, should the States' Chief Information Officer (CIO) or Chief Technology Officer (CTO) play in the State and Local Implementation grant program and the required consultations with FirstNet? How will these different positions interact and work with public safety officials under the State and Local Implementation grant program?

17. The Act requires that the Federal share of the cost of activities carried out under the State and Local Implementation grant program not exceed 80 percent and it gives the Assistant Secretary the authority to waive the matching requirement, in whole or in part, if good cause is shown and upon determining that the waiver is in the public interest.[7] As NTIA develops the State and Local Implementation grant program, what are some of the factors it should consider regarding States' ability to secure matching funds?

18. What public interest factors should NTIA consider when weighing whether to grant a waiver of the matching requirement of State and Local Implementation grant program?

Other

19. Please provide comment on any other issues that NTIA should consider in creating the State and Local Implementation grant program, consistent with the Act's requirements.

[7] Id. at § 6302(b).

Dated: May 11, 2012.

Lawrence E. Strickling,

Assistant Secretary for Communications and Information.

[FR Doc. 2012–11818 Filed 5–15–12; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Government-Owned Inventions; Available for Licensing

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The inventions listed below are assigned to the United States Government as represented by the Secretary of the Navy and are available for licensing by the Department of the Navy.

Navy Case No. 101588//U.S. Patent Application No. 13/372,755: Foam Free Testing Systems and Methods, Navy Case No. 101448//U.S. Patent Application No. 7,372,712: Foam Free Testing Systems and Methods.

ADDRESSES: Requests for copies of the inventions cited should be directed to Andrew Drucker, Naval Facilities Engineering Service Center, Code EV12, 1100 23rd Ave., Port Hueneme, CA 93043–4370 and must include the Navy Case number.

FOR FURTHER INFORMATION CONTACT: Andrew Drucker supporting the Head of Technology Transfer Office, Naval Facilities Engineering Service Center, Code EV12, 1100 23rd Ave., Port Hueneme, CA 93043–4370, telephone 805–982–1108, FAX 805–982–4832, Email: *andrew.drucker@navy.mil.*

Authority: 35 U.S.C. 207, 37 CFR part 404.

Dated: May 9, 2012.

J.M. Beal,

Lieutenant Commander, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2012–11882 Filed 5–15–12; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests; Federal Student Aid; Federal Perkins Loan Program Master Promissory Note

SUMMARY: The Federal Perkins Loan Master Promissory Note (MPN) provides the terms and conditions of the Perkins Loan program and is prepared by the participating eligible institution and signed by the borrower.

DATES: Interested persons are invited to submit comments on or before July 16, 2012.

ADDRESSES: Written comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 04850. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Federal Perkins Loan Program Master Promissory Note.

OMB Control Number: 1845–0074.

Type of Review: Extension.

Total Estimated Number of Annual Responses: 462,922.

Total Estimated Number of Annual Burden Hours: 231,461.

Abstract: The borrower may receive loans for a single academic year or multiple academic years. The adoption of the MPN in the Perkins Loan Program has simplified the loan process by eliminating the need for institutions to prepare, and students to sign, a promissory note each award year.

Dated: May 10, 2012.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2012–11820 Filed 5–15–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Submission for OMB Review; Office of Elementary and Secondary Education; Application for New Grants Under the Indian Education Professional Development Program

SUMMARY: The Office of Indian Education of the U.S. Department of Education requests clearance for the Indian Education Discretionary Grant Applications authorized under Title VII, Part A, of the Elementary and Secondary Education Act, as amended. The Professional Development (CFDA 84.299B) program is a competitive discretionary grant program. The grant applications submitted for this program are evaluated on the basis of how well an applicant addresses the selection criteria, and are used to determine applicant eligibility and amount of award for projects selected for funding.

DATES: Interested persons are invited to submit comments on or before June 15, 2012.

ADDRESSES: Written comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 04856. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically

mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Application for New Grants Under the Indian Education Professional Development Program .

OMB Control Number: 1810–0580.

Type of Review: Extension.

Total Estimated Number of Annual Responses: 50.

Total Estimated Number of Annual Burden Hours: 1,500.

Abstract: The Office of Indian Education of the Department of Education requests clearance for the Indian Education Discretionary Grant Applications authorized under Title VII, Part A, of the Elementary and Secondary Education Act, as amended. The Professional Development (CFDA 84.299B) program is a competitive discretionary grant program. The grant applications submitted for this program are evaluated on the basis of how well an applicant addresses the selection criteria, and are used to determine applicant eligibility and amount of award for projects selected for funding.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1894–0001). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection.

Dated: May 10, 2012.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2012–11821 Filed 5–15–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Secretary of Energy Advisory Board, Small Modular Reactor Subcommittee

AGENCY: Department of Energy.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces an open meeting of the Secretary of Energy Advisory Board (SEAB), Small Modular Reactor Subcommittee (SMR). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, May 30, 2012, 9:30 a.m.–12:00 p.m., 1:00 p.m.–3:30 p.m.

ADDRESSES: U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Renee Stone, Deputy Designated Federal Officer, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585; email: *SMRCommittee@hq.doe.gov* or Web site: *http://www.nuclear.gov/smrsubcommittee/overview.html*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The Board was reestablished to provide advice and recommendations to the Secretary on the Department's basic and applied research, economic and national security policy, educational issues, operational issues, and other activities as directed by the Secretary.

Background: The Subcommittee was established to provide recommendations on areas in which standards for safety, security, and nonproliferation should be developed for SMRs to enhance U.S. leadership in civil nuclear energy. In addition, to identify challenges, uncertainties and risks to commercialization and provide advice on policies and other approaches that may be appropriate to manage these risks and accelerate deployment in support of national goals.

Purpose of the Meeting: The purpose of this meeting is to hear from external stakeholders and to provide the subcommittee members with additional information.

Tentative Agenda: The meeting will start at 9:30 a.m., Wednesday, May 30, 2012. The tentative meeting agenda includes presentations from the National Nuclear Security Administration (NNSA), external stakeholders, and environmental groups.

Public Participation: The meeting is open to the public. Individuals who would like to attend must RSVP no later than 5:00 p.m., Friday, May 25, 2012, by email at: *SMRCommittee@hq.doe.gov.* Please provide your name, organization, citizenship, and contact information. Space is limited. Anyone attending the meeting will be required to present government issued identification. Individuals and representatives of organizations who would like to offer comments and suggestions may do so at the end of the meeting on Wednesday, May 30, 2012. Approximately 30 minutes will be reserved for public comments. Time allotted per speaker will depend on the number of individuals who wish to speak, but will not exceed five minutes. The Designated Federal Officer (or designee) is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Those wishing to speak should register to do so beginning at 9:30 a.m. on Wednesday, May 30, 2012. Those not able to attend the meeting or have insufficient time to address the subcommittee, are invited to send a written statement to Renee Stone, U.S. Department of Energy 1000 Independence Avenue SW., Washington, DC 20585, or by email to: *SMRCommittee@hq.doe.gov.*

Dated: Issued in Washington, DC, on May 10, 2012.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2012–11822 Filed 5–15–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC12–6–000]

Commission Information Collection Activities (FERC–585); Comment Request

AGENCY: Federal Energy Regulatory Commission.

ACTION: Comment request.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, 44 United States Code (U.S.C.) 3507(a)(1)(D), the Federal Energy Regulatory Commission (Commission or FERC) is submitting the information collection FERC–585, Reporting of Electric Energy shortages and Contingency Plans under PURPA, to the Office of Management and Budget (OMB) for review of the information collection requirements. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission issued a Notice in the **Federal Register** (77 FR 11519, 02/27/2012) requesting public comments. FERC received no comments on the FERC–585 and is making this notation in its submittal to OMB.

DATES: Comments on the collection of information are due by June 15, 2012.

ADDRESSES: Comments filed with OMB, identified by the OMB Control No. 1902–0138, should be sent via email to the Office of Information and Regulatory Affairs: *oira_submission@omb.gov.* Attention: Federal Energy Regulatory Commission Desk Officer. The Desk Officer may also be reached via telephone at 202–395–4718.

A copy of the comments should also be sent to the Federal Energy Regulatory Commission, identified by the Docket No. IC12–6–000, by either of the following methods:

- eFiling at Commission's Web Site: *http://www.ferc.gov/docs-filing/efiling.asp.*
- *Mail/Hand Delivery/Courier:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov/help/submission-guide.asp.* For user assistance contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov/docs-filing/docs-filing.asp.*

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov,* by telephone at (202) 502–8663, and by fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION:

Title: FERC–585, Reporting of Electric Energy shortages and Contingency Plans under PURPA.

OMB Control No.: 1902–0138.

Type of Request: Three-year extension of the FERC–585 information collection requirements with no changes to the reporting requirements.

Abstract: The information collected under the requirements of FERC–585, ''Reporting of Electric Energy Shortages and Contingency Plans under PURPA'', is used by the Commission to implement the statutory provisions of section 206 of the Public Utility Regulatory Policies Act of 1979 (PURPA) Public Law 95–617, 92 Stat. 3117. Section 206 of PURPA amended the Federal Power Act (FPA) by adding a new subsection (g) to section 202, under which the Commission by rule, was to require each public utility to (1) report to the Commission and appropriate state regulatory authorities of any anticipated shortages of electric energy or capacity which would affect the utility's capability to serve its wholesale customers; and (2) report to the Commission and any appropriate state regulatory authority contingency plan that would outline what circumstances might give rise to such occurrences.

In Order No. 575,[1] the Commission modified the reporting requirements in 18 CFR 294.101(b) to provide that, if a public utility includes in its rates schedule, provisions that: (a) During electric energy and capacity shortages it will treat firm power wholesale customers without undue discrimination or preference; and (b) it will report any modifications to its contingency plan for accommodating shortages within 15 days to the appropriate state regulatory agency and to the affected wholesale customers, then the utility need not file with the Commission an additional statement of contingency plan for accommodating such shortages. This revision merely changed the reporting mechanism; the public utility's contingency plan would be located in its filed rate rather than in a separate document.

In Order No. 659,[2] the Commission modified the reporting requirements in 18 CFR 294.101(e) to provide that the means by which public utilities must comply with the requirements to report shortages and anticipated shortages is to submit this information electronically using the Office of Electric Reliability's pager system at *emergency@ferc.gov* in lieu of submitting an original and two copies with the Secretary of the Commission.

The Commission uses the information to evaluate and formulate an appropriate option for action in the event an unanticipated shortage is reported and/or materializes. Without this information, the Commission and State agencies would be unable to: (1) Examine and approve or modify utility actions, (2) prepare a response to anticipated disruptions in electric energy, and (3) ensure equitable treatment of all public utility customers under the shortage situations. The Commission implements these filing requirements in the Code of Federal Regulations (CFR) under 18 CFR Part 294.

Estimate of Annual Burden:[3] The Commission estimates the total Public Reporting Burden for this information collection as:

FERC–585 (IC12–6–000)—REPORTING OF ELECTRIC ENERGY SHORTAGES AND CONTINGENCY PLANS UNDER PURPA

	Number of respondents (A)	Number of responses per respondent (B)	Total number of responses (A) × (B) = (C)	Average burden hours per response (D)	Estimated total annual burden (C) × (D)
Contingency Plan	1	1	1	73	73
Capacity Shortage	1	1	1	0.25	0.25
Total	[4] N/A	[4] N/A	2	[4] N/A	73.25

[1] 60 FR 4859 (25 Jan 1995).

[2] 70 FR 35028 (16 Jun 2005).

[3] Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, reference 5 Code of Federal Regulations 1320.3.

[4] Not applicable.

The total estimated annual cost burden to respondents is $5,054 [73.25 hours ÷ 2,080 [5] hours/year = 0.03521 * $143,540/year [6] = $5,054].

The estimated annual cost of filing the FERC–585 per response is $2,527 [$5,054 ÷ 2 responses = $2,527/ response].

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

Dated: May 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11830 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC12–13–000]

Commission Information Collection Activities (FERC–915); Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information collection, FERC–915, Public Utility Market-Based Rate Authorization Holders—Records Retention Requirement.

DATES: Comments on the collection of information are due July 16, 2012.

ADDRESSES: You may submit comments (identified by Docket No. IC12–13–000) by either of the following methods:

- *eFiling at Commission's Web Site: http://www.ferc.gov/docs-filing/ efiling.asp.*
- *Mail/Hand Delivery/Courier:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http:// www.ferc.gov/help/submission-guide.asp.* For user assistance contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov/docs-filing/docs-filing.asp.*

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at DataClearance@FERC.gov, telephone at (202) 502–8663, and fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION:

Title: FERC–915 and Public Utility Market-Based Rate Authorization Holders—Records Retention Requirement.

OMB Control No.: 1902–0223.

Type of Request: Three-year extension of the FERC–915 information collection requirements with no changes to the current reporting requirements.

Abstract: The Commission has the regulatory responsibility under section 205 of the Federal Power Act (FPA) to ensure that wholesale sales of electricity are just and reasonable and provided in a non-discriminatory manner. The Commission uses the information maintained by the respondents under FERC–915 to monitor the entities' sales, ensure that the prices are just and reasonable, maintain the integrity of the wholesale jurisdictional sales markets, and ensure that the entities comply with the requirements of the FPA (i.e., the Commission's regulations) and any orders authorizing market-based rate sales.

Type of Respondents: Public Utility Market-Based Rate Authorization Holders.

Estimate of Annual Burden: [1] The Commission estimates the total Public Reporting Burden for this information collection as:

FERC–915 (IC12–13–000)—PUBLIC UTILITY MARKET-BASED RATE AUTHORIZATION HOLDERS—RECORDS RETENTION REQUIREMENT

	Number of respondents (A)	Number of responses per respondent (B)	Total number of responses (A) × (B) = (C)	Average burden hours per response (D)	Estimated total annual burden (C) × (D)
Electric Utilities with Market-Based Rate Authority	[2] 1,730	1	1,730	1	1,730

The total estimated annual cost burden to respondents is $386,073 [$32,870 (labor costs) + $315,792 (record retention/storage cost) + $37,411 (electronic record-keeping cost) = $386,073].

- Labor costs: 1,730 hours * $19/ hours [3] = $32,870.
- Record retention/storage cost (using an estimate of 48,891 cubic feet): $315,792.[4]

[5] 2,080 hours = 40 hours/week * 52 weeks (1 year).

[6] Average annual salary per employee in 2012.

[1] Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, reference 5 Code of Federal Regulations 1320.3.

[2] Electric utilities with approved market-based rate authority—*http://www.ferc.gov/industries/ electric/gen-info/mbr/list.asp* as of 4/30/2012.

[3] 2012 average hourly wage of filing clerk working within an electric utility.

[4] The Commission bases this figure on industry archival storage costs.

• Electronic record retention/storage cost: $37,411.25 [1,730 hours ÷ 2 = 865 hours * $28/hour [5] = $24,220; [6] electronic record storage cost: 865 * $15.25/year [7] = $13,191; total electronic record storage cost: $37,411].

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

Dated: May 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11831 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

[5] The Commission bases the $28/hour figure on a FERC staff study that included estimating public utility recordkeeping costs.

[6] Only 50% of records are retained in electronic formats.

[7] Per entity; the Commission bases this figure on the estimated cost to service and to store 1 GB of data (based on the aggregated cost of an IBM advanced data protection server).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–11–001]

Elba Express Company, L.L.C.; Notice of Amendment to Petition To Amend Order Issuing Certificate

Take notice that on May 3, 2012, Elba Express Company, L.L.C. (Elba Express), located at 569 Brookwood Village, Suite 501, Birmingham, Alabama 35209, filed an Amendment to its Petition To Amend Order Issuing Certificate (Amendment to Petition To Amend) in the above referenced docket pursuant to section 385.207 and 385.2001 of the Commission's regulations under the Natural Gas Act (NGA) to amend their certificate issued in Docket No. CP06–471–000. Elba Express filed a Petition To Amend Order Issuing Certificate on October 31, 2011 (Petition To Amend) in Docket No. CP12–11–000, requesting authorization to change the location of the Phase B Compression from Jenkins County, Georgia to Elbert County, Georgia. As noticed herein, this amendment requests the Commission consider a site in Hart County, Georgia, as the preferred site for the Phase B Compression. Elba Express notes that the horsepower and incremental capacity will remain the same as that requested in the Petition To Amend, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions concerning this application may be directed to Pamela R. Donaldson, Principal Regulatory Analyst, Elba Express Company, L.L.C., 569 Brookwood Village, Suite 501, Birmingham, Alabama 35209, by telephone at (205) 325–3739 or by email at *pam.donaldson@elpaso.com*.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 7 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and seven copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to

receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: May 31, 2012.

Dated: May 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11832 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 6764–036]

BMB Enterprises, Inc.; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Terms and Conditions, and Fishway Prescriptions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Amendment of license.

b. *Project No.:* 6764–036.

c. *Date Filed:* December 5, 2011, and supplemented on April 30, 2012.

d. *Applicant:* BMB Enterprises, Inc.

e. *Name of Project:* Sixmile Creek Hydroelectric Project.

f. *Location:* When constructed, the project will be located on the Sixmile Creek in Sanpete County, Utah.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Brad F. Hutchings, BMB Enterprises, Inc., 282 North 1350 East, Bountiful, Utah 84010; telephone (801) 298–7383.

i. *FERC Contact:* Linda Stewart, telephone: (202) 502–6680, and email address: *linda.stewart@ferc.gov.*

j. Deadline for filing motions to intervene and protests, comments, recommendations, terms and conditions, and fishway prescriptions is 60 days from the issuance of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please include the project number (P–6764–036) on any comments, motions, or recommendations filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* BMB Enterprises, Inc. (licensee) proposes to modify various project facilities as authorized in the October 16, 1987 Order Issuing License (Minor Project). Instead of constructing a new powerhouse containing two 325-kilowatt (kW) turbine generating units for a total installed capacity of 650 kW, the licensee proposes to construct a new powerhouse containing two 350-kW and two 330-kW turbine generating units for a total installed capacity of 1,360 kW. The hydraulic capacity of the project would increase from 20 to 40 cubic feet per second. The licensee also proposes to: modify the diversion structure and install screens; increase the penstock size from 24 to 30 inches in diameter; and change the transmission line route. Additionally, the licensee proposes to modify the instream minimum flow requirements pursuant to Article 103.[1]

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Responsive Documents:* All filings must (1) bear in all capital letters the title ''PROTEST'', ''MOTION TO INTERVENE'', ''COMMENTS,'' ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' '' TERMS AND CONDITIONS,'' or ''FISHWAY PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). All comments, recommendations, terms and conditions or prescriptions should relate to project works which are the subject of the license amendment. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. If an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they

[1] The minimum flow requirement as specified in Article 103 is a section 4(e) license condition stipulated by the U.S. Forest Service.

must also serve a copy of the document on that resource agency. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: May 9, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11737 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–455–000]

Pivotal Utility Holdings, Inc. d/b/a Elkton Gas; Notice of Application

Take notice that on May 4, 2012, Pivotal Utility Holdings, Inc. d/b/a Elkton Gas (Elkton Gas), 125 B East High Street, Elkton, Maryland 21921, filed an abbreviated application pursuant to Section 7(f) of the Natural Gas Act (NGA) and Part 157 of the Commission's Regulations seeking a service area determination to include 744 feet of pipe and appurtenant facilities extended from Maryland border into Delaware. Elkton Gas also requests: (i) A finding that Elkton Gas continues to qualify as a local distribution company (LDC) in Maryland, for purposes of section 311 of the Natural Gas Policy Act of 1978 (NGPA); and (ii) a waiver of the Commission's accounting and reporting requirements and other regulatory requirements ordinarily applicable to natural gas companies under the NGA and NGPA. The filing may also be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

In early 2012, Elkton Gas has determined that its Maryland LDC system includes 744 feet of pipe and appurtenant facilities crossing Maryland/Delaware border in order to reach a gate station owned and operated by Eastern Shore Natural Gas Company (Eastern Shore), known as the North Gate Station. Elkton Gas does not provide service in Delaware and is not subject to regulation by the Delaware Public Service Commission. Elkton Gas does not contemplate any changes in its operations as a result of this change in regulatory status. The purpose of owning facilities in Delaware is to bring gas to Maryland to serve Elkton Gas' customers in Maryland.

Any questions regarding this application should be directed to Shannon Pierce, Senior Counsel, AGL Resources Inc., Ten Peachtree Place, Suite 1000, Atlanta, GA 30309; phone number (404) 584–3394; or email: *spierce@aglresources.com.*

Any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the below listed comment date, file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit original and 7 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

Motions to intervene, protests and comments may be filed electronically via the Internet in lieu of paper, see, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: 5:00 p.m. Eastern Time on May 31, 2012.

Dated: May 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11828 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13011–003]

Shelbyville Hydro LLC; Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Major License.

b. Project No.: 13011–003.

c. *Date filed:* October 28, 2011.

d. *Applicant:* Shelbyville Hydro LLC (Shelbyville Hydro), a wholly-owned subsidiary of Symbiotics LLC.

e. *Name of Project:* Lake Shelbyville Dam Hydroelectric Project.

f. *Location:* On the Kaskaskia River, in Shelby County, Illinois at an existing dam owned and operated by the U.S. Corps of Engineers (Corps). The project would occupy 3.24 acres of federal lands managed by the Corps.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Brent L. Smith, Chief Operating Officer, Symbiotics LLC, 371 Upper Terrace, Suite 2, Bend, OR 97702; Telephone (541)–330–8779.

i. *FERC Contact:* Lesley Kordella, (202) 502–6406 or *Lesley.Kordella@ferc.gov.*

j. *Deadline for filing motions to intervene and protests:* 60 days from the issuance date of this notice.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedures require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted for filing, but is not ready for environmental analysis at this time.

l. *Project Description:* The project would be located at an existing dam owned and operated by the Corps (St.

Louis District). The existing Lake Shelbyville Dam was constructed in 1963 for the purposes of flood control, recreation development, water supply, navigation release, and fish and wildlife conservation. In August of 1970, the Corps closed the gates to start the initial filling of the lake. The West Okaw and Kaskaskia rivers were inundated for 17 miles upstream of the dam.

The Lake Shelbyville Dam is an earthen embankment with an elevation of 643 feet above mean sea level (MSL). The dam is 3,025 feet long and rises 108 feet above the river bed. The concrete spillway is located at 593 feet MSL and is topped by three Tainter gates that are approximately 45-feet-wide by 37-feet-high. The two regulating outlet structures release water through the face of the spillway. The impoundment above the Lake Shelbyville Dam, referred to as Lake Shelbyville, varies according to flood control operations controlled by the Corps. Lake Shelbyville has a maximum storage capacity of 684,000 acre-feet. Of the 684,000 acre-feet of storage, 474,000 acre-feet have been designated for flood control. The average depth of the reservoir is 16 feet and the maximum is 67 feet.

The proposed Lake Shelbyville Project would consist of: (1) A trash rack with 4-inch spacing integrated into the Corps' existing west intake structure; (2) a steel liner installed in the Corps' existing west outlet chamber transitioning to a bifurcation; (3) a 13-foot-diameter bifurcation and a river release valve installed at the west outlet structure; (4) a 13-foot-diameter penstock at the bifurcation after which it reduces to a 12-foot-diameter, 570-foot-long steel penstock; (5) a 60-foot-long, 40-foot-wide, 68.5-foot-high reinforced concrete powerhouse containing a 6.8-megawatt Kaplan turbine-generator with a flow of 130 to 1,500 cubic feet per second (cfs) at a net head of 33 to 77 feet; (6) an approximately 25-foot-wide, 25-foot-long draft tube; (7) a 25 to 105-foot-wide, 49-foot-long tailrace; (8) a 12.47-kilovolt, 407-foot-long buried transmission line connecting the project to an existing Shelby Electric Cooperative substation located 900 feet downstream of the dam; and (9) appurtenant facilities. The project boundary would include 3.24 acres of Federal lands owned by the Corps. The annual average energy production is estimated to be 20.3 gigawatt-hours.

The project would operate in a run-of-release mode utilizing releases from Lake Shelbyville as they are dictated by the Corps, with no proposed change to the Corps' facility operation. Power generation would be seasonally variable as flow regimens and pool levels are set forth by the Corps. The project would generate power using flows between 130 and 1,500 cfs. When flows are below 130 cfs, all flows would be passed through the Corps' existing outlet structure and the project would then be offline. When flows are greater than 1,500 cfs, excess flow would be passed through the existing outlet structure.

m. *Scoping:* Commission staff completed the scoping process for the proposed project, including a site visit and public meeting, by letter issued on March 12, 2010. Commission staff does not intend to conduct additional scoping.

n. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified intervention deadline date, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified intervention deadline date. Applications for preliminary permits will not be accepted in response to this notice.

A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a development application. A notice of intent must be served on the applicant(s) named in this public notice.

Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

When the application is ready for environmental analysis, the Commission will issue a public notice requesting comments, recommendations, terms and conditions, or prescriptions.

All filings must (1) bear in all capital letters the title ''PROTEST'' or ''MOTION TO INTERVENE,'' ''NOTICE OF INTENT TO FILE COMPETING APPLICATION,'' or ''COMPETING APPLICATION;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

Dated: May 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11837 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–285–000]

Southern Star Central Gas Pipeline, Inc.; Notice of Application

Take notice that on April 27, 2012, Southern Star Central Gas Pipeline, Inc. (Southern Star), 4700 Highway 56, Owensboro, Kentucky 42304, filed in Docket No. CP12–285–000 an application pursuant to section 7 of the Natural Gas Act (NGA), as amended, for authorization to expand the existing certificated boundary and buffer zone by 160 acres at Southern Star's existing McLouth Gas Storage Field in Jefferson and Leavenworth Counties, Kansas, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Any questions regarding the applications should be directed to David N. Roberts, Staff Analyst, Regulatory Affairs, Southern Star Central Gas Pipeline, Inc. (Southern Star), 4700 Highway 56, Owensboro, Kentucky 42304, or call at 270–852–4654.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 7 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: May 31, 2012.

Dated: May 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11833 Filed 5–15–12; 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 rate filings:

Docket Numbers: ER12–1660–001.
Applicants: Tuscola Bay Wind, LLC.
Description: Amendment to Tuscola Bay Wind, LLC MBR Tariff to be effective 6/29/2012.
Filed Date: 5/8/12.
Accession Number: 20120508–5121.
Comments Due: 5 p.m. ET 5/29/12.

Docket Numbers: ER12–1713–001.
Applicants: Southwest Power Pool, Inc.
Description: Amendment to 2415 Kansas Municipal Energy Agency NITSA NOA to be effective 4/1/2012.
Filed Date: 5/9/12.
Accession Number: 20120509–5099.
Comments Due: 5 p.m. ET 5/30/12.

Docket Numbers: ER12–1744–000.
Applicants: Dennis Energy Company.
Description: Cancellation of Tariff to be effective 5/8/2012.
Filed Date: 5/8/12.
Accession Number: 20120508–5125.
Comments Due: 5 p.m. ET 5/29/12.

Docket Numbers: ER12–1745–000.
Applicants: Copper Mountain Solar 2, LLC.
Description: Copper Mountain Solar 2 LLC Concurrence to Joint Use Agreement to be effective 5/8/2012.
Filed Date: 5/8/12.
Accession Number: 20120508–5136.
Comments Due: 5 p.m. ET 5/29/12.

Docket Numbers: ER12–1746–000.
Applicants: PJM Interconnection, L.L.C.
Description: Original Service Agreement No. 3281; Queue No. W3–101 to be effective 4/11/2012.
Filed Date: 5/9/12
Accession Number: 20120509–5034.
Comments Due: 5 p.m. ET 5/30/12.

Docket Numbers: ER12–1747–000.
Applicants: PJM Interconnection, L.L.C.
Description: Original Service Agreement No. 3286; Queue No. X3–001 to be effective 4/13/2012.
Filed Date: 5/9/12.
Accession Number: 20120509–5035.
Comments Due: 5 p.m. ET 5/30/12.

Docket Numbers: ER12–1748–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: G587 GIA to be effective 5/10/2012.
Filed Date: 5/9/12
Accession Number: 20120509–5057.
Comments Due: 5 p.m. ET 5/30/12.

Docket Numbers: ER12–1749–000.
Applicants: International Transmission Company.
Description: Notice of Succession to be effective 7/11/2012.
Filed Date: 5/9/12.
Accession Number: 20120509–5059.
Comments Due: 5 p.m. ET 5/30/12.

Docket Numbers: ER12–1750–000.
Applicants: Delmarva Power & Light Company.

Description: Construction Agreement Between Delmarva and ODEC to be effective 6/12/2012.

Filed Date: 5/9/12.

Accession Number: 20120509–5067.

Comments Due: 5 p.m. ET 5/30/12.

Docket Numbers: ER12–1751–000.

Applicants: Renewable Power Strategies, LLC.

Description: Market-Based Rate Tariff to be effective 6/8/2012.

Filed Date: 5/9/12.

Accession Number: 20120509–5079.

Comments Due: 5 p.m. ET 5/30/12.

Docket Numbers: ER12–1752–000.

Applicants: Nevada Power Company.

Description: Rate Schedule No. 127 SDG&E Ancillary Services Agreement to be effective 5/10/2012.

Filed Date: 5/9/12.

Accession Number: 20120509–5090.

Comments Due: 5 p.m. ET 5/30/12.

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 5:00 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: May 9, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–11805 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Commission Staff Attendance

The Federal Energy Regulatory Commission hereby gives notice that members of the Commission's staff may attend the following meeting related to the transmission planning activities of the Southern Company Services, Inc.:

2012 Southeastern Regional Transmission Planning Process (SERTP) Interim Meeting on Order No. 1000

May 17, 2012, 9:00 a.m.–12:00 p.m., Local Time.

The above-referenced meeting will be a Telephone/Web Conferencing meeting.

The above-referenced meeting is open to stakeholders.

Further information may be found at: *www.southeasternrtp.com.*

The discussions at the meeting described above may address matters at issue in the following proceeding: Docket No. ER12–337, *Mississippi Power Company.*

For more information, contact Valerie Martin, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (202) 502–6139 or *Valerie.Martin@ferc.gov.*

Dated: May 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11826 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL12–66–000; Docket No. EL12–63–000]

Exelon Corporation, Public Service Electric and Gas Company, PSEG Power LLC, PSEG Energy Resources & Trade LLC, v. Unnamed Participant, PJM Interconnection, L.L.C.; Independent Market Monitor for PJM v. Unnamed Participant; Notice of Complaint

Take notice that on May 8, 2012, pursuant to sections 206(h) and 211 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206 and 385.211 and section 206 of the Federal Power Act, 16 U.S.C. 824(e), Exelon Corporation, Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC (collectively, Joint Complainants), filed a formal complaint against Unnamed Participant and PJM Interconnection, L.L.C. (PJM), requesting that the Commission direct PJM to reject any Sell Offer by Unnamed Participant for Project X that does not comply with the Minimum Offer Price Rule and affect the price at which the Base Residual Auction clears.

Joint Complainants state that the Complaint was served: (1) By email on PJM and (2) electronically via the Commission's ECF system and all parties in EL12–63. Joint Complainants state that they are unable to confirm service on Unnamed Participant because its identity is not known.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on May 21, 2012.

Dated: May 9, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11740 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR07–6–002]

Worsham Steed Gas Storage, LLC; Notice of Compliance Filing

Take notice that on May 2, 2012, Worsham-Steed Gas Storage, LLC filed

an updated market power analysis to comply with Ordering Paragraph (B) of the Commission's order issued on May 11, 2007, in Docket No. PR07–6–000, as more fully described in the filing.

Any person desiring to participate in this rate proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on Thursday, May 17, 2012.

Dated: May 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11836 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–100–000]

Floridian Natural Gas Storage Company, LLC; Notice of Intent To Prepare an Environmental Assessment for the Floridian Natural Gas Amendment Project and Request for Comments on Environmental Issues

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Floridan Natural Gas Storage Company, LLC's (FGS) amendment to their Certificate of Public Convenience and Necessity issued by the Commission in Docket No. CP08–13–000 on August 29, 2008 (The Order). The Order authorized FGS to construct, own, and operate a new natural gas storage facility and ancillary facilities near Indiantown in Martin County, Florida. FGS's amendment is seeking authorization to redeliver gas in its liquefied state to transporting vehicles provided by its customers during normal course of business (Project). FGS does not request authorization for any new facilities or modifications to already authorized facilities. This EA will be used by the Commission in its decision-making process to determine whether the Project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the Project. Your input will help the Commission staff determine what issues they need to evaluate in the EA. Please note that the scoping period will close on June 8, 2012.

This notice is being sent to the Commission's current environmental mailing list for this Project. State and local government representatives should notify their constituents of this planned project and encourage them to comment on their areas of concern.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' is available for viewing on the FERC Web site (*www.ferc.gov*). This fact sheet addresses a number of typically-asked questions, including how to participate in the Commission's proceedings.

Summary of the Proposed Project

FGS is seeking an amendment to authorize FGS, in the normal course of business, to redeliver gas in its liquefied state to transporting vehicles provided by its customers near Indiantown in Martin County, Florida.

Land Requirements for Construction

This proposal would not involve construction of any facilities.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us [1] to discover and address concerns the public may have about proposals. This process is referred to as scoping. The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the amendment, under these general headings:

- Transportation and traffic;
- Air quality and noise; and
- Reliability and safety.

We will also evaluate possible alternatives to the planned project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before making our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section beginning on page 3.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues related to this project to formally cooperate with us in the preparation of the EA.[2] Agencies

[1] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

[2] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before June 8, 2012.

For your convenience, there are three methods you can use to submit your comments to the Commission. In all instances, please reference the project docket number (CP12–100–000) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.*

(1) You can file your comments electronically using the eComment feature located on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. This is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You can file your comments electronically using the eFiling feature located on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; other interested parties; and local libraries and newspapers. This list also includes affected landowners within 0.5 mile of the existing terminal (as defined in the Commission's regulations 18 CFR 157.6(d)(2)(iii)) and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the planned project.

If we publish and distribute the EA, copies will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 1).

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an ''intervenor'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the User's Guide under the ''e-filing'' link on the Commissions Web site.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number, excluding the last three digits in the Docket Number field (i.e., CP12–100–000). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at www.ferc.gov/EventCalendar/EventsList.aspx along with other related information.

Dated: May 9, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11742 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 6443–003]

Algonquin Power Company; Abenaki Timber Corporation; Notice of Transfer of Exemption

1. Pursuant to section 4.106 of the Commission's regulations,[1] Rebecca McCauley, exemptee for the Little Mac Power Project No. 6443, originally issued November 30, 1982,[2] has been transferred to Robert and Kathi Meyers. The project is located on Cedar Draw Creek in Twin Falls County, Idaho. The transfer of an exemption does not require Commission approval.

2. Robert and Kathi Meyers, located at 3291 N 3300 E, Twin Falls, Idaho 83301 are now the exemptees of the Little Mac Power Project No. 6443.

Dated: May 9, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11741 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–1751–000]

Renewable Power Strategies, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Renewable Power Strategies, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application

[1] 18 CFR 4.106(i)(2011).

[2] 21 FERC ¶ 62,346, Order Granting Exemption From Licensing of a Small Hydroelectric Project of 5 Megawatts or Less and Denying Competing Application for Preliminary Permit.

includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is May 30, 2012.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: May 10, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–11804 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of FERC Staff Attendance at the SPP–ITO Louisville Gas & Electric/ Kentucky Utilities Stakeholder Meeting

The Federal Energy Regulatory Commission hereby gives notice that members of its staff may attend the meeting noted below. Their attendance is part of the Commission's ongoing outreach efforts.

SPP–ITO Louisville Gas & Electric/ Kentucky Utilities Stakeholder Meeting

May 15, 2012 (8:30 a.m.–6 p.m.)

This meeting will be held at the Hyatt Regency Louisville, 320 W. Jefferson, Louisville, KY 40202.

The discussions may address matters at issue in the following proceedings:

Docket No. ER12–1357–000—Louisville Gas & Electric Company

Docket No. ER12–1697–000—Louisville Gas & Electric Company

Docket No. ER12–1732–000—Louisville Gas & Electric Company

These meetings are open to the public.

For more information, contact Peter Nagler, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (202) 502–6083 or *peter.nagler@ferc.gov.*

Dated: May 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11827 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL12–67–000]

WPPI Energy; Notice of Petition for Declaratory Order

Take notice that on May 9, 2012, pursuant to the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 381.302 and 385.207, WPPI Energy (WPPI) submitted a petition requesting the Commission to issue a declaratory order approving: (1) Establishment of a regulatory asset to accumulate expenses not recoverable prior to commercial operation, (2) a 45 percent equity hypothetical capital structure, and (3) abandoned plant recoverability.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on June 8, 2012.

Dated: May 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11829 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14370–000]

Willwood Irrigation District; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On March 12, 2012, the Willwood Irrigation District filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Deer Creek Hydropower Project (Deer Creek Project or project) to be

located on the Willwood Irrigation District's Main Canal, near Powell, Park County, Wyoming. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) A diversion structure and penstock intake; (2) a 350-foot-long, 6-foot-diameter penstock; (3) a powerhouse containing one turbine rated for 780 kilowatts at 43.08 feet of net head; (4) a 75-foot-long, 8-foot-diameter reinforced concrete tailrace; (5) a 3.5-mile-long, 12.5-kilovolt transmission line extending from the project to an existing transmission line (the point of interconnection); and (6) appurtenant facilities. The estimated annual generation of the Deer Creek Project would be 2.58 gigawatt-hours.

Applicant Contacts: Mr. Tom Walker, Willwood Irrigation District, 1306 Road 9, Powell, Wyoming, 82435; phone: (307) 754–3831. Mr. Keith Murray, Willwood Irrigation District, 1306 Road 9, Powell, Wyoming, 82435; phone: (307) 754–3831.

FERC Contact: Kim Nguyen at *kim.nguyen@ferc.gov;* phone: (202) 502–6105.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14370) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: May 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11835 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14369–000]

Nuvista Light and Electric Cooperative, Inc.; Notice of Preliminary Permit Application Accepted for Filing and Extension of Time for Soliciting Comments, Motions To Intervene, and Competing Applications

On March 2, 2012, Nuvista Light and Electric Cooperative, Inc., filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Chikuminuk Lake Hydroelectric Project (Chikuminuk Project or project) to be located on the Allen River, 118 miles southeast of Bethel, Alaska, in the unincorporated Bethel and Dillingham Census Area, Alaska. The project would be partially located on federal lands managed by the U.S. Fish and Wildlife Service in the Yukon Delta National Wildlife Refuge. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following: (1) An approximately 1,325-foot-long, 128-foot-high concrete-faced rockfill dam; (2) a 25-foot-diameter intake structure; (3) a 775-foot-long, 25-foot-diameter tunnel bringing flows from the intake to a gate house; (4) a gate house and gate shaft to convey flows from the tunnel to the main penstock; (5) a 120-foot-long, 9- to 13-foot-diameter main penstock, which bifercates into a 135-foot-long, 9-foot-diameter penstock leading to turbine 1 and a 115-foot-long, 9-foot-diameter penstock leading to turbine 2; (6) a 150-foot-long, 75-foot-wide powerhouse containing two vertical Francis turbine/generator units rated for 6.7 megawatts (MW) each, for a total installed capacity of 13.4 MW; (7) a 100-foot-long, 75-foot-wide tailrace returning project flows to the Allen River; (8) a 118-mile long, 138-kilovolt transmission line leading from the powerhouse to a substation in the town of Bethel; (9) project access facilities, including a float plane dock and a heliport; (10) project roads leading from the float plane dock to the dam and powerhouse; and (11) appurtenant facilities. The estimated annual generation of the Chikuminuk Project would be 88.7 gigawatt-hours.

Applicant Contact: Ms. Elaine Brown, Executive Director, Nuvista Light and Electric Cooperative, Inc., 301 Calista Court, Suite A, Anchorage, Alaska 99518; phone: (907) 868–2460.

FERC Contact: Jennifer Harper; phone: (202) 502–6136.

The deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications has been extended 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14369) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: May 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11834 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–449–000]

ONEOK Rockies Midstream, L.L.C.; Notice of Redesignation of Proceeding

On April 11, 2012, ONEOK Rockies Midstream, L.L.C. (ORM) filed a letter in the above-docketed proceeding informing the Commission of a name change related to the Natural Gas Act (NGA) Section 3 Authority and Presidential Permit issued June 16, 2000, in Docket No. CP96–684–001 [1] to Bear Paw Energy, L.L.C. (BPE). Specifically, ORM states that its name was filed as an amendment to Delaware incorporation documents to replace BPE, effective September 21, 2011, and that no change in ownership has occurred.

ORM states that the name change has no effect on its obligations and responsibilities under the Presidential Permit and Section 3 authority as provided by the June 16, 2000, order with respect to operation of the natural gas facilities at the international boundary near Portal, North Dakota. Accordingly, pursuant to Section 375.302(r) of the Commission's Rules and Regulations, notice is hereby given that this proceeding is being redesignated to reflect the permit holder's new name.

Dated: May 9, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11739 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

[1] 91 FERC ¶ 61,286 (2000).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2662–012]

FirstLight Hydro Generating Company; Notice of Proposed Restricted Service List for a Programmatic Agreement for Managing Properties Included in or Eligible for Inclusion in the National Register of Historic Places

Rule 2010 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure provides that, to eliminate unnecessary expense or improve administrative efficiency, the Secretary may establish a restricted service list for a particular phase or issue in a proceeding.[1] The restricted service list should contain the names of persons on the service list who, in the judgment of the decisional authority establishing the list, are active participants with respect to the phase or issue in the proceeding for which the list is established.

The Commission staff is consulting with the Connecticut State Historic Preservation Officer (hereinafter, Connecticut SHPO), and the Advisory Council on Historic Preservation (hereinafter, Advisory Council) pursuant to the Advisory Council's regulations, 36 CFR part 800, implementing section 106 of the National Historic Preservation Act, as amended, (16 U.S.C. 470f), to prepare and execute a programmatic agreement for managing properties included in, or eligible for inclusion in, the National Register of Historic Places that could be affected by issuance of a new license for the Scotland Hydroelectric Project No. 2662.

The programmatic agreement, when executed by the Commission and the Connecticut SHPO would satisfy the Commission's section 106 responsibilities for all individual undertakings carried out in accordance with the license until the license expires or is terminated (36 CFR 800.13[e]). The Commission's responsibilities pursuant to section 106 for the Scotland Hydroelectric Project would be fulfilled through the programmatic agreement, which the Commission proposes to draft in consultation with certain parties listed below. The executed programmatic agreement would be incorporated into any Order issuing a license.

FirstLight Hydro Generating Company, as the licensee for the Scotland Hydroelectric Project No. 2662, and the Mashantucket Pequot Tribe of Connecticut have expressed an interest in this preceding and are invited to participate in consultations to develop the programmatic agreement.

For purposes of commenting on the programmatic agreement, we propose to restrict the service list for the aforementioned project as follows:

John Eddins or Representative, Office of Planning and Review, Advisory Council on Historic Preservation, 1100 Pennsylvania Ave. NW., Suite 803, Washington, DC 20004

Daniel Forrest or Representative, Archaeologist/Environmental Review Coordinator, Historic Preservation and Museum Division, One Constitution Plaza, 2nd Floor, Hartford, CT 06103

Richard Laudenat or Representative, FirstLight Hydro Generating Company, 143 West Street Ext., Suite E, New Milford, CT 06776

Kathleen Knowles or Representative, Tribal Historic Preservation Officer, Mashantucket Pequot Tribe of Connecticut, 550 Trolley Line Blvd., Mashantucket, CT 06338–3202.

Any person on the official service list for the above-captioned proceeding may request inclusion on the restricted service list, or may request that a restricted service list not be established, by filing a motion to that effect within 15 days of this notice date. In a request for inclusion, please identify the reason(s) why there is an interest to be included. Also please identify any concerns about historic properties, including Traditional Cultural Properties. If historic properties are to be identified within the motion, please use a separate page, and label it NON–PUBLIC Information.

Any such motions may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the ''eFiling'' link. For a simpler method of submitting text only comments, click on ''eComment.'' For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please put the project number (P–2662–012) on the first page of the filing.

If no such motions are filed, the restricted service list will be effective at the end of the 15-day period. Otherwise, a further notice will be issued ruling on any motion or motions filed within the 15-day period.

Dated: May 10, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11825 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

[1] 18 CFR section 385.2010.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP12–340–000]

Gulfstream Natural Gas System, L.L.C.; Notice of Request Under Blanket Authorization

Take notice that on April 30, 2012 Gulfstream Natural Gas System, L.L.C. (Gulfstream), 2701 North Rocky Point Drive, Suite 1050, Tampa, Florida, 33607, filed in the above Docket, a prior notice request pursuant to sections 157.205, and 157.210 of the Commission's regulations under the Natural Gas Act (NGA), for authorization to update its mainline design to reflect an increase in its total system capacity from 1,271.2 MMcfd (1,298 MDthd) to 1,278.3 MMcfd (1,300 Dthd), all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Gulfstream will post this capacity on its electronic bulletin board as available capacity subject to approval of this Notice. Gulfstream will allocate this available capacity on a first-come, first-served basis, in accordance with its FERC Gas Tariff.

Any questions concerning this application may be directed to Lisa A. Connolly, General Manager, Rates and Certificates, Gulfstream Natural Gas System, L.L.C., 5400 Westheimer Court, P.O. Box 1642, Houston, Texas, 77251–1642 at (713) 627–4102, or by email at *laconnolly@spectraenergy.com.*

Any person may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention. Any person filing to intervene or the Commission's staff may, pursuant to section 157.205 of the Commission's Regulations under the Natural Gas Act (NGA) (18 CFR 157.205) file a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*www.ferc.gov*) under the ''e-Filing'' link.

Dated: May 9, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–11738 Filed 5–15–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9669–4]

Delegation of Authority to the Commonwealth of Virginia To Implement and Enforce Additional or Revised National Emission Standards for Hazardous Air Pollutants and New Source Performance Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of delegation of authority.

SUMMARY: On March 5, 2012, EPA sent the Commonwealth of Virginia (Virginia) a letter acknowledging that Virginia's delegation of authority to implement and enforce National Emissions Standards for Hazardous Air Pollutants (NESHAP) and New Source Performance Standards (NSPS) had been updated, as provided for under previously approved delegation mechanisms. To inform regulated facilities and the public of Virginia's updated delegation of authority to implement and enforce NESHAP and NSPS, EPA is making available a copy of EPA's letter to Virginia through this notice.

DATES: On March 5, 2012, EPA sent Virginia a letter acknowledging that Virginia's delegation of authority to implement and enforce NESHAP and NSPS had been updated.

ADDRESSES: Copies of documents pertaining to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103–2029. Copies of Virginia's submittal are also available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219. Copies of Virginia's notice to EPA that Virginia has updated its incorporation by reference of Federal NESHAP and NSPS, and of EPA's response, may also be found posted on EPA Region III's Web site at: *http://www.epa.gov/reg3artd/airregulations/delegate/vadelegation.htm.*

FOR FURTHER INFORMATION CONTACT: Ray Chalmers, (215) 814–2061, or by email at *chalmers.ray@epa.gov.*

SUPPLEMENTARY INFORMATION: On February 16, 2012, Virginia notified EPA that Virginia has updated its incorporation by reference of Federal NESHAP and NSPS to include many such standards, as they were published in final form in the Code of Federal Regulations dated July 1, 2011. On March 5, 2012, EPA sent Virginia a letter acknowledging that Virginia now has the authority to implement and enforce the NESHAP and NSPS as specified by Virginia in its notice to EPA, as provided for under previously approved automatic delegation mechanisms. All notifications, applications, reports and other correspondence required pursuant to the delegated NESHAP and NSPS must be submitted to both the U.S. EPA Region III and to the Virginia Department of Environmental Quality. A copy of EPA's letter to Virginia follows:

''Michael G. Dowd, Director, Air Quality Division, Virginia Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, Virginia 23218.

Dear Mr. Dowd:

The United States Environmental Protection Agency (EPA) has previously delegated to the Commonwealth of Virginia (Virginia) the authority to implement and enforce various federal National Emissions Standards for Hazardous Air Pollutants (NESHAP) and New Source Performance Standards (NSPS), which are found at 40 CFR Parts 60, 61 and 63.[1] In those actions, EPA also delegated to Virginia the authority to implement and enforce any future EPA NESHAP or NSPS on the condition that Virginia legally adopt the future standards, make only allowed wording changes, and provide specified notice to EPA.

In a letter dated February 16, 2012, Virginia informed EPA that Virginia had updated its incorporation by reference of federal NESHAP and NSPS to include many such standards, as they were published in final form in the Code of Federal Regulations dated July 1, 2011. Virginia noted that its intent in updating its incorporation by reference of the NESHAP and NSPS was to retain the authority to enforce all standards included in the revisions, as per the

[1] EPA has posted copies of these actions at: *http://www.epa.gov/reg3artd/airregulations/delegate/vadelegation.htm.*

provisions of EPA's previous delegation actions. Virginia committed to enforcing the federal standards in conformance with the terms of EPA's previous delegations of authority. Virginia made only allowed wording changes.

Virginia provided copies of its revised regulations specifying the NESHAP and NSPS which Virginia has adopted by reference. These revised regulations are entitled 9 VAC 5–50 ''New and Modified Stationary Sources,'' and 9 VAC 5–60 ''Hazardous Air Pollutant Sources.'' These revised regulations have an effective date of February 15, 2012.

Accordingly, EPA acknowledges that Virginia now has the authority, as provided for under the terms of EPA's previous delegation actions, to implement and enforce the NESHAP and NSPS standards which Virginia has adopted by reference in Virginia's revised regulations 9 VAC 5–50 and 9 VAC 5–60, both effective on February 15, 2012.

Please note that on December 19, 2008, in *Sierra Club* v. *EPA*,[2] the United States Court of Appeals for the District of Columbia Circuit vacated certain provisions of the General Provisions of 40 CFR Part 63 relating to exemptions for startup, shutdown, and malfunction (SSM). On October 16, 2009, the Court issued a mandate vacating these SSM exemption provisions, which are found at 40 CFR § 63.6(f)(1) and (h)(1).

Accordingly, EPA no longer allows sources the SSM exemption as provided for in the vacated provisions at 40 CFR § 63.6(f)(1) and (h)(1), even though EPA has not yet formally removed these SSM exemption provisions from the General Provisions of 40 CFR Part 63. Because Virginia incorporated 40 CFR Part 63 by reference, Virginia should also no longer allow sources to use the former SSM exemption from the General Provisions of 40 CFR Part 63 due to the Court's ruling in *Sierra Club* vs. *EPA.*

EPA appreciates Virginia's continuing NESHAP and NSPS enforcement efforts, and also Virginia's decision to take automatic delegation of additional and more recent NESHAP and NSPS by adopting them by reference.

Sincerely,

Diana Esher, Director
Air Protection Division''

This notice acknowledges the update of Virginia's delegation of authority to implement and enforce NESHAP and NSPS.

Dated: April 18, 2012.

Diana Esher,

Director, Air Protection Division, Region III.

[FR Doc. 2012–11847 Filed 5–15–12; 8:45 am]

BILLING CODE 6560–50–P

[2] *Sierra Club* v. *EPA,* 551 F.3rd 1019 (D.C. Cir. 2008).

FEDERAL COMMUNICATIONS COMMISSION

Information Collections Being Submitted for Review and Approval to the Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: The Federal Communications Commission (FCC), as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995. An agency 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 control number. Comments are requested concerning whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC 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.

DATES: Written comments should be submitted on or before June 15, 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, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, OMB, via fax 202–395–5167, or via email *Nicholas_A._Fraser@omb.eop.gov;* and to Cathy Williams, FCC, via email *PRA@fcc.gov <mailto:PRA@fcc.gov>* and to *Cathy.Williams@fcc.gov*. Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *<http://www.reginfo.gov/public/do/PRAMain>,* (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1150.

Title: Structure and Practices of the Video Relay Service Program, Second Report and Order and Order, CG Docket No. 10–51.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 28 respondents; 89 responses.

Estimated Time per Response: .017 hours (1 minute) to 50 hours.

Frequency of Response: Annual, on occasion, and one-time reporting requirements; third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for the information collections are found at section 225 of the Act, 47 U.S.C. 225. The law was enacted on July 26, 1990, as Title IV of the ADA, Public Law 101–336, 104 Stat. 327, 366–69.

Total Annual Burden: 934 hours.

Total Annual Cost: None.

Nature and Extent of Confidentiality: An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information (PII) from individuals.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On July 28, 2011, in document FCC 11–118, the Commission released a Second Report and Order and

Order, published at 76 FR 47469, August 5, 2011, and at 76 FR 47476, August 5, 2011, adopting final and interim rules—designed to help prevent fraud and abuse, and ensure quality service, in the provision of Internet-based forms of Telecommunications Relay Services (iTRS). The Second Report and Order and Order amends the Commission's process for certifying Internet-based Telecommunications Relay Service (iTRS) providers as eligible for payment from the Interstate TRS Fund (Fund) for their provision of iTRS, as proposed in the Commission's April 2011 Further Notice of Proposed Rulemaking in the Video Relay Service (VRS) reform proceeding, CG Docket No. 10–51, published at 76 FR 24437, May 2, 2011. The Commission adopted the newly revised certification process to ensure that iTRS providers receiving certification are qualified to provide iTRS in compliance with the Commission's rules, and to eliminate waste, fraud and abuse through improved oversight of such providers.

The Second Report and Order and Order contains information collection requirements with respect to the following eight requirements, all of which aims to ensure that providers are qualified to provide iTRS and that the services are provided in compliance with the Commission's rules with no or minimal service interruption.

(A) Required Evidence for Submission for Eligibility Certification. The Second Report and Order and Order requires that potential iTRS providers must provide full and detailed information in its application for certification that show its ability to comply with the Commission's rules. The Second Report and Order and Order requires that applicants must provide a detailed description of how the applicant will meet all non-waived mandatory minimum standards applicable to each form of TRS offered, including documentary and other evidence, and in the case of VRS, such documentary and other evidence shall demonstrate that the applicant leases, licenses or has acquired its own facilities and operates such facilities associated with TRS call centers and employees communications assistants, on a full or part-time basis, to staff such call centers at the date of the application. Such evidence shall include but not be limited to:

1. For VRS applicants operating five or fewer call centers within the United States, a copy of each deed or lease for each call center operated by the applicant within the United States;

2. For VRS applicants operating more than five call centers within the United States, a copy of each deed or lease for a representative sampling (taking into account size (by number of communications assistants) and location) of five call centers operated by the applicant within the United States;

3. For VRS applicants operating call centers outside of the United States, a copy of each deed or lease for each call center operated by the Applicant outside of the United States;

4. For all applicants, a list of individuals or entities that hold at least a 10 percent equity interest in the applicant, have the power to vote 10 percent or more of the securities of the applicant, or exercise de jure or de facto control over the applicant, a description of the applicant's organizational structure, and the names of its executives, officers, members of its board of directors, general partners (in the case of a partnership), and managing members (in the case of a limited liability company);

5. For all applicants, a list of the number of applicant's full-time and part-time employees involved in TRS operations, including and divided by the following positions: Executives and officers; video phone installers (in the case of VRS), communications assistants, and persons involved in marketing and sponsorship activities;

6. Where applicable, a description of the call center infrastructure, and for all core call center functions (automatic call distribution, routing, call setup, mapping, call features, billing for compensation from the TRS fund, and registration) a statement whether such equipment is owned, leased or licensed (and from whom if leased or licensed) and proofs of purchase, leases or license agreements, including a complete copy of any lease or license agreement for automatic call distribution;

7. For all applicants, copies of employment agreements for all of the provider's employees directly involved in TRS operations, executives and communications assistants, and a list of names of employees directly involved in TRS operations, need not be submitted with the application, but must be retained by the applicant and submitted to the Commission upon request; and

8. For all applicants, a list of all sponsorship arrangements relating to Internet-based TRS, including any associated written agreements.

(B) Submission of Annual Report. The Second Report and Order and Order requires that providers submit annual reports that include updates to the information listed under Section A above or certify that there are no changes to the information listed under Section A above.

(C) Requiring Providers to Seek Prior Authorization of Voluntary Interruption of Service. The Second Report and Order and Order requires that a VRS provider seeking to voluntarily interrupt service for a period of 30 minutes or more in duration must first obtain Commission authorization by submitting a written request to the Commission's Consumer and Governmental Affairs Bureau (CGB) at least 60 days prior to any planned service interruption, with detailed information of:

(i) Its justification for such interruption;

(ii) Its plan to notify customers about the impending interruption; and

(iii) Its plans for resuming service, so as to minimize the impact of such disruption on consumers through a smooth transition of temporary service to another provider, and restoration of its service at the completion of such interruption.

(D) Reporting of Unforeseen Service Interruptions. With respect to brief, unforeseen service interruptions or in the event of a VRS provider's voluntary service interruption of less than 30 minutes in duration, the Second Report and Order and Order requires that the affected provider submit a written notification to CGB within two business days of the commencement of the service interruption, with an explanation of when and how the provider has restored service or the provider's plan to do so imminently. In the event the provider has not restored service at the time such report is filed, the provider must submit a second report within two business days of the restoration of service with an explanation of when and how the provider has restored service.

(E) Applicant Certifying Under Penalty of Perjury for Certification Application.

The chief executive officer (CEO), chief financial officer (CFO), or other senior executive of an applicant for Internet-based TRS certification with first hand knowledge of the accuracy and completeness of the information provided, when submitting an application for certification for eligibility to receive compensation from the Intestate TRS Fund, must certify under penalty of perjury that all application information required under the Commission's rules and orders has been provided and that all statements of fact, as well as all documentation contained in the application submission, are true, accurate, and complete.

(F) Certified Provider Certifying Under Penalty of Perjury for Annual Compliance Filings.

The Second Report and Order and Order requires the chief executive officer (CEO), chief financial officer (CFO), or other senior executive of an Internet-based TRS provider with first hand knowledge of the accuracy and completeness of the information provided, when submitting an annual compliance report under paragraph (g) of section 64.606 of the Commission's rules, must certify under penalty of perjury that all information required under the Commission's rules and orders has been provided and all statements of fact, as well as all documentation contained in the annual compliance report submission, are true, accurate, and complete.

(G) Notification of Service Cessation.

The Second Report and Order and Order requires the applicant for certification must give its customers at least 30 days notice that it will no longer provide service should the Commission determine that the applicant's certification application does not qualify for certification under paragraph (a)(2) of section 64.606 of the Commission's rules.

(H) Notification on Web site.

The Second Report and Order and Order requires the provider must provide notification of temporary service outages to consumers on an accessible Web site, and the provider must ensure that the information regarding service status is updated on its Web site in a timely manner.

On October 17, 2011, in document FCC 11–155, October 31, 2011, addressing the petition for reconsideration filed by Sorenson Communications, Inc. (Sorenson). Sorenson concurrently filed a PRA comment challenging two aspects of the information collection requirements as being too burdensome. The Commission modified two aspects of information collection requirements contained in the July 28, 2011 Second Report and Order and Order to lessen the burdens on applicants for VRS certification and VRS providers to provide certain documentation to the Commission. In the MO&O, the Commission revised the language in the rules to require that providers that operate five or more domestic call centers only submit copies of proofs of purchase, leases or license agreements for technology and equipment used to support their call center functions for five of their call centers that constitute a representative sample of their centers, rather than requiring copies for all call centers. Further, the Commission clarifies that the rule requiring submission of a list of all sponsorship arrangements relating to iTRS only requires that a certification applicant include on the list associated written agreements, and does not require the applicant to provide copies of all written agreements.

Therefore, the information collection requirements listed above in section (A) 6 and 8 were revised to read as follows:

6. A description of the technology and equipment used to support their call center functions-including, but not limited to, automatic call distribution, routing, call setup, mapping, call features, billing for compensation from the TRS Fund, and registration-and for each core function of each call center for which the applicant must provide a copy of technology and equipment proofs of purchase, leases or license agreements in accordance with paragraphs (a)–(d) listed below, a statement whether such technology and equipment is owned, leased or licensed (and from whom if leased or licensed);

(a) For VRS providers operating five or fewer call centers within the United States, a copy of each proof of purchase, lease or license agreement for all technology and equipment used to support their call center functions, for each call center operated by the applicant within the United States;

(b) For VRS providers operating more than five call centers within the United States, a copy of each proof of purchase, lease or license agreement for technology and equipment used to support their call center functions for a representative sampling (taking into account size (by number of communications assistants) and location) of five call centers operated by the applicant within the United States; a copy of each proof of purchase, lease or license agreement for technology and equipment used to support their call center functions for all call centers operated by the applicant within the United States must be retained by the applicant for three years from the date of the application, and submitted to the Commission upon request;

(c) For VRS providers operating call centers outside of the United States, a copy of each proof of purchase, lease or license agreement for all technology and equipment used to support their call center functions for each call center operated by the applicant outside of the United States; and

(d) A complete copy of each lease or license agreement for automatic call distribution.

8. For all applicants, a list of all sponsorship arrangements relating to Internet-based TRS, including on that list a description of any associated written agreements; copies of all such arrangements and agreements must be retained by the applicant for three years from the date of the application, and submitted to the Commission upon request.

OMB Control Number: 3060–1154.

Title: Commercial Advertisement Loudness Mitigation (''CALM'') Act; Financial Hardship and General Waiver Requests.

Form Number: Not applicable.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 300 respondents and 300 responses.

Frequency of Response: On occasion reporting requirement.

Estimated Time per Response: 1–20 hours.

Total Annual Burden: 3,150 hours.

Total Annual Cost to Respondents: $90,000.

Obligation to Respond: Required to obtain benefits. The statutory authority for this collection of information is contained in 47 U.S.C. 151, 154(i) and (j), 303(r) and 621.

Nature and Extent of Confidentiality: There is no assurance of confidentiality provided to respondents, but, in accordance with the Commission's rules, 47 CFR 0.459, a station/MVPD may request confidential treatment for financial information supplied with its waiver request.

Privacy Impact Assessment: No impact(s).

Needs and Uses: TV stations and multichannel video programming distributors (MVPDs) may file financial hardship waiver requests to seek a one-year waiver of the effective date of the rules implementing the CALM Act or to request a one-year renewal of such waiver. A TV station or MVPD must demonstrate in its waiver request that it would be a ''financial hardship'' to obtain the necessary equipment to comply with the rules. TV stations and MVPDs may file general waiver requests to request waiver of the rules implementing the CALM Act for good cause. The information obtained by financial hardship and general waiver requests will be used by Commission staff to evaluate whether grant of a waiver would be in the public interest.

OMB Control Number: 3060–xxxx.

Title: Commercial Advertisement Loudness Mitigation (''CALM'') Act; 73.682(e) and 76.607(a).

Form Number: Not applicable.

Type of Review: New collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 2,937 respondents and 2,937 responses.

Frequency of Response: Recordkeeping requirement; Third party disclosure requirement; On occasion reporting requirement; Annual reporting requirement.

Estimated Time per Response: 0.25–80 hours.

Total Annual Burden: 6,240 hours.

Total Annual Cost to Respondents: None.

Obligation to Respond: Mandatory. The statutory authority for this collection of information is contained in 47 U.S.C. 151, 152, 154(i) and (j), 303(r) and 621.

Nature and Extent of Confidentiality: There is no assurance of confidentiality provided to respondents.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On December 13, 2011, the FCC released a Report & Order (''R&O''), FCC 11–182, adopting rules to implement the Commercial Advertisement Loudness Mitigation (''CALM'') Act. Among other things, the CALM Act directs the Commission to incorporate into its rules by reference and make mandatory a technical standard developed by an industry standard-setting body that is designed to prevent television commercial advertisements from being transmitted at louder volumes than the program material they accompany. Specifically, the CALM Act requires the Commission to incorporate by reference the Advanced Television Systems Committee (''ATSC'') A/85 Recommended Practice (''ATSC A/85 RP'') and make it mandatory ''insofar as such recommended practice concerns the transmission of commercial advertisements by a television broadcast station, cable operator, or other multichannel video programming distributor.'' As mandated by the statute, the rules will apply to TV broadcasters, cable operators and other multichannel video programming distributors (''MVPDs'').The Commission will use this information to determine compliance with the CALM Act.

OMB Control Number: 3060–0120.

Type of Review: Extension of a currently approved collection.

Title: Broadcast EEO Program Model Report, FCC Form 396–A.

Form Number: FCC Form 396–A.

Respondents: Business or other for-profit entities; not-for-profit institutions.

Number of Respondents and Responses: 5,000 respondents; 5,000 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain benefits. The statutory authority for this collection of information is contained in Sections 154(i) and 303 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Total Annual Burden: 5,000 hours.

Total Annual Cost: None.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: The Broadcast Equal Employment Opportunity (EEO) Model Program Report, FCC Form 396–A, is filed in conjunction with applicants seeking authority to construct a new broadcast station, to obtain assignment of construction permit or license and/or seeking authority to acquire control of an entity holding construction permit or license. This program is designed to assist the applicant in establishing an effective EEO program for its station.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2012–11766 Filed 5–15–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 92–237; DA 12–726]

Next Meeting of the North American Numbering Council

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission released a public notice announcing the meeting and agenda of the North American Numbering Council (NANC). The intended effect of this action is to make the public aware of the NANC's next meeting and agenda.

DATES: Thursday, June 7, 2012, 10:00 a.m.

ADDRESSES: Requests to make an oral statement or provide written comments to the NANC should be sent to Deborah Blue, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, Portals II, 445 12th Street SW., Room 5–C162, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Deborah Blue, Special Assistant to the Designated Federal Officer (DFO) at (202) 418–1466 or *Deborah.Blue@fcc.gov.* The fax number is: (202) 418–1413. The TTY number is: (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document in CC Docket No. 92–237, DA 12–726 released May 8, 2012. The complete text in this document is available for public inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via the Internet at *http://www.bcpiweb.com.* It is available on the Commission's Web site at *http://www.fcc.gov.*

The North American Numbering Council (NANC) has scheduled a meeting to be held Thursday, June 7, 2012, from 10:00 a.m. until 2:00 p.m. The meeting will be held at the Federal Communications Commission, Portals II, 445 12th Street SW., Room TW–C305, Washington, DC. This meeting is open to members of the general public. The FCC will attempt to accommodate as many participants as possible. The public may submit written statements to the NANC, which must be received two business days before the meeting. In addition, oral statements at the meeting by parties or entities not represented on the NANC will be permitted to the extent time permits. Such statements will be limited to five minutes in length by any one party or entity, and requests to make an oral statement must be received two business days before the meeting.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty). Reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation you will need, including as much detail as you can. Also include a way we can contact you if we need more information. Please allow at least five days advance notice; last minute requests will be accepted, but may be impossible to fill.

Proposed Agenda: Thursday, June 7, 2012, 10:00 a.m.*

1. Announcements and Recent News
2. Approval of Transcript
   —Meeting of March 29, 2012

3. Report of the North American Numbering Plan Administrator (NANPA)
4. Report of the National Thousands Block Pooling Administrator (PA)
5. Report of the Numbering Oversight Working Group (NOWG)
6. Report of the North American Numbering Plan Billing and Collection (NANP B&C) Agent
7. Report of the Billing and Collection Working Group (B&C WG)
8. Report of the North American Portability Management LLC (NAPM LLC)
9. Report of the LNPA Selection Working Group (SWG)
10. Report of the Local Number Portability Administration (LNPA) Working Group
11. Status of the Industry Numbering Committee (INC) activities
12. Report of the Future of Numbering Working Group (FoN WG)
13. Summary of Action Items
14. Public Comments and Participation (5 minutes per speaker)
15. Other Business

Adjourn no later than 2:00 p.m.

* The Agenda may be modified at the discretion of the NANC Chairman with the approval of the DFO.

Federal Communications Commission.

Marilyn Jones,

Attorney, Wireline Competition Bureau.

[FR Doc. 2012–11789 Filed 5–15–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 012028–001.

Title: WWL/Hoegh Middle East Space Charter Agreement.

Parties: Hoegh Autoliners AS and Wallenius Wilhelmsen Logistics AS.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street NW., Suite 900; Washington, DC 20036.

Synopsis: The Agreement would add the U.S. Gulf Coast, Mediterranean Sea, Persian Gulf, Gulf of Aden, Black Sea, Gulf of Oman and Indian Ocean to the geographic scope of the agreement.

Agreement No.: 012170.

Title: Crowley/SC Line Space Charter and Sailing Agreement.

Parties: Crowley Latin America Services, LLC and SC Line.

Filing Party: Wayne R. Rohde, Esquire; Cozen O'Connor; 1627 I Street NW., Suite 1100; Washington, DC 20006–4007.

Synopsis: The agreement authorizes SC Line to charter space to Crowley in the trade between the U.S. Atlantic Coast and ports in Panama.

Dated: May 11, 2012.

By Order of the Federal Maritime Commission.

Karen V. Gregory,

Secretary.

[FR Doc. 2012–11880 Filed 5–15–12; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for a license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF)—Ocean Transportation Intermediary (OTI) pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR 515). Notice is also hereby given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a license.

Interested persons may contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573, by telephone at (202) 523–5843 or by email at *OTI@fmc.gov.*

Data Freight LLC. dba Bright Express International (NVO & OFF), 332 Hindry Avenue, Inglewood, CA 90301, Officers: Edison Chen, Manager (Qualifying Individual), Wei-Nung (Janus) Lin, Member/Manager/CEO, Application Type: QI Change/Trade Name Change.

Lone Star Integrated Distribution, LLC dba H.B. Shipping (NVO & OFF), 16516 Air Center Blvd., Houston, TX 77032, Officer: Albert E. Garcia, President/Manager/Member (Qualifying Individual), Application Type: License Transfer.

NC Freight & Logistics LLC (NVO & OFF), 11604 NW. 51st Terrace, Miami, FL 33178, Officer: Lorenzo J. Colina, Member/Manager (Qualifying Individual), Application Type: New NVO & OFF License.

Pacific Global Logistics, Inc. (NVO & OFF), 1500 Pumphrey Avenue, Auburn, AL 36832, Officers: Seung Woo Han, COO (Qualifying Individual), Kee T. Choi, CEO/President/Secretary, Application Type: QI Change.

Rockin Boxes Global, Inc. (NVO & OFF), 28337 Constellation Road, Valencia, CA 91355, Officers: Omar Cantos, Vice President, (Qualifying Individual), Mie Glenm, Vice President/Treasurer, Application Type: New NVO & OFF License.

The Camelot Company dba Purple Star Line (NVO & OFF), 9865 W. Leland Avenue, Schiller Park, IL 60176, Officers: Scott A. Case, Vice President (Qualifying Individual), Thomas C. Case, President, Application Type: Trade Name Change.

Unit International, Inc. (OFF), 644 Cesery Blvd., #200, Jacksonville, FL 32211, Officers: Jeffrey R. Landa, President (Qualifying Individual), Warren P. Powers, Chairman, Application Type: QI Change.

Dated: May 11, 2012.

Karen V. Gregory,

Secretary.

[FR Doc. 2012–11884 Filed 5–15–12; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Revocation

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary license has been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515, effective on the corresponding date shown below:

License Number: 16661NF.

Name : H.L.M. Cargo Corp. dba Sea Line Express.

Address : 8355 NW. 74th Street, Miami, Fl 33166.

Date Revoked: April 1, 2012.

Reason: Failed to maintain valid bonds.

Vern W. Hill,

Director, Bureau of Certification and Licensing.

[FR Doc. 2012–11881 Filed 5–15–12; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

HIT Policy Committee Advisory Meeting; Notice of Meeting

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice of meeting.

This notice announces a forthcoming meeting of a public advisory committee of the Office of the National Coordinator for Health Information Technology (ONC). The meeting will be open to the public.

Name of Committee: HIT Policy Committee.

General Function of the Committee: to provide recommendations to the National Coordinator on a policy framework for the development and adoption of a nationwide health information technology infrastructure that permits the electronic exchange and use of health information as is consistent with the Federal Health IT Strategic Plan and that includes recommendations on the areas in which standards, implementation specifications, and certification criteria are needed.

Date and Time: The meeting will be held on May 30, 2012, from 4:00 p.m. to 6:00 p.m./ Eastern Time.

Location: This is a virtual meeting. For up-to-date call-in information, go to the ONC Web site, *http://healthit.hhs.gov.*

Contact Person: MacKenzie Robertson, Office of the National Coordinator, HHS, 355 E Street SW., Washington, DC 20201, 202–205–8089, Fax: 202–260–1276, email: *mackenzie.robertson@hhs.gov.* Please call the contact person for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice.

Agenda: The committee will hear reports from its workgroups and updates from ONC and other Federal agencies. ONC intends to make background material available to the public prior to the meeting on its Web site, at *http://healthit.hhs.gov.*

Procedure: ONC is committed to the orderly conduct of its advisory committee meetings. Interested persons may present data, information, or views, orally or in writing, on issues pending before the Committee. Written submissions may be made to the contact person on or before two days prior to the Committee's meeting date. Oral comments from the public will be scheduled in the agenda. Time allotted for each presentation will be limited to three minutes. If the number of speakers requesting to comment is greater than can be reasonably accommodated during the scheduled public comment period, ONC will take written comments after the meeting until close of business on that day.

ONC welcomes the attendance of the public at its advisory committee meetings. If you require special accommodations due to a disability, please contact MacKenzie Robertson at least seven (7) days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App. 2).

Dated: May 7, 2012.

MacKenzie Robertson,

FACA Program Lead, Office of Policy and Planning, Office of the National Coordinator for Health Information Technology.

[FR Doc. 2012–11776 Filed 5–15–12; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–12–0814]

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 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

CDC Cervical Cancer Study (CX3)(OMB No. 0920–0814, exp. 6/30/2012)—Revision—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The National Breast and Cervical Cancer Early Detection Program (NBCCEDP) is the only organized national screening program in the United States that offers breast and cervical cancer screening to underserved women. Current NBCCEDP screening standards for cervical cancer include an annual Pap test until a woman has had three consecutive normal Pap tests, at which time the Pap test frequency is reduced to every three years.

An alternative cervical cancer screening strategy involves administration of both the Pap test and a human papillomavirus (HPV) DNA test. Because persistent, carcinogenic HPV is strongly predictive of cervical cancer, this strategy, called HPV co-testing, can be used to identify women who should be screened frequently for signs of cervical cancer. HPV co-testing can also be used to extend the screening interval for women who are low risk, i.e., both cytology negative and HPV negative. HPV co-testing is recommended by national organizations, but health care providers have been slow to adopt it or to use the results of HPV testing to modify the frequency of cervical cancer screening with the Pap test.

CDC is currently conducting a pilot study in 15 clinics in Illinois to examine the effects of an educational intervention aimed at improving patient and provider understanding of HPV co-testing (CDC Cervical Cancer Study (CX3)). The specific aims of the study are to: (1) Assess whether provider and patient education leads to extended screening intervals for women who have negative screening results; (2) identify facilitators and barriers to acceptance and appropriate use of the HPV test and longer screening intervals; (3) track costs associated with HPV testing and educational interventions; and (4) identify the HPV genotypes among this sample of low income women. Secondary goals of the study are to: (1) Assess follow-up of women with positive test results and (2) determine provider knowledge and acceptability of the HPV vaccine.

During the first three years of the study, each participating clinic was assigned to one of two study arms. Clinics in the intervention group administered the HPV DNA tests to eligible patients, along with a multi-component educational intervention involving both providers and patients. Clinics in the comparison group administered the HPV tests, but patients and providers have not received the educational intervention. A total of 2,246 women between the ages of 30 and 60 have been recruited into the study. Baseline information collection has been completed for an initial clinic survey, a 12-month follow-up clinic survey, a baseline provider survey, patient recruitment and enrollment, and a baseline patient survey. Information collection was initiated for a 36-month follow-up provider survey and an 18-month follow-up patient survey. These activities were described in the original Information Collection Request.

In order to complete the study as planned, CDC requests one additional year of approval from OMB. Information collection will include completion of the 18-month follow-up survey for approximately 150 patients and completion of the 36-month follow-up survey for 70 providers. The final year of the study will also include focus

groups with approximately 75 providers.

Information collected through follow-up surveys of patients and providers will be used to assess changes in knowledge, attitudes, beliefs and behavior regarding cervical cancer screening. Qualitative information collected during the focus groups with providers will be used to identify facilitators and barriers to acceptance and appropriate use of the HPV test and longer screening intervals. Findings from the CX3 study will help inform NBCCEDP standards for primary cervical cancer screening, including reimbursement guidelines for the HPV DNA test.

Participation in the CX3 study is voluntary and there are no costs to respondents other than their time. OMB approval is requested for one year. Because the majority of information collection activities were completed in the first three years of the study, the estimated burden to respondents will decrease in the final year of OMB approval. The total estimated annualized burden hours are 135.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Patients	Follow-up Patient Survey	150	1	10/60
Providers	Follow-up Provider Survey	70	1	30/60
	Focus Group Moderator Guide	75	1	1

Kimberly S. Lane,

Deputy Director, Office of Science Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–11874 Filed 5–15–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–12–0566]

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 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.

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.'' Although the research studies continued, the notification activities were discontinued after the extension ICR was not submitted to OMB before the original expiration date.

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 Reader Response Postcard is to obtain feedback from workers that would improve the quality and usefulness of the Institute's worker notification activities. The actual number of notifications required in a given year cannot be known in advance. Each year, the NIOSH IWSB, 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, averaging 8,000/yr. Researchers from NIOSH propose to routinely include a Reader Response postcard with notification materials to assess the value and usefulness of said materials. The Reader Response postcard was tested internally and the average time to complete was 10 minutes. We are requesting approval for three years. Participation is voluntary and there is no cost to respondents except for their time. The total estimated annual burden hours are 1,333.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses	Avg. burden per response (hours)
Reader Response Card	8,000	1	10/60

Kimberly S. Lane,

Deputy Director, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–11871 Filed 5–15–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC–2012–0004]

Draft Public Health Action Plan—A National Public Health Action Plan for the Detection, Prevention, and Management of Infertility

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of availability and request for public comment.

SUMMARY: The Centers for Disease Control and Prevention (CDC), located within the Department of Health and Human Services (HHS) is publishing this notice requesting public comment on the draft *National Public Health Action Plan for the Detection, Prevention, and Management of Infertility.* The draft plan can be found at *http://www.regulations.gov* Docket No. CDC–2012–0004. Also found in the docket is a supporting document for reference, the *Outline for a National Action Plan for the Prevention, Detection, and Management of Infertility,* which was subsequently developed into the present Plan.

DATES: Written comments must be received on or before June 15, 2012.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2012–0004, by any of the following methods:

- *Internet:* Access the Federal eRulemaking portal at *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Division of Reproductive Health, Attn: National Public Health Action Plan for the Detection, Prevention, and Management of Infertility, Docket No. CDC–2012–0004, 4770 Buford Highway NE., Mailstop K–34, Atlanta, Georgia, 30341.

Instructions: All submissions received must include the agency name and docket number for this notice. All relevant comments received will be posted publicly without change, including any personal or proprietary information provided. To download an electronic version of the plan, access *http://www.regulations.gov.* Written comments, identified by Docket No. CDC–2012–0004, will be available for public inspection Monday through Friday, except for legal holidays, from 9 a.m. until 5 p.m., Eastern Daylight Time, at 2900 Woodcock Blvd., Atlanta, Georgia 30341. Please call ahead to (770) 488–5200 and ask for a representative from the Division of Reproductive Health to schedule your visit. Comments may also be viewed at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Denise Jamieson, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Division of Reproductive Health, 4770 Buford Highway NE., Mailstop K–34, Atlanta, Georgia 30341, (770)488–5200.

SUPPLEMENTARY INFORMATION: In 2007, a CDC-wide ad hoc workgroup formed to examine the full scope of infertility activities across the agency. This workgroup conducted an assessment to identify gaps and opportunities in public health surveillance, research, communications, programs, and policy development, which led to the 2010 publication of a white paper outlining the need for a national plan, with a public health focus, on infertility prevention, detection, and management. In consultation with many governmental and nongovernmental partners, CDC developed the National Public Health Action Plan for the Detection, Prevention and Management of Infertility. Addressing both male and female infertility, the plan outlines and summarizes actions needed to promote, preserve, and restore the ability of women in the United States to conceive, carry a pregnancy to term, and deliver a healthy infant. This goal extends beyond simply addressing the inability to conceive but also focuses on reducing the burden of impaired fecundity by promoting behaviors that maintain fertility; by promoting prevention, early detection, and treatment of medical conditions; and by reducing environmental and occupational threats to fertility. Given the public health focus of this action plan, promoting healthy pregnancy outcomes associated with treating and managing infertility is also important, as is improving the efficacy and safety of infertility treatment.

The document is organized into three chapters: ''Detection of Infertility,'' ''Prevention of Infertility,'' and ''Management of Infertility.'' Each chapter addresses the topic's public health importance, existing challenges, and opportunities for action to decrease the impact of infertility on the public's health. The suggested opportunities provide federal and other government agencies, professional and consumer organizations, and other partners and stakeholders a foundation and platform to work together to decrease the burden of infertility in the United States.

Dated: May 9, 2012.

Kathleen Sebelius,

Secretary.

[FR Doc. 2012–11774 Filed 5–15–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0009]

Cooperative Agreement To Support Innovation in Vaccine Clinical Trial Design and Collaboration in Pharmacovigilance To Advance Global Access to Safe and Effective Vaccines

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) announces its intention to accept and consider a single source application for an award of a cooperative agreement to the World Health Organization (WHO) in support of collaborative efforts to advance innovative approaches to vaccine clinical trial design and to enhance the utilization of a range of pharmacovigilance tools as a means to further vaccine safety and potentially facilitate more rapid introduction of new vaccines. The goal of FDA's Center for Biologics Evaluation and Research (CBER) is to enhance technical collaboration and cooperation between FDA, WHO, and its Member States to facilitate strengthening regulatory capacity globally.

DATES: Important dates are as follows:

1. The application due date is June 15, 2012.
2. The anticipated start date is September 15, 2012.
3. The expiration date is June 16, 2012.

ADDRESSES: Submit the paper application to: Vieda Hubbard, Grants Management (HFA–500), 5630 Fishers Lane, Rockville, MD 20857, and a copy to Leslie Haynes, Center for Biologics Evaluation and Research, Office of the Director (HFM–30), 1401 Rockville Pike, Rockville, MD 20852–1448. For more

information, see section III of the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT:

Gopa Raychaudhuri, Office of the Director (HFM–1), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–6352, *email: gopa.raychaudhuri@fda.hhs.gov.* or
Leslie Haynes, Office of the Director (HFM–30), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–3114, *email: leslie.haynes@fda.hhs.gov.* or
Vieda Hubbard, Office of Acquisitions and Grants Services (HFA 500), Food and Drug Administration, 5630 Fishers Lane, Rockville, MD 20857, 301–827–7177, email: *vieda.hubbard@fda.hhs.gov.*

For more information on this funding opportunity announcement (FOA) and to obtain detailed requirements, please refer to the full FOA located at *http://www.fda.gov/BiologicsBloodVaccines/ScienceResearch/ucm297861.htm.*

SUPPLEMENTARY INFORMATION:

I. Funding Opportunity Description

RFA–FD–12–022
93.103

A. Background

CBER has been a leader and active participant in the global community to improve human health in the world's populations over many years. A significant area of engagement for CBER is its support of innovative science to advance vaccine development and to improve access of the global population to safe and effective vaccines. The U.S. Department of Health and Human Services (HHS) has invested significantly in developing sustainable global vaccines production capacity. Adequate regulatory oversight throughout the vaccine development life cycle is essential in assuring the safety, purity, and potency of vaccines and other biologicals.

WHO is the directing and coordinating authority for health within the United Nations system. It is responsible for providing leadership on global health matters, shaping the health research agenda, setting norms and standards, articulating evidence-based policy options, providing technical support to countries, and monitoring and assessing health trends. It is the only organization with the mandate, technical expertise, and broad reach to meet the Summary Objectives.

WHO has played a key role for over 50 years in establishing international guidelines and standards for development and use of vaccines and other biologicals. The assessment, licensure, regulatory control, and surveillance of vaccines and biological medicinal products are major challenges for national regulatory authorities confronted by a steadily increasing number of novel products, complex quality concerns, new regulatory issues arising from rapid technical and technological advances, and emerging infectious diseases (e.g., pandemic influenza). With the globalization of markets, the volume of vaccines and biological medicinal products crossing national borders continues to rise, making it even more critical that regulatory knowledge and experience be shared as appropriate to do so, and that global monitoring to ensure product safety be harmonized to the greatest extent possible.

WHO played a leading role in coordinating pharmacovigilance activities and exchange of information among regulators and public health authorities during the H1N1 pandemic. WHO has further demonstrated its leadership in the cause of vaccine safety through its Global Vaccine Safety Blueprint effort, a WHO initiative that focuses on monitoring vaccine safety once a product has been licensed for use. The Blueprint focuses on the need to monitor vaccinated populations for the occurrence of adverse events following immunization (AEFI), and to address vaccine safety concerns in a timely manner when they arise.

CBER has been a leader and active participant in the global community to improve human health in the world's populations over many years. Its international engagements have been informed by the knowledge that protection of global public health against infectious disease threats translates into protection of public health in the United States. In its capacity as a Pan American Health Organization/WHO Collaborating Center for Biological Standardization, CBER has supported many of WHO's efforts to advance vaccine safety, including serving on the Consultative Committee of the Global Vaccine Safety Blueprint project, serving on the WHO Global Advisory Committee on Vaccine Safety, and collaborating with the Uppsala Monitoring Center (UMC), a WHO Collaborating Center that is responsible for maintaining the global Adverse Drug Reaction database, Vigibase.

CBER seeks to support efforts to advance innovative approaches to vaccine clinical trial designs and to enhance the utilization of a range of pharmacovigilance tools as a means to further vaccine safety and potentially facilitate more rapid introduction of new vaccines. The two primary focus areas are:

1. Innovative Vaccine Clinical Trial Design

Clinical trials are performed to evaluate the safety and efficacy of vaccines. Improving the efficiency of vaccine clinical trials in the development process could lead to more rapid availability of new vaccines. In the case of early phase clinical trials, new approaches can more rapidly determine whether novel vaccine candidates are likely to be safe and efficacious, and better approaches to optimizing allocation of study participants between late phase clinical trials and postmarketing safety studies could lead to more rapid access to lifesaving vaccines, while still obtaining the data necessary to ensure vaccine safety.

2. Vaccine Pharmacovigilance

An important regulatory tool to assure vaccines are safe and effective is a robust pharmacovigilance system. The decision to license a product is based on information available at the time of approval, and the conditions for use are specified in the product label. However, the knowledge related to the safety profile of the product can change over time through expanded use in greater numbers of people and in diverse populations. Rare adverse events often are not identified in clinical trials since the numbers of subjects enrolled in the trials are not large enough to detect low frequency signals. Thus, it is essential to continue monitoring vaccine safety throughout the product life cycle and to obtain and analyze any additional safety information in ''real time.''

This project represents a collaborative effort between CBER and WHO (and complements and builds upon other existing commitments of FDA and HHS with WHO) to support scientific collaboration and enhance regulatory capabilities of National Regulatory Authorities to advance global access to safe and effective vaccines and other biologicals that meet international standards. This project will lead to improved technical cooperation between FDA, WHO, and its Member States.

B. Research Objectives

1. Innovative Vaccine Clinical Trial Design

In recent years there has been interest in finding innovative study designs to speed development of promising new vaccines, particularly in disease areas

where an urgent and unmet need exists. Diseases such as malaria, tuberculosis, and human immunodeficiency virus are especially challenging due to the widespread public health impact of these diseases, as well as the fact that traditional vaccine development mechanisms do not appear applicable because of the nature of the disease pathogens and/or the natural history of the disease. Bringing these candidate vaccines forward into larger late Phase 2 or Phase 3 clinical trials has had minimal success to date. The goals, thus, in seeking innovative trial designs are to: (1) Minimize the number of ineffective candidate vaccines that proceed into late Phase 2/Phase 3 trials, (2) enhance ability to identify promising candidate vaccines early to move forward into late Phase trials, (3) obtain answers to other scientific questions of interest (e.g. establishing correlates of protection) more quickly, and (4) promote more efficient use of resources. Of special interest are various types of adaptive trial designs and other innovations in clinical study designs.

2. Improving Allocation of Safety Data Collection Throughout the Vaccine Development Life Cycle

Achieving optimal allocation of safety data collection at each phase of the product development life cycle requires a better understanding of the interplay among disease morbidity and mortality, vaccine effectiveness and safety, quality of study designs, individual risk perception, and vaccination choice. One approach to obtain this understanding is through mathematical simulation of the vaccine development life cycle. Additional research in both the structure of the mathematical models and how to decide what constitutes the acceptable vaccine risk is needed to advance this work. Further translation of such theoretical work into practical study designs and pharmacovigilance activities through demonstration projects would also be desirable.

3. Enhancing Postmarketing Surveillance of Vaccine Safety

Four types of activities are of interest:

a. *Improvement of the evaluation of centralized spontaneous reporting systems data.* Efficient and rigorous analysis of spontaneous reports of adverse events following immunization, maintained at the UMC, through improvements in application of case definitions, data mining algorithms, vaccine dictionaries, and development of case-based reasoning strategies (such as text mining and natural language processing and statistical and mathematical algorithms), and other approaches would be considered.

b. *Improvements in the interoperability of global pharmacovigilance systems.* Examples include the development and implementation of a database that would allow tracking global distribution and use of any vaccine (including vaccine constituents and dose information) and enable linkages to existing global pharmacovigilance systems where those vaccines are in use, as a basis for rapid response to vaccine safety concerns arising in any country where a vaccine is distributed. For countries that have electronic population-based health care data systems, this could include improvements in data architecture (e.g. use of electronic medical records), methods for near real-time surveillance, and conducting definitive studies with rigorous case definitions in an efficient manner for vaccine safety surveillance following globally accepted standards to help create a global vaccine safety data link.

c. *Improving approaches to rigorous vaccine safety studies in low and middle income countries (LMICs).* The basic requirements for a collaborative approach of this kind in LMICs would be: That the methodology is simple, so it could be easily implemented and standardized for all sites; is timely; only uses resources already available in the local public health system; and avoids the need for population denominators. An example of successful use of this approach is the 2009 H1N1 influenza vaccine safety study using the self-controlled case series methodology. Improving this approach, because of its flexibility and applicability to countries where population denominator information may not be available, is one direction that could be taken.

d. *Evaluating social media and mobile communication devices for vaccine safety in LMICs.* The use of social media for public health information has received attention recently because of the success of ''Google flu trends'' (*http://www.google.org/flutrends/*) and ''HealthMaps'' (*http://healthmap.org/en/*) in identifying infectious disease outbreaks, at least as fast as traditional methods but at lower cost. Evaluation of methods for efficient approaches to aggregating the highest quality information from the Internet and social media for earlier warning of emerging safety concerns or identifying geographically localized clusters for regulators and public health authorities, might be beneficial. Mobile communication devices have been successfully used for drug safety surveillance in Africa. Evaluation of mobile devices for inexpensive alerting of central monitoring point for AEFI might be warranted. The collation, investigation, and analysis of such reports remains a challenge but might be resolved by the development and deployment of artificial intelligence systems to conduct data mining and semiautomated case-series evaluations that would provide cogent summaries for human review.

4. Dissemination of Successful Enhancements to the Vaccine Clinical Trial and Pharmacovigilance Enterprise Through Seminars or Other Training Programs

C. Eligibility Information

WHO is the directing and coordinating authority for health within the United Nations system. It is responsible for providing leadership on global health matters, shaping the health research agenda, setting norms and standards, articulating evidence-based policy options, providing technical support to countries, and monitoring and assessing health trends. It is the only organization with the mandate, technical expertise, and broad reach through its Member States to meet the project goals.

II. Award Information/Funds Available

A. Award Amount

CBER anticipates providing in FY2012 up to $2 million (total costs include direct and indirect costs) for one award subject to availability of funds in support of this project. The possibility of 4 additional years of support up to $10 million of funding is contingent upon successful performance and the availability of funds.

B. Length of Support

The support will be 1 year with the possibility of an additional 4 years of noncompetitive support. Continuation beyond the first year will be based on satisfactory performance during the preceding year, receipt of a noncompeting continuation application, and available Federal Fiscal Year appropriations.

III. Paper Application, Registration, and Submission Information

To submit a paper application in response to this FOA, the applicant should first review the full announcement located at *http://www.fda.gov/BiologicsBloodVaccines/ScienceResearch/ucm297861.htm.* (FDA has verified the Web site addresses throughout this document, but FDA is not responsible for any subsequent

changes to the Web sites after this document publishes in the **Federal Register**.) Persons interested in applying for a grant may obtain an application at *http://grants.nih.gov/grants/funding/phs398/phs398.html.* For all paper application submissions, the following steps are required:

- Step 1: Obtain a Dun and Bradstreet (DUNS) Number.
- Step 2: Register With Central Contractor Registration.

Steps 1 and 2, in detail, can be found at *http://www07.grants.gov/applicants/organization_registration.jsp.* After you have followed these steps, submit the paper application to: Vieda Hubbard, Grants Management (HFA–500), 5630 Fishers Lane, Rockville, MD 20857, and a copy to Leslie Haynes, Center for Biologics Evaluation and Research, Office of the Director (HFM–30), 1401 Rockville Pike, Rockville, MD 20852–1448.

Dated: May 10, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–11932 Filed 5–15–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; 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 materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; K99R00 Special Emphasis Panel.

Date: June 26, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Washington, DC, 2401 M Street NW., Washington, DC 20037.

Contact Person: JoAnn McConnell, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH, NSC, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892, 301–496–5324, *McConnej@ninds.nih.gov*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: May 10, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–11850 Filed 5–15–12; 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: Center for Scientific Review Special Emphasis Panel; PAR–12–017: Shared Instrument Grant (SIG) Program: Surface Plasmon Resonance Instruments.

Date: June 7, 2012.

Time: 1:00 p.m. to 3:00 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: Stephen M. Nigida, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4212, MSC 7812, Bethesda, MD 20892, 301–435–1222, *nigidas@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Computational Modeling and Sciences for Biomedical and Clinical Applications.

Date: June 11, 2012.

Time: 8:00 a.m. to 5:00 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: 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*.

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Neural Oxidative Metabolism and Death Study Section.

Date: June 11–12, 2012.

Time: 8:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Washington, DC, Dupont Circle, 1143 New Hampshire Avenue NW., Washington, DC 20037.

Contact Person: Carol Hamelink, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4192, MSC 7850, Bethesda, MD 20892, (301) 213–9887, *hamelinc@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflicts: Renal Physiology and Pathophysiology.

Date: June 11, 2012.

Time: 1:00 p.m. to 5:00 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: Atul Sahai, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2188, MSC 7818, Bethesda, MD 20892, 301–435–1198, *sahaia@csr.nih.gov*.

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Sensorimotor Integration Study Section.

Date: June 12, 2012.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Washington, DC, 2401 M Street NW., Washington, DC 20037.

Contact Person: John Bishop, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7844, Bethesda, MD 20892, (301) 408–9664, *bishopj@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; R15 applications: Dental and Inflammation.

Date: June 12–13, 2012.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Aruna K Behera, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4211, MSC 7814, Bethesda, MD 20892, 301–435–6809, *beheraak@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Prokaryotic Cell and Molecular Biology.

Date: June 12, 2012.

Time: 1:00 p.m. to 2:00 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: Michael M. Sveda, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2204, MSC 7890, Bethesda, MD 20892, 301–435–3565, *svedam@csr.nih.gov*.

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Neurodifferentiation, Plasticity, Regeneration and Rhythmicity Study Section.
Date: June 13–14, 2012.
Time: 8:00 a.m. to 3:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Hotel Monaco Alexandria, 480 King Street, Alexandria, VA 22314.
Contact Person: Carole L Jelsema, Ph.D., Chief and Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4176, MSC 7850, Bethesda, MD 20892, (301) 435–1248, *jelsemac@csr.nih.gov*.

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Genetic Variation and Evolution Study Section.
Date: June 13–14, 2012.
Time: 8:00 a.m. to 5:30 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: 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: Center for Scientific Review Special Emphasis Panel; PAR–12–017: Shared Instrumentation: Bioanalytical.
Date: June 13–14, 2012.
Time: 11:00 a.m. to 6:00 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 R Filpula, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6181, MSC 7892, Bethesda, MD 20892, 301–435–2902, *filpuladr@mail.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: May 10, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–11852 Filed 5–15–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health, Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of a meeting of the Director's Council of Public Representatives.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: Director's Council of Public Representatives.
Date: June 8, 2012.
Time: 2:30 p.m. to 4:00 p.m.
Agenda: The Council will discuss opportunities and tools for encouraging broader input from the public on various NIH Initiatives.
Place: National Institutes of Health, Building 1, 1 Center Drive, Wilson Hall, Bethesda, MD 20892.
Contact Person: Sheria Washington, Executive Secretary/Outreach Program Specialist, Office of Communications and Public Liaison, Office of the Director, National Institutes of Health, 45 Center Drive, Room 1As13F, Bethesda, MD 20892, 301–594–4837, *Sheria.Washington@nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.copr.nih.gov,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS).

Dated: May 10, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–11873 Filed 5–15–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Developmental Biology Subcommittee.
Date: June 14–15, 2012.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Latham Hotel, 3000 M Street NW., Washington, DC 20007.
Contact Person: Cathy J. Wedeen, Ph.D., Scientific Review Officer, Division Of Scientific Review, OD, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd. Room 5B01–G, Bethesda, MD 20892, 301–435–6878, *wedeenc@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: May 10, 2012.

Anna P. Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–11870 Filed 5–15–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Function, Integration, and Rehabilitation Sciences Subcommittee.

Date: June 11, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Legacy Hotel and Meeting Center, 1775 Rockville Pike, Rockville, MD 20852.

Contact Person: Anne Krey, Ph.D., Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–6908, *Ak41o@Nih.Gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: May 10, 2012.

Anna P. Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–11860 Filed 5–15–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Population Sciences Subcommittee.

Date: June 14–15, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Arlington Capital View Hotel, 2850 South Potomac Avenue, Arlington, VA 22202.

Contact Person: Carla T. Walls, Ph.D., Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Boulevard, Room 5b01, Bethesda, MD 20892–7510, 301–435–6898 *wallsc@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: May 10, 2012.

Anna P. Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–11891 Filed 5–15–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Initial Review Group; Health, Behavior, and Context Subcommittee.

Date: June 14, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel and Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Michele C. Hindi-Alexander, Ph.D., Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–8382, *hindialm@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: May 10, 2012.

Anna P. Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–11888 Filed 5–15–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Human Genome Research Institute Initial Review Group; Genome Research Review Committee.

Date: June 7, 2012.

Time: 11:30 a.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Human Genome Research Institute, 3635 Fishers Lane, Suite 4076,

Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Keith McKenney, Ph.D., Scientific Review Officer, NHGRI, 5635 Fishers Lane, Suite 4076, MSC 9306, Bethesda, MD 20814, 301–594–4280, *mckenneyk@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: May 9, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–11883 Filed 5–15–12; 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: Center for Scientific Review Special Emphasis Panel; Behavioral Genetics and Epidemiology: Special Topics.

Date: June 4, 2012.

Time: 3:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street NW., Washington, DC 20036.

Contact Person: Suzanne Ryan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, MSC 7770, Bethesda, MD 20892, (301) 435–1712, *ryansj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR12–010: Smoking Cessation and Tobacco Control Revision Applications: Behavioral Genetics and Epidemiology.

Date: June 4, 2012.

Time: 4:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street NW., Washington, DC 20036.

Contact Person: George Vogler, Ph.D., Scientific Review Officer, PSE IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3140, Bethesda, MD 20892, 301–435–0694, *voglergp@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel on Smoking Cessation and Tobacco Control Revision Applications: Behavioral Genetics and Epidemiology.

Date: June 4, 2012.

Time: 4:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street NW., Washington, DC 20036.

Contact Person: Suzanne Ryan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, MSC 7770, Bethesda, MD 20892, (301) 435–1712, *ryansj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA Panel: System Science and Health in the Behavioral and Social Sciences.

Date: June 6–7, 2012.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Tomas Drgon, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3152, MSC 7770, Bethesda, MD 20892, 301–435–1017, *tdrgon@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–11–044: Indo-US Collaborative Program on Low-Cost Medical Devices.

Date: June 6–7, 2012.

Time: 11:00 a.m. to 6:00 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 R. Filpula, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6181, MSC 7892, Bethesda, MD 20892, 301–435–2902, *filpuladr@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Pilot and Feasibility Clinical Research Studies in Digestive Diseases and Nutrition.

Date: June 6, 2012.

Time: 12:00 p.m. to 4:00 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: Peter J. Perrin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892, (301) 435–0682, *perrinp@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: May 10, 2012.

Anna P. Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–11856 Filed 5–15–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel; Review of RFA AA–12–011.

Date: June 8, 2012.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Ranga Srinivas, Ph.D., Chief, Extramural Project Review Branch EPRB, NIAAA. National Institutes of Health, 5365 Fishers Lane, Room 2085, Rockville, MD 20852 (301) 451–2067, *srinivar@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards., National Institutes of Health, HHS)

Dated: May 10, 2012.

Anna P. Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–11854 Filed 5–15–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group; Kidney, Urologic and Hematologic Diseases D Subcommittee.

Date: June 18–19, 2012.

Open: June 18, 2012, 8:00 a.m. to 8:30 a.m.

Agenda: To review procedures and discuss policy.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Closed: June 18, 2012, 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Closed: June 19, 2012, 8:00 a.m. to 5:00 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: Barbara A. Woynarowska, Ph.D., Scientific Review Administrator, Review Branch, DEA, NIDDK, National Institutes of Health, Room 754, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 402–7172, *woynarowskab@niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group; Diabetes, Endocrinology and Metabolic Diseases B Subcommittee.

Date: June 20–21, 2012.

Open: June 20, 2012, 8:00 a.m. to 8:30 a.m.

*Agenda:*To review procedures and discuss policy.

Place: Doubletree Suites by Houston Galleria, 5353 Westgeimer Blvd., Houston, TX 77056.

Closed: June 20, 2012, 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Suites by Houston Galleria, 5353 Westgeimer Blvd., Houston, TX 77056.

Closed: June 21, 2012, 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Suites by Houston Galleria, 5353 Westgeimer Blvd., Houston, TX 77056.

Contact Person: John F. Connaughton, Ph.D., Chief, Chartered Committees Section, Review Branch, DEA, NIDDK, National Institutes of Health, Room 753, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7797, *connaughtonj@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group; Digestive Diseases and Nutrition C Subcommittee.

Date: June 27–28, 2012.

Open: June 27, 2012, 6:00 p.m. to 6:30 p.m.

Agenda: To review procedures and discuss policy.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Closed: June 27, 2012, 6:30 p.m. to 10:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Closed: June 28, 2012, 8:00 a.m. to 6:00 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: Robert Wellner, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 706, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, *rw175w@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: May 9, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–11877 Filed 5–15–12; 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: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Molecular Neuropharmacology and Signaling Study Section.

Date: June 4–5, 2012.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance, Washington, DC Hotel, 999 Ninth Street, NW., Washington, DC 20001–4427.

Contact Person: Deborah L Lewis, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4183, MSC 7850, Bethesda, MD 20892, 301–408–9129, *lewisdeb@csr.nih.gov.*

Name of Committee: Immunology Integrated Review Group; Cellular and Molecular Immunology—A Study Section.

Date: June 7–8, 2012.

Time: 8:30 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Crowne Plaza Hotel—Silver Spring, 8777 Georgia Avenue, Silver Spring, MD 20910.

Contact Person: David B Winter, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4204, MSC 7812, Bethesda, MD 20892, 301–435–1152, *dwinter@mail.nih.gov.*

Name of Committee: Oncology 2—Translational Clinical Integrated Review Group; Clinical Oncology Study Section.

Date: June 11–12, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Alexandria Old Town, 1767 King Street, Alexandria, VA 22314.

Contact Person: Malaya Chatterjee, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6192, MSC 7804, Bethesda, MD 20892, 301–806–2515, *chatterm@csr.nih.gov.*

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Gastrointestinal Mucosal Pathobiology Study Section.
Date: June 11, 2012.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Fairmont Hotel San Francisco, 950 Mason Street, San Francisco, CA 94108.
Contact Person: Peter J Perrin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892, (301) 435–0682, *perrinp@csr.nih.gov.*

Name of Committee: Oncology 1-Basic Translational Integrated Review Group; Tumor Microenvironment Study Section.
Date: June 11–12, 2012.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Hotel Nikko San Francisco, 222 Mason Street, San Francisco, CA 94102.
Contact Person: Angela Y Ng, Ph.D., MBA, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6200, MSC 7804, Bethesda, MD 20892, 301–435–1715, *ngan@mail.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Diseases and Pathophysiology of the Visual System Study Section.
Date: June 11–12, 2012.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Hotel Nikko San Francisco, 222 Mason Street, San Francisco, CA 94102.
Contact Person: Jerry L Taylor, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5202, MSC 7846, Bethesda, MD 20892, 301–435–1175, *taylorje@csr.nih.gov.*

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group; Clinical Research and Field Studies of Infectious Diseases Study Section.
Date: June 11, 2012.
Time: 8:00 a.m. to 8:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Hilton Washington, DC/Rockville Hotel, and Executive Meeting Center (Hilton Rockville), 1750 Rockville Pike, Rockville, MD 20852.
Contact Person: Soheyla Saadi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3211, MSC 7808, Bethesda, MD 20892, 301–435–0903, *saadisoh@csr.nih.gov.*

Name of Committee: Oncology 2—Translational Clinical Integrated Review Group; Developmental Therapeutics Study Section.
Date: June 11–12, 2012.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: The Westin National Harbor, 171 Waterfront Street, National Harbor, MD 20745.
Contact Person: Sharon K Gubanich, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6214, MSC 7804, Bethesda, MD 20892, (301) 408–9512, *gubanics@csr.nih.gov.*

Name of Committee: Digestive, Kidney and Urological Systems Integrated Review Group; Hepatobiliary Pathophysiology Study Section.
Date: June 11–12, 2012.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Fairmont Hotel San Francisco, 950 Mason Street, San Francisco, CA 94108.
Contact Person: Bonnie L Burgess-Beusse, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2182, MSC 7818, Bethesda, MD 20892, 301–435–1783, *beusseb@mail.nih.gov.*

Name of Committee: Vascular and Hematology Integrated Review Group; Vascular Cell and Molecular Biology Study Section.
Date: June 11–12, 2012.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Washington Plaza Hotel, 10 Thomas Circle, NW., Washington, DC 20005.
Contact Person: Larry Pinkus, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4132, MSC 7802, Bethesda, MD 20892, (301) 435–1214, *pinkusl@csr.nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Infectious Diseases, Reproductive Health, Asthma and Pulmonary, Conditions Study Section.
Date: June 11–12, 2012.
Time: 8:30 a.m. to 5:00 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: Lisa Steele, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, MSC 7770, Bethesda, MD 20892, 301–594–6594, *steeleln@csr.nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Epidemiology of Cancer Study Section.
Date: June 11–12, 2012.
Time: 8:30 a.m. to 3:00 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: Denise Wiesch, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3150, MSC 7770, Bethesda, MD 20892, (301) 435–0684, *wieschd@csr.nih.gov.*

Name of Committee: Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Skeletal Muscle and Exercise Physiology Study Section.
Date: June 11–12, 2012
Time: 8:30 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Latham Hotel, 3000 M Street NW., Washington, DC 20007.
Contact Person: Richard Ingraham, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4116, MSC 7814, Bethesda, MD 20892, 301–496–8551, *ingrahamrh@mail.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: May 10, 2012.

Anna P. Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–11853 Filed 5–15–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2012–0012]

National Flood Insurance Program Programmatic Environmental Impact Statement

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice of Intent to prepare an Environmental Impact Statement.

SUMMARY: The Federal Emergency Management Agency intends to prepare an Environmental Impact Statement evaluating the impacts on the quality of the human environment of the National Flood Insurance Program as it is currently implemented and of potential future changes to the Program.

DATES: Comments must be submitted by July 16, 2012.

ADDRESSES: Comments must be identified by Docket ID FEMA–2012–0012 and may be submitted by one of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments. Please note that this notice of intent is not a rulemaking and that the Federal Rulemaking Portal is being utilized only as a mechanism for receiving comments.

Mail: Regulatory Affairs Legal Division, Office of Chief Counsel, Federal Emergency Management Agency, Room 835, 500 C Street SW., Washington, DC 20472–3100.

FOR FURTHER INFORMATION CONTACT: Emily Blanton, Federal Emergency

Management Agency, Office of Environmental Planning and Historic Preservation, 1800 South Bell Street, 7th Floor, Arlington, VA 20598–3020. Phone: (202) 646–2585. Fax: (202) 646–4033.

SUPPLEMENTARY INFORMATION: Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), the Council on Environmental Quality (CEQ) regulations implementing NEPA, and the Federal Emergency Management Agency's (FEMA's) Environmental Consideration regulations require preparation of an Environmental Impact Statement (EIS) for major Federal actions that would have significant impacts to the quality of the human environment. FEMA is undertaking an EIS of the National Flood Insurance Program (NFIP) to consider new information relating to the environmental impacts of the NFIP, to update the 1976 EIS on the NFIP, and to consider potential changes to the program's implementation. The CEQ regulations at 40 CFR 1501.7 and 40 CFR 1508.22 require the issuance of a notice of intent to prepare an EIS to initiate the scoping process. Scoping is an early and open process that assists the Federal action agency in determining the scope of issues to be addressed and for identifying significant issues related to a proposed action.

The U.S. Congress established the NFIP with the passage of the National Flood Insurance Act of 1968. The NFIP is a Federal program for property owners in NFIP participating communities to purchase insurance as a protection against flood losses in exchange for State and community adoption and implementation of land use criteria that reduce future flood damages. Participation in the NFIP is based on an agreement between communities and the Federal Government. If a community adopts and enforces a FEMA approved floodplain management ordinance to reduce future flood risk to new construction in regulated floodplains, the Federal Government will make flood insurance available to individuals within the community as financial protection against flood losses. This insurance is designed to provide a financial alternative and to reduce the escalating costs of Federal disaster assistance for flood damaged buildings and their contents. The costs associated with flood damage are reduced by nearly $1.7 billion a year through communities implementing sound floodplain management requirements and property owners purchasing flood insurance. Additionally, buildings constructed in compliance with NFIP building standards suffer approximately 80 percent less damage annually than those not built to NFIP standards.

The Federal Insurance and Mitigation Administration (FIMA), a part of FEMA, manages the NFIP. The three components of the NFIP are Flood Insurance, Floodplain Management, and Flood Hazard Mapping. More than 21,000 communities across the United States and its territories participate in the NFIP by adopting and enforcing floodplain management ordinances to reduce future flood damages.

In addition to providing flood insurance and reducing flood damages through floodplain management regulations, the NFIP identifies and maps the Nation's regulated floodplains. Mapping flood hazards creates a broad-based awareness of flood hazards and provides data needed for floodplain management programs and to actuarially rate new construction for flood insurance.

FEMA has led various efforts to identify areas for improvement within the NFIP. In 2006, FEMA released an evaluation of the program across five major areas: Actuarial soundness and the cost of flooding, compliance with NFIP floodplain management requirements, building standards and identifying flood risks, insurance policy sales and mandatory purchase requirement, and environmental and development impacts of the NFIP. The evaluation can be accessed at *http://www.fema.gov/business/nfip/nfipeval.shtm*.

More recently FEMA initiated an open and public process to modify the NFIP which has led to the identification of possible program changes. Many of these changes would also account for environmental planning and historic preservation considerations in the administration of the program, including but not limited to impacts on endangered and threatened species and critical habitat. This effort will result in a comprehensive series of policy recommendations designed to transition the NFIP toward a more resilient, sustainable, and comprehensive approach to flood risk management. Information about this effort can be found at *http://www.fema.gov/business/nfip/nfip_reform.shtm*.

FEMA has developed a Purpose and Need statement for evaluating NFIP proposed action and alternatives. The Purpose and Need statement discusses the need for a National Flood Insurance Program and the purpose laid out by Congress. It also establishes the need to account for Constitutional considerations, such as due process and preservation of States' rights, and consideration of national policies such as those established by NEPA, the National Historic Preservation Act, the Endangered Species Act, Executive Order 11988—*Floodplain Management,* and Executive Order 12898—*Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.* FEMA has developed five alternatives for its consideration. In addition, FEMA has preliminarily identified nine broad areas for evaluation of potential for effect on the human environment that will be evaluated during this process. These documents are available in this Docket for review and comment. FEMA proposes to evaluate the following proposed action and alternatives in this EIS:

(1) Modify the NFIP based upon changes identified through the evaluation process to enhance floodplain management standards including provisions to address endangered species and habitat concerns. This is FEMA's proposed action.

(2) Taking no action, which would result in the continued administration and implementation of the NFIP as it stands today.

(3) Discontinue the NFIP, recognizing that only Congress can take this action.

(4) Request legislative authority to remove existing subsidies and cross subsidies for flood insurance policies.

(5) Modify the NFIP based upon changes identified through the evaluation process to enhance floodplain management standards including provisions to address endangered species and habitat concerns and request legislative authority to remove existing subsidies and cross subsidies for flood insurance policies.

This notice and public comment request initiates the public scoping process for this action. Public comments submitted on these documents will become part of the scoping record. FEMA also intends to initiate discussions with other Federal agencies on the scope of this effort and identify cooperating agencies interested in participating as such in this process.

At this time FEMA does not plan to conduct public scoping meetings given the amount of public input FEMA has already received during the NFIP Reform process. The evaluation process included one scoping meeting with key stakeholders in November 2009. A summary of the information gathered (Phase I Report) can be found at *http://www.fema.gov/business/nfip/nfip_reform.shtm#3*. The Phase I Report

is available in this Docket for inspection. In December 2010, FEMA conducted two public meetings and opened a public comment period on four alternatives for NFIP Reform. See 75 FR 69096, Nov. 10, 2010. Comments received can be viewed at *http://www.regulations.gov/* under Docket ID FEMA–2010–0065. These comments will be considered part of the scoping process for this EIS.

Authority: National Environmental Policy Act (NEPA), as amended, 42 U.S.C. 4331 *et seq.;* 40 CFR part 1500; 44 CFR part 10.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2012–11841 Filed 5–15–12; 8:45 am]

BILLING CODE 9111–A6–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Intent To Request Approval From OMB of One New Public Collection of Information: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-day notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on a new Information Collection Request (ICR) abstracted below that we will submit to the Office of Management and Budget (OMB) for approval in compliance with the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. The proposed information collection activity provides a means to gather qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery.

DATES: Send your comments by July 16, 2012.

ADDRESSES: Comments may be emailed to *TSAPRA@dhs.gov* or delivered to the TSA PRA Officer, Office of Information Technology (OIT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011.

FOR FURTHER INFORMATION CONTACT: Susan L. Perkins at the above address, or by telephone (571) 227–3398.

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

Purpose and Description of Data Collection

The proposed information collection activity provides a means to gather qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery.

From the TSA perspective, qualitative customer and stakeholder feedback is information that provides useful insights on perceptions and opinions; it is different than the results of statistical surveys, which yield quantitative results that can be generalized to the population of study. This qualitative feedback will provide insights into customer or stakeholder perceptions, experiences, and expectations regarding TSA products or services, provide TSA with an early warning of issues with service, and focus attention on areas where improvement is needed regarding communication, training, or changes in operations that might improve delivery of products or services. These collections will allow for ongoing, collaborative, and actionable communications between the Agency and its customers and stakeholders. They will also allow feedback to contribute directly to the improvement of program management. The solicitation of feedback will target areas such as: Timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered by TSA. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collections are voluntary.
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government.
- The collections are noncontroversial and do not raise issues of concern to other Federal agencies.
- Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future.
- Personally identifiable information (PII) is collected only to the extent necessary and is not retained.

As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Preliminary estimates of the aggregate burden are based on a review of past behavior of participating program offices and several individual office estimates. The likely respondents to this proposed information request are State, Local or Tribal Government and Law Enforcement, traveling public, Individuals and Households, Businesses and Organizations. TSA estimates an average of 10 annual activities with approximately 12,500 respondents per activity for a total of 125,000 responses. TSA further estimates a frequency of one response per request with an average response time of 30 minutes resulting in an estimated 62,500 burden hours. Program offices will provide more refined individual estimates of burden in their subsequent notices.

Use of Results

Information gathered is intended to be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency (if released, the agency must indicate the qualitative

nature of the information). While the information gathered might be used to improve delivery of products or services, it will not be used for the purpose of substantially informing influential policy decisions.

Feedback collected under this generic clearance provides useful qualitative information, but it does not yield data that can be generalized to the overall population; it is not designed or expected to yield statistically reliable or actionable results. The information gathered will yield qualitative information. This type of generic clearance for qualitative information will not be used for quantitative information collections, such as monitoring trends over time or documenting program performance. Unlike this generic collection, quantitative data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, there may be future information collection submissions for other generic mechanisms that are designed to yield quantitative results.

Dated: Issued in Arlington, Virginia, on May 11, 2012.

Susan L. Perkins,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2012–11855 Filed 5–15–12; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Maritime Vulnerability Self-Assessment Tool

AGENCY: Transportation Security Administration, DHS.

ACTION: Notice of removal of TSA's maritime vulnerability self-assessment tool.

SUMMARY: The Transportation Security Administration (TSA) announces that the TSA Maritime Self-Assessment Risk Module (TMSARM), developed to support the United States Coast Guard's (USCG) regulatory efforts promulgated pursuant to the Maritime Transportation Security Act (MTSA) of 2002, will no longer be available. Since the TMSARM became available, other tools for conducting vulnerability assessments became available and usage of the TMSARM has dropped off considerably.

FOR FURTHER INFORMATION CONTACT: Thomas Roman Reilly, Office of Security Capabilities, TSA–16, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6016; telephone (571) 227–2990; facsimile (571) 227–1933, email *TSA–OSCCommunications@tsa.dhs.gov.*

SUPPLEMENTARY INFORMATION: On December 5, 2003 (68 FR 68096), TSA published a notice in the **Federal Register** announcing the availability of the Maritime Self-Assessment Risk Module (TMSARM). The TMSARM was developed to support the USCG regulatory efforts promulgated pursuant to the Maritime Transportation Security Act (MTSA) of 2002 (Pub. L. 107–295, 116 Stat. 2064, Nov. 25, 2002). One of these MTSA requirements is that any facility or vessel that might be involved in a transportation security incident (TSI)[1] must conduct a vulnerability assessment and submit a security plan to the USCG. TSA, in coordination with other Federal agencies, developed TMSARM specifically to meet the security assessment requirements mandated by MTSA.

Since the TMSARM was made available in 2003, hundreds of maritime owner/operators have used it to support their vulnerability assessments. However, usage has fallen off significantly, in part, due to the fact that other tools have become available, and TSA has determined that it is not necessary to continue to support it.

Issued in Arlington, Virginia, on May 10, 2012.

Kelly Hoggan,

Assistant Administrator, Office of Security Capabilities.

[FR Doc. 2012–11857 Filed 5–15–12; 8:45 am]

BILLING CODE 9110–05–P

[1] The MTSA defines a TSI as ''a security incident that results in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area.''

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Collection of Qualitative Feedback Through Focus Groups

ACTION: 30-Day Notice of Information Collection for Office of Management and Budget Review and Request for Comments.

SUMMARY: The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection notice was previously published in the **Federal Register** on February 8, 2012, at 77 FR 6573, allowing for a 60-day public comment period. USCIS/did not receive any comments in connection with the 60-day notice.

DATES: The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until June 15, 2012. This process is conducted in accordance with 5 CFR 1320.10.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief Regulatory Coordinator, Regulatory Coordination Division, Office of Policy and Strategy, 20 Massachusetts Avenue, Washington, DC 20529–2020. Comments may also be submitted to DHS via facsimile to 202–272–0997 or via email at *uscisfr.comment@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via email at *oira_submission@omb.eop.gov.* When submitting comments by email, please make sure to add ''1615–NEW, Collection of Qualitative Feedback through Focus Groups'' in the subject box.

Note: The address listed in this notice should only be used to submit comments concerning this information collection. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of your individual case, please check ''My Case Status'' online at: *https://egov.uscis.gov/cris/*

Dashboard.do, or call the USCIS National Customer Service Center at 1–800–375–5283.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection Request:* New collection.

(2) *Title of the Form/Collection:* Collection of Qualitative Feedback through Focus Groups.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No Agency Form Number; U.S. Citizenship and Immigration Services (USCIS).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households; Business or other for-profit. The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback USCIS means information that provides useful insights on perceptions and opinions, but not responses to statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide information on customer and stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, and/or focus attention on areas where communication, training, or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders and contribute directly to the improvement of program management. Feedback collected under this generic clearance will provide useful information, but it will not be generalized to the overall population. This data collection will not be used to generate quantitative information that is designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* Focus Group with Stakeholders, 500 respondents × 1.5 hours per response = 750 hours; Focus Group with Immigrants, 500 respondents × 1.5 hours per response = 750 hours. Total annual hours burden = 1,500 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 1,500 Hours.

If you need a copy of the information collection instrument with supplementary documents, or need additional information, please visit *http://www.regulations.gov.*

We may also be contacted at: USCIS, Regulatory Coordination Division, Office of Policy and Strategy, 20 Massachusetts Avenue NW., Washington, DC 20529–2020; Telephone 202–272–1470.

Dated: May 10, 2012.

Sunday A. Aigbe,

Acting Chief Regulatory Coordinator, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2012–11778 Filed 5–15–12; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–R–2012–N005; FXRS12650800000–123–FF08R0000]

Don Edwards San Francisco Bay National Wildlife Refuge, Alameda, Santa Clara, and San Mateo Counties, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments: draft comprehensive conservation plan/environmental assessment.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service) announce the availability of a Draft Comprehensive Conservation Plan (CCP) and Environmental Assessment (EA) for the Don Edwards San Francisco Bay National Wildlife Refuge for public review and comment. The CCP/EA, prepared under the National Wildlife Refuge System Improvement Act of 1997, and in accordance with the National Environmental Policy Act of 1969, describes how the Service proposes to manage the Refuge for the next 15 years. Draft compatibility determinations for several existing and proposed uses are also available for review and public comment with the Draft CCP/EA.

DATES: To ensure consideration, we must receive your written comments by July 2, 2012.

ADDRESSES: Send your comments or requests for more information by any of the following methods.

Email: sfbaynwrc@fws.gov. Include ''Don Edwards SFB CCP'' in the subject line of the message.

Fax: Attn: Winnie Chan, (510) 792–5828.

U.S. Mail: San Francisco Bay National Wildlife Refuge Complex, 1 Marshlands Road, Fremont, CA 94555.

In-Person Drop-off: You may drop off comments during regular business hours, please call (510) 792–0222 for directions.

FOR FURTHER INFORMATION CONTACT: Winnie Chan, Refuge Planner, or Eric Mruz, Refuge Manager, at (510) 792–0222 or *sfbaynwrc@fws.gov*

SUPPLEMENTARY INFORMATION: The National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee), which amended the National Wildlife Refuge System Administration Act of 1966, requires the Service to develop a CCP for each national wildlife refuge. The purpose in developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, environmental education and interpretation. We will review and update the CCP at least every 15 years

in accordance with the Improvement Act.

We initiated the CCP/EA for the Don Edwards San Francisco Bay National Wildlife Refuge in October 2009. We then hosted a series of pre-scoping meetings on October 28, 2009; November 3, 2009; and November 5, 2009. An average of 10 persons attended each of the meetings. A number of individuals provided comments at the meetings, via email, and by postal mail. Following the pre-scoping meetings, we published a **Federal Register** notice of intent on February 23, 2010 (75 FR 8106), to solicit additional comments. To announce the scoping comment period and provide background on the Refuge, we also mailed a planning update to over 200 agency and organization representatives, including members of the public, media, and elected representatives of each of the counties where the Refuge is located. The scoping comment period ended on April 26, 2010. We also created a web page (*http://www.fws.gov/cno/refuges/DonEdwards/DonEdwards.cfm*) to share information. In 2011, we hosted another series of public meetings on April 13, 2011 and April 19, 2011 to present management alternatives. An average of 15 persons attended each of these meetings. Verbal comments were recorded at these public meetings, and written comments were submitted via postal mail and email.

Background

Don Edwards San Francisco Bay National Wildlife Refuge was established in 1972 pursuant to the Act Authorizing the Transfer of Certain Real Property for Wildlife, or other purposes (16 U.S.C. 667b), Endangered Species Act of 1973 (16 U.S.C. 1537), and the Fish and Wildlife Act of 1956 (16 U.S.C. 742f(b)(1)). The roughly 30,000-acre Don Edwards San Francisco Bay National Wildlife Refuge, located in the Alameda, Santa Clara, and San Mateo Counties of California, consists of several noncontiguous parcels divided into four management units that surround the southern edge of the San Francisco Bay. The Refuge was established to preserve and enhance wildlife habitat, protect migratory birds, and protect threatened and endangered species. The Refuge also provides opportunities for wildlife-dependent recreation and environmental education.

Alternatives

The Draft CCP/EA identifies and evaluates three alternatives for managing the Don Edwards San Francisco Bay National Wildlife Refuge for the next 15 years. The alternative that appears to best meet the Refuge purposes is identified as the preferred alternative. The preferred alternative is identified based on the analysis presented in the Draft CCP/EA, which may be modified following the completion of the public comment period based on comments received from other agencies, Tribal governments, nongovernmental organizations, or individuals.

Under Alternative A (no action alternative), the current management actions, including habitat management, wildlife management, wildlife-oriented recreation opportunities, and environmental education, would be continued. Habitat and wildlife management activities would include habitat restoration projects, invasive weed management, wildlife surveys, and predator management. We would continue to offer a wide variety of wildlife-oriented recreation opportunities to the public. The environmental education program would continue to provide a variety of environmental education activities for local schools. Also, we would continue to use volunteers to support the biology, visitor services, environmental education, and management needs of the Refuge. Current staffing and funding would remain the same. Existing restoration and management plans (e.g., Bair Island Restoration and Management Plan and South Bay Salt Pond Restoration Project) would continue to be implemented. We would also actively work with partners and willing sellers to acquire the remaining lands within the approved acquisition boundary.

Alternative B (preferred alternative) includes those actions in Alternative A. In addition, we would moderately expand biological, habitat management, visitor service, and environmental education activities. Additional biological activities would include increased survey efforts on priority listed species as well as baseline surveys on native focal flora and fauna. Habitat would be improved for the western snowy plover and California least tern. Other habitat management activities include completion and implementation of a comprehensive weed management plan, additional improvement to tidal marsh areas such as enhancement and restoration of the marsh-upland ecotone, and addressing climate change impacts on Refuge resources. The National Wildlife Refuge System's priority public uses—wildlife observation, photography, hunting, fishing, interpretation, and environmental education—would all be enhanced on the Refuge. Refuge staff would expand the volunteer program to recruit new volunteers and provide additional learning opportunities to existing volunteers. Additional staff and funding would be needed to implement this alternative.

Under Alternative C, in addition to tasks included in Alternative A and B, we would increase the frequency of baseline monitoring, investigate reintroduction of listed species (e.g., the salt marsh harvest mouse and the California clapper rail), survey for listed plant species, and encourage additional research to benefit listed species. Additional habitat management actions would include further tidal marsh improvements, more aggressive control of invasive weeds, revegetation of grassland areas, and more aggressive enhancement and restoration of the marsh-upland ecotone. All priority public uses would be further improved, such as opening additional acreage to hunting, installing additional interpretive signage, constructing an auto tour route, and enhancing the environmental education program offsite, beyond the existing field trip experience. Additional staff and funding would be needed to implement this alternative.

Review and Comment

Copies of the Draft CCP/EA may be obtained by writing to Winnie Chan (see **ADDRESSES**). Copies of the Draft CCP/EA may be viewed at the same address and local libraries. The Draft CCP/EA will also be available for viewing and downloading online at: *http://www.fws.gov/cno/refuges/DonEdwards/DonEdwards.cfm.*

Comments on the Draft CCP/EA should be addressed to Winnie Chan (see **ADDRESSES**).

At the end of the review and comment period for this Draft CCP/EA, comments will be analyzed by the Service and addressed in the Final CCP/EA. 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.

Alexandra Pitts,

Acting Regional Director, Pacific Southwest Region, Sacramento, California.

[FR Doc. 2012–11811 Filed 5–15–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Advisory Board for Exceptional Children

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Meeting.

SUMMARY: The Bureau of Indian Education (BIE) is announcing that the Advisory Board for Exceptional Children (Advisory Board) will hold its next meeting in Albuquerque, New Mexico. The purpose of the meeting is to meet the mandates of the Individuals with Disabilities Education Act of 2004 (IDEA) for Indian children with disabilities.

DATES: The Advisory Board will meet on Sunday, June 3, 2012, from 8:30 a.m. to 4:30 p.m. and Monday, June 4, 2012, from 8:30 a.m. to 4:30 p.m. Mountain Time.

ADDRESSES: The meeting will be held at the Hyatt Place Albuquerque/Uptown, 6901 Arvada Avenue North East, Albuquerque, New Mexico; telephone number (505) 872–9000.

FOR FURTHER INFORMATION CONTACT: Sue Bement, Designated Federal Officer, Bureau of Indian Education, Albuquerque Service Center, Division of Performance and Accountability, 1011 Indian School Road NW., Suite 332, Albuquerque, NM 87104; telephone number (505) 563–5274.

SUPPLEMENTARY INFORMATION: In accordance with the Federal Advisory Committee Act, the BIE is announcing that the Advisory Board will hold its next meeting in Albuquerque, New Mexico. The Advisory Board was established under the Individuals with Disabilities Act of 2004 (20 U.S.C. 1400 *et seq.*) to advise the Secretary of the Interior, through the Assistant Secretary—Indian Affairs, on the needs of Indian children with disabilities. The meetings are open to the public.

The following items will be on the agenda:

- Report from Supervisory Education Specialist, Special Education, BIE, Division of Performance and Accountability
- Report from BIE Director's Office
- Updates from the BIE, Division of Performance and Accountability
- Group work on Priority Topics
- Public Comment (via conference call, June 4, 2012, meeting only*)
- BIE Advisory Board-Advice and Recommendations

* During the June 4, 2012, meeting, time has been set aside for public comment via conference call from 1:30–2:00 p.m. Mountain Time. The call-in information is: Conference Number 1–888–417–0376, Passcode 1509140.

New Members:

- Dr. Jonathon Stout, Board Chair
- Dr. Marilyn Johnson
- Paula Seanez
- Luvette Russell
- Beth Ann Tepper
- Dr. Billie Jo Kipp
- Dr. Rosemarie Dugi
- Rozalyn Hoff, Alternate
- Morgan James Peters, Alternate

Dated: May 7, 2012.

Donald E. Laverdure,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 2012–11886 Filed 5–15–12; 8:45 am]

BILLING CODE 4310–6W–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Water Act

Notice is hereby given that on May 10, 2012, a proposed Consent Decree in *United States* v. *City of Unalaska and State of Alaska,* Civ. A. No. 3:11–cv–00133–HRH, was lodged with the United States Court for the District of Alaska.

The Complaint filed in this action in June 2011 asserts claims against the City of Unalaska under Sections 301 and 309 of the Clean Water Act, 33 U.S.C. 1311 and 1319, arising from the City's violation of the National Pollution Discharge Elimination System Permit (''NPDES Permit'') for its wastewater treatment plant. The Consent Decree requires the City to construct and operate four upgrades to its wastewater treatment system that will enable it to comply with the permit, which include upgrading its treatment plant to chemically enhanced primary treatment. In addition to requiring the City to comply with the NPDES permit, the consent decree requires the City to adhere to a limit for fecal coliform bacteria that is more stringent than the permit limit until at least mid-2020. The City also will pay a $340,000 civil penalty.

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. 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* v. *the City of Unalaska and State of Alaska,* 90–5–1–1–09888.

During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or 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 $10.75 (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.

Robert E. Maher, Jr.,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2012–11791 Filed 5–15–12; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

Notice is hereby given that on May 10, 2012, a proposed Consent Decree in *United States of America* v. *American Sugar Refining, Inc.,* Civil Action No. 12–CV–01408 was lodged with the United States District Court for the District of Maryland.

The Consent Decree in this Clean Air Act enforcement action against American Sugar Refining, Inc. (''ASR'') resolves allegations by the Environmental Protection Agency, asserted in a complaint filed together with the Consent Decree, under section 113(b) of the Clean Air Act, 42 U.S.C. 7413(b), for alleged environmental violations at ASR's sugar refinery in Baltimore, Maryland. In addition to the payment of a $200,000 civil penalty, the settlement requires ASR to perform injunctive relief to reduce emission of nitrogen oxides (NO_X), including installing ultra low-NO_X burners and meeting certain emission rate limits.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. 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 American Sugar, D.J. Ref. 90–5–2–1–09801.

During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, at *http://www.usdoj.gov/enrd/Consent_Decrees.html*. A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or 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 $11.00 (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.

Robert Brook,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2012–11785 Filed 5–15–12; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

[CPCLO Order No. 011–2012]

Privacy Act of 1974; System of Records

AGENCY: Office of Community Oriented Policing Services, United States Department of Justice.

ACTION: Notice of a New System of Records.

SUMMARY: Pursuant to the Privacy Act of 1974 (5 U.S.C. 552a), the United States Department of Justice, Office of Community Oriented Policing Services (COPS) proposes to establish a new system of records entitled, ''COPS Online Ordering System,'' (JUSTICE/COPS–002). The system collects contact and order information from individuals who request free knowledge resource products on community policing topics through the COPS Resource Information Center (RIC), or other COPS-related information, via requests through the COPS Web site, or requests sent in by mail, telephone, or fax.

DATES: In accordance with 5 U.S.C. 552a(e)(4) and (11), the public is given a 30-day period in which to comment. Therefore, please submit any comments by June 15, 2012.

ADDRESSES: The public, Office of Management and Budget (OMB), and Congress are invited to submit any comments to the Department of Justice, ATTN: Privacy Analyst, Office of Privacy and Civil Liberties, U.S. Department of Justice, National Place Building, 1331 Pennsylvania Ave. NW., Suite 1000, Washington, DC 20530–0001, or by facsimile to (202) 307–0693.

FOR FURTHER INFORMATION CONTACT: Barton Day, Information Technology Operations Manager, COPS, 145 N Street NE., Washington, DC 20530, phone (202) 305–8840.

SUPPLEMENTARY INFORMATION: Community policing is a philosophy that promotes organizational strategies, which support the systematic use of partnerships and problem-solving techniques to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime.

COPS advances the practice of community policing in America's state, local, and tribal law enforcement agencies through information-sharing and grant-making. The knowledge resource products available from COPS provide essential information in the form of best practices for law enforcement, problem-oriented policing guides addressing crime-related problems, and publications composed by subject-matter experts on topics ranging from bullying in schools to computer mapping.

The COPS Online Ordering System facilitates the distribution of free COPS knowledge resource products and updates (e.g., publications, best practices guides, etc.) on a wide range of community policing topics, and it authorizes system users to effectively search, integrate, display, maintain and record information in support of the COPS's community policing mission.

In accordance with 5 U.S.C. 552a(r), the Department has provided a report to OMB and to Congress on this system of records.

Dated: April 30, 2012.

Nancy C. Libin,

Chief Privacy and Civil Liberties Officer, United States Department of Justice.

JUSTICE/COPS–002

SYSTEM NAME:

COPS Online Ordering System.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at two locations where the Office of Community Oriented Policing Services (COPS) operations are supported: 145 N Street NE., Washington, DC 20530, and 1151–D Seven Locks Road, Rockville, MD 20854. Contact information is listed on the COPS Internet Web site, *http://www.cops.usdoj.gov/*.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who submit requests via online order forms on the COPS Internet Web site, or via other means such as mail, telephone, or fax, to receive free COPS knowledge resource products or other COPS-related information. These individuals include, but are not limited to, law enforcement officers, government officials, scholars, researchers, and members of the general public.

CATEGORIES OF RECORDS IN THE SYSTEM:

The COPS Online Ordering System contains contact information for requesters, including names, organizations, organization types, agency types, titles, street addresses, phone numbers, fax numbers, and email addresses. The system also contains order information, such as a requester's preferences regarding products or information to be provided and future updates.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

General authority for COPS mission activities includes the Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. 103–322) and the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Pub. L. 109–162). Specifically, COPS is authorized to provide technical assistance to States, units of local government, Indian tribal governments, and public and private entities to advance community policing.

PURPOSE(S):

The system collects contact and order information from individuals who request specific COPS knowledge resource products, or other COPS-related information, for the purpose of assisting COPS in managing and responding to such requests.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b), all or a portion of the records or information contained in this system may be disclosed outside the Department as a routine use pursuant to

5 U.S.C. 552a(b)(3) under the circumstances and for the purposes described below, to the extent such disclosures are compatible with the purposes for which the information was collected:

A. To the news media and the public, including disclosures pursuant to 28 CFR 50.2, unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

B. To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

C. To the National Archives and Records Administration for purposes of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To appropriate agencies, entities, and persons when (1) the Department suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

E. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the federal government, when necessary to accomplish an agency function related to this system of records.

F. To a former employee of the Department for purposes of: Responding to an official inquiry by a federal, state, or local government entity or professional licensing authority, in accordance with applicable Department regulations; or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes where the Department requires information and/or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

G. Where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law—criminal, civil, or regulatory in nature—the relevant records may be referred to the appropriate federal, state, local, territorial, tribal, or foreign law enforcement authority or other appropriate entity charged with the responsibility for investigating or prosecuting such violation or charged with enforcing or implementing such law.

H. To such recipients and under such circumstances and procedures as are mandated by federal statute or treaty.

I. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body, when the Department of Justice determines that the records are arguably relevant to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored on paper and/or in electronic form. Records are stored securely in accordance with applicable executive orders, statutes, and agency implementation recommendations.

RETRIEVABILITY:

Information is retrieved by an individual's name or other identifying information.

SAFEGUARDS:

Information in this system is safeguarded in accordance with appropriate laws, rules, and policies, including the Department's automated systems security and access policies. Records and technical equipment are maintained in buildings with restricted access. The required use of password protection identification features and other system protection methods also restrict access. Access is limited to those who have an official need for access to perform their official duties. Electronic records are accessed only by authorized personnel with accounts on the COPS computer network. Additionally, direct access to certain information may be restricted depending on a user's role and responsibility within the system. Paper records are safeguarded in accordance with appropriate laws, rules, and policies based on the classification and handling restrictions of the particular document.

RETENTION AND DISPOSAL:

Records are destroyed three years after the calendar year in which the information was collected, Disposition Authority N1–060–10–023, item 001.

SYSTEM MANAGER(S) AND ADDRESS:

Information Technology Operations Manager, COPS, 145 N Street NE., Washington, DC 20530.

NOTIFICATION PROCEDURE:

Same as the Record Access Procedures, below.

RECORDS ACCESS PROCEDURES:

Requests for access to a record in this system must be in writing and should be addressed to the System Manager named above. The envelope and the letter should be clearly marked ''Privacy Act Request.'' Requests for access to records must comply with the Department's Privacy Act regulations set forth in 28 CFR subpart D (Protection of Privacy and Access to Individual Records Under the Privacy Act of 1974). The request should include a description of the records sought and must include sufficient information to verify identity, including the requester's full name, current address, and place and date of birth. The request must be signed and dated and either notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain a form (Form DOJ–361) for use in certification of your identity by writing to the FOIA/PA Mail Referral Unit, Department of Justice, Room 115, LOC Building, Washington, DC 20530–0001, or by visiting the Department's Web site at *http://www.justice.gov/oip/forms/cert_ind.pdf*.

CONTESTING RECORD PROCEDURES:

Requests for amendment or correction of information maintained in the system should be directed to the System Manager and follow the Record Access Procedures provided above. In addition, the request should also comply with the provisions of 28 CFR 16.46, which include requirements to identify each particular record in question and state clearly and concisely what information is being contested, the reasons for contesting it, and the proposed amendment or correction desired. (Individuals may also submit changes to contact or order information by

updating their account information on the COPS Web site.)

RECORD SOURCE CATEGORIES:

Information contained in this system is provided by individuals who submit requests for COPS knowledge resource products or other COPS-related information.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2012–11908 Filed 5–15–12; 8:45 am]

BILLING CODE 4410–01–P

DEPARTMENT OF LABOR

Employment and Training Administration

Amended Certification Regarding Eligibility to Apply for Worker Adjustment Assistance

TA–W–81,004
Pace American Enterprises, Inc., Mcgregor, Texas
TA–W–81,004A
Pace American Enterprises, Inc., Middlebury, Indiana
TA–W–81,004B
Pace American Enterprises, Inc., Fitzgerald, Georgia
TA–W–81,004C
Pace American Enterprises, Inc., Lebanon, Oregon
TA–W–81,004D
Pace American Enterprises, Inc., Hurricane, Utah
TA–W–81,004E
Pace American Enterprises, Inc., Bannockburn, Illinois

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor (Department) issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on December 21, 2012, applicable to workers and former workers of Pace American Enterprises, Inc., McGregor, Texas (TA–W–81,004); Pace American Enterprises, Inc., Middlebury, Indiana (TA–W–81,004A); Pace American Enterprises, Inc., Fitzgerald, Georgia (TA–W–81,004B); Pace American Enterprises, Inc., Lebanon, Oregon (TA–W–81,004C); and Pace American Enterprises, Inc., Hurricane, Utah (TA–W–81,004D). The Department's notice of determination was published in the **Federal Register** on January 12, 2012 (76 FR 1951). The workers are engaged in the production of cargo trailers.

At the request of a State Workforce Office, the Department reviewed the certification for workers of Pace American Enterprises, Inc. (subject firm). The State Workforce Office reports that some workers' wages were reported under Pace American Enterprises, Inc., Bannockburn, Illinois.

The Department has received confirmation that there was corporate office at Bannockburn, Illinois and that workers have been separated from that location as well as the other subject firm locations.

The amended notice applicable to TA–W–81,004 is hereby issued as follows:

All workers of Pace American Enterprises, Inc., McGregor, Texas (TA–W–81,004), Pace American Enterprises, Inc., Middlebury, Indiana (TA–W–81,004A), Pace American Enterprises, Inc., Fitzgerald, Georgia (TA–W–81,004B), Pace American Enterprises, Inc., Lebanon, Oregon (TA–W–81,004C), Pace American Enterprises, Inc., Hurricane, Utah (TA–W–81,004D), and Pace American Enterprises, Inc., Bannockburn, Illinois (TA–W–81,004E), who became totally or partially separated from employment on or after February 13, 2010, through December 21, 2013, and all workers in the group threatened with total or partial separation from employment on December 21, 2011 through December 21, 2012, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC this 8th day of May, 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–11813 Filed 5–15–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–72,121]

Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance; General Motors Company, Formerly Known as General Motors Corporation; Technical Center, Including On-Site Leased Workers From Aerotek, Bartech Group, CDI Professional Services, EDS/HP Enterprise Services, Engineering Labs, Inc., Global Technology Associates Limited, G–Tech Professional Staffing, Inc., Jefferson Wells, Kelly Services, Inc., Optimal, Inc., Populus Group, RCO Engineering, Inc., Tek Systems, Modern Engineering/Professional Services, General Physics Corporation, Entech, and Pinnacle Technical Resources, Inc.; Excluding Workers of the Global Purchasing and Supply Chain Division, Warren, MI

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on April 30, 2010, applicable to workers of General Motors Company, formerly known as General Motors Corporation, Technical Center, including on-site leased workers from Aerotek, Bartech Group, EDI Professional Services, EDS/HP Enterprise Services, Engineering Labs, Inc., Global Technology Associates Limited, G–Tech Professional Staffing, Inc., Jefferson Wells, Kelly Services, Inc., Optimal, Inc., Populus Group, RCO Engineering, Inc., and Tek Systems, excluding workers of The Global Purchasing and Supply Chain Division, Warren, Michigan. The notice was published in the **Federal Register** on May 28, 2010 (75 FR 30070). The notice was amended on December 6, 2010, January 13, 2011, and May 20, 2011 to include on-site leased workers from Modern Engineering/Professional Services, General Physics Corporation, and Entech.

At the request of the state, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the engineering and other technical support of automotive production at affiliated plants.

Further review revealed that workers leased from Pinnacle Technical Resources, Inc. were employed on-site at the Warren, Michigan location of General Motors Company, formerly known as General Motors Corporation, Technical Center. The Department has determined that on-site workers from Pinnacle Technical Resources, Inc. were sufficiently under the control of General Motors Company to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Pinnacle Technical Resources, Inc. working on-site at the Warren, Michigan location of General Motors Company, formerly known as General Motors Corporation, Technical Center.

The amended notice applicable to TA–W–72,121 is hereby issued as follows:

All workers of General Motors Company, formerly known as General Motors Corporation, Technical Center, including on-site leased workers from Aerotek, Bartech Group, CDI Professional Services, EDS/HP Enterprise Services, Engineering Labs, Inc., Global Technology Associates Limited, G–Tech Professional Staffing, Inc., Jefferson Wells, Kelly Services, Inc., Optimal, Inc., Populus Group, RCO Engineering, Inc., Tek Systems, Modern Engineering/Professional Services, General Physics Corporation,

Entech, and Pinnacle Technical Resources, Inc., excluding workers of the Global Purchasing and Supply Chain Division, Warren, Michigan, who became totally or partially separated from employment on or after August 14, 2008, through April 30, 2012, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 8th day of May 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–11814 Filed 5–15–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–80,502; TA–W–80,502A]

Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance; Lexis Nexis, a Subsidiary of Reed Elsevier, Quality & Metrics Department, Including Employees Located Throughout the United States Who Report to Miamisburg, OH; Lexis Nexis, a Subsidiary of Reed Elsevier, Quality & Metrics Department, Including Employees Located Throughout the United States Who Report to Colorado Springs, CO

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on February 3, 2012, applicable to workers of Lexis Nexis, Quality & Metrics Department, including workers located throughout the United States who report to, Miamisburg, Ohio (TA–W–80,502). On March 14, 2012, the Department issued an amended certification to cover workers of Lexis Nexis, Quality & Metrics Department, including workers located throughout the United States who report to, Colorado Springs, Colorado (TA–W–80,502A).

At the request of a state workforce official, the Department reviewed the certification for workers of the subject firm.

The worker groups include workers who report wages under the parent company, Reed Elsevier.

The amended notice applicable to TA–W–80,205 and TA–W–80205A is hereby issued as follows:

All workers of Lexis Nexis, a subsidiary of Reed Elsevier, Quality & Metrics Department, including workers located throughout the United States who report to, Miamisburg, Ohio (TA–W–80,502) and workers of Lexis Nexis, a subsidiary of Reed Elsevier, Quality & Metrics Department, including workers located throughout the United States who report to, Colorado Springs, Colorado (TA–W–80,502A), who became totally or partially separated from employment on or after October 6, 2010 through February 3, 2014, and all workers in the group threatened with total or partial separation from employment on February 3, 2012 through February 3, 2012, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 8th day of May, 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–11817 Filed 5–15–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–80,490]

Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance; Novartis Pharmaceuticals Corporation, Primary Care Business Unit (Sales) Division, Including On-Site Leased Workers From Inventiv Health, Ashfield Healthcare, and Pro Unlimited and Including Off-Site Workers In Illinois Reporting to This Location, East Hanover, NJ

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on January 6, 2012, applicable to workers of Novartis Pharmaceuticals Corporation, Primary Care Business Unit (Sales) Division, East Hanover, New Jersey. The Department's notice of determination was published in the **Federal Register** on January 24, 2012 (77 FR 3501).

At the request of an Illinois State Workforce Official, the Department reviewed the certification for workers of the subject firm. The workers are engaged in sales of pharmaceuticals.

New information shows that worker separations have occurred involving employees under the control of the subject firm working off-site in Illinois. The employees support the Novartis Pharmaceuticals Corporation, Primary Care Business Unit (Sales) Division, East Hanover, New in sales of pharmaceuticals.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by increased imports.

Based on these findings, the Department is amending this certification to include employees of the subject firm's employees working off-site in Illinois.

The amended notice applicable to TA–W–80,490 is hereby issued as follows:

All workers of Novartis Pharmaceuticals Corporation, Primary Care Business Unit (Sales) Division, East Hanover, New Jersey, including employees working off-site in Illinois, who became totally or partially separated from employment on or after October 3, 2010, through January 6, 2014, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 4th day of May 2012.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–11816 Filed 5–15–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–75,009C]

Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance; The UBS Group, a Division of UBS AG, Also Known as UBS Financial Services, Inc. and/or UBS–GLB (Americas), Inc., Formerly Known as Brinson Partners, Inc., Corporate Center Division, Group Technology Infrastructure Services, Infrastructure Service Delivery Compute Investment Bank, Global Asset Management, Formerly Known as Distributed Systems and Storage, Including Workers Throughout the United States Reporting to Jersey City, NJ

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on February 8, 2010, applicable to workers of The UBS Group, a division of UBS AG, also known as UBS Financial Services, Inc., and/or UBS–GLB (Americas), Inc.,

Corporate Center Division, Group Technology Infrastructure Services, Distributed Systems and Storage Group, Chicago, Illinois. The workers provide information technology services.

The notice was published in the **Federal Register** on December 8, 2010 (75 FR 76488).

At the request of the company, the Department reviewed the certification for workers of the subject firm.

New information shows that, due to an organizational change within UBS Services LLC, the unit formerly known as Group Technology Infrastructure Services, Distributed Systems and Storage is currently known as Group Technology Infrastructure Services, Infrastructure Service Delivery Compute Investment Bank, Global Asset Management. Workers of Group Technology Infrastructure Services, Infrastructure Service Delivery Compute Investment Bank, Global Asset Management worked from home offices and remote locations throughout the United States and reported to the Jersey City, New Jersey facility.

Accordingly, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by a shift in information technology services to a foreign country.

The amended notice applicable to TA–W–75,009 is hereby issued as follows:

All workers of UBS Group, a division of UBS AG, also known as UBS Financial Services, Inc., and/or UBS–GLB (Americas), Inc., Corporate Center Division, Group Technology Infrastructure Services, Distributed Systems and Storage Group, Stamford, Connecticut (TA–W–75,009); UBS Group, a division of UBS AG, also known as UBS Financial Services, Inc., and/or UBS–GLB (Americas), Inc., formerly known as Brinson Partners, Inc., Corporate Center Division, Group Technology Infrastructure Services, Distributed Systems and Storage Group, Chicago, Illinois (TA–W–75,009A); and UBS Group, a division of UBS AG, also known as UBS Financial Services, Inc., and/or UBS–GLB (Americas), Inc., Corporate Center Division, Group Technology Infrastructure Services, Distributed Systems and Storage Group, New York, New York (TA–W–75,009B), who became totally or partially separated from employment on or after December 15, 2009, through February 8, 2013, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 8th day of May, 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–11815 Filed 5–15–12; 8:45 am]

BILLING CODE 4510–FN–P

LEGAL SERVICES CORPORATION

Sunshine Act Meetings

Notice

DATE AND TIME: The Legal Services Corporation's Board of Directors will meet telephonically May 21, 2012. The meeting will commence at 1:30 p.m., Eastern Daylight Time, and will continue until the conclusion of the Board's agenda.

LOCATION: F. William McCalpin Conference Center, Legal Services Corporation Headquarters, 3333 K Street NW., Washington, DC 20007.

PUBLIC OBSERVATION: Members of the public who are unable to attend in person but wish to listen to the public proceedings may do so by following the telephone call-in directions provided below but are asked to keep their telephones muted to eliminate background noises. To avoid disrupting the meeting, please refrain from placing the call on hold. From time to time, the presiding Chair may solicit comments from the public.

CALL-IN DIRECTIONS FOR OPEN SESSIONS:

- Call toll-free number: 1–866–451–4981;
- When prompted, enter the following numeric pass code: 5907707348;
- When connected to the call, please immediately ''Mute'' your telephone.

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

1. Approval of Agenda.
2. Approval of minutes of the Board's meeting of April 15–16, 2012.
3. Consider and act on the Board of Directors' transmittal to accompany the Inspector General's Semiannual Report to Congress for the period of November 1, 2011 through March 31, 2012.
4. Consider and act on a draft Strategic Plan for the Corporation.
5. Public comment.
6. Consider and act on other business.
7. Consider and act on motion to adjourn the meeting.

CONTACT PERSON FOR INFORMATION: Katherine Ward, Executive Assistant to the Vice President & General Counsel, at (202) 295–1500. Questions may be sent by electronic mail to *FR_NOTICE_QUESTIONS@lsc.gov.*

NON-CONFIDENTIAL MEETING MATERIALS: Non-confidential meeting materials will be made available in electronic format at least 24 hours in advance of the meeting on the LSC Web site, at *http://www.lsc.gov/board-directors/meetings/board-meeting-notices/non-confidential-materials-be-considered-open-session.*

ACCESSIBILITY: LSC complies with the American's with Disabilities Act and Section 504 of the 1973 Rehabilitation Act. Upon request, meeting notices and materials will be made available in alternative formats to accommodate individuals with disabilities. Individuals who need other accommodations due to disability in order to attend the meeting in person or telephonically should contact Katherine Ward, at (202) 295–1500 or *FR_NOTICE_QUESTIONS@lsc.gov*, at least 2 business days in advance of the meeting. If a request is made without advance notice, LSC will make every effort to accommodate the request but cannot guarantee that all requests can be fulfilled.

Dated: May 11, 2012.

Mattie Cohan,

Senior Assistant General Counsel.

[FR Doc. 2012–11920 Filed 5–14–12; 11:15 am]

BILLING CODE 7050–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978 (Pub. L. 95–541)

AGENCY: National Science Foundation.

ACTION: Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978, Public Law 95–541.

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. 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 June 15, 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 requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

The applications received are as follows:

Permit Application: 2013–004

1. *Applicant:* Paul J. Ponganis, Center for Marine Biotechnology and Biomedicine, Scripps Institution of Oceanography, 9500 Gilman Drive, Mail Code 0204, University of California, San Diego, La Jolla, CA 92093–0204.

Activity for Which Permit Is Requested

Enter Antarctic Specially Protected Areas (ASPA's). The applicant plans to conduct aerial census surveys of the Emperor penguin colonies at Cape Crozier (ASPA #124), Beaufort Island (ASPA #105), Cape Colbeck, Franklin Island, Cape Washington, and Cape Roget. The purpose of the census surveys is to evaluate the status of the Ross Sea population because a) annual chick counts at Coulman Island, the largest emperor colony in the world, have declined by 50% in 2010 and 2011, b) the Beaufort Island colony produced no chicks in 2011 probably due to the lack of sea ice, and c) the Cape Colbeck colony in 2011 appears to have doubled in size in 2011 (>20,000 adults). These changes raise questions as to a possible decline in the Ross Sea population and/or a shift in the distribution of breeding adults to Cape Colbeck. Such changes are potentially secondary to dates of sea ice formation, stability of sea ice, and/or availability of prey.

Location

Cape Crozier (ASPA #124), Beaufort Island (ASPA #105), Cape Colbeck, Franklin Island, Cape Washington, and Cape Roget.

Dates

October 1, 2012 to December 30, 2012.

Nadene G. Kennedy,

Permit Officer, Office of Polar Programs.

[FR Doc. 2012–11840 Filed 5–15–12; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS) Meeting of the ACRS Subcommittee on Fukushima; Notice of Meeting

The ACRS Subcommittee on Fukushima will hold a meeting on May 22, 2012, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Tuesday, May 22, 2012—8:30 a.m. until 12:00 p.m.

The Subcommittee will review the guidance documents associated with the Near Term Task Force Recommendation 2.3. The Subcommittee will hear presentations by and hold discussions with the NRC staff, the Nuclear Energy Institute, and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Derek Widmayer (Telephone 301–415–7366 or Email: *Derek.Widmayer@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64126–64127).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: May 10, 2012.

Cayetano Santos,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–11867 Filed 5–15–12; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Product Change—First-Class Package Service 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: May 16, 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 May 9, 2012, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add First-Class Package Service Contract 2 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2012–18, CP2012–24.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–11782 Filed 5–15–12; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—First-Class Package Service 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: May 16, 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 May 9, 2012, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add First-Class Package Service Contract 3 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2012–19, CP2012–25.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–11783 Filed 5–15–12; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—First-Class Package Service 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: May 16, 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 May 9, 2012, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add First-Class Package Service Contract 6 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2012–22, CP2012–28.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–11786 Filed 5–15–12; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—First-Class Package Service 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: May 16, 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 May 9, 2012, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add First-Class Package Service Contract 4 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2012–20, CP2012–26.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–11788 Filed 5–15–12; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—First-Class Package Service 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: May 16, 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 May 9, 2012, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add First-Class Package Service Contract 5 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2012–21, CP2012–27.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–11784 Filed 5–15–12; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—First-Class Package Service 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: May 16, 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 May 9, 2012, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add First-Class Package Service Contract 7 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2012–23, CP2012–29.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–11787 Filed 5–15–12; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66957; File No. 4–533]

Joint Industry Plan; Notice of Filing and Immediate Effectiveness of Amendment to the National Market System Plan for the Selection and Reservation of Securities Symbols To Add BOX Options Exchange LLC as a Party Thereto

May 10, 2012.

Pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 608 thereunder,[2] notice is hereby given that on May 7, 2012, the BOX Options Exchange LLC (''BOX'') filed with the Securities and Exchange Commission (''Commission'') an amendment to the National Market System Plan for the Selection and Reservation of Securities Symbols (''Symbology Plan'' or ''Plan'').[3] The

[1] 15 U.S.C. 78k–1(a)(3).

[2] 17 CFR 242.608.

[3] On November 6, 2008, the Commission approved the Symbology Plan that was originally proposed by the Chicago Stock Exchange, Inc. (''CHX''), The Nasdaq Stock Market, Inc. (''Nasdaq''), National Association of Securities Dealers, Inc. (''NASD'') (n/k/a Financial Industry Regulatory Authority, Inc. (''FINRA'')), National

amendment proposes to add BOX as a party to the Symbology Plan. The Commission is publishing this notice to solicit comments on the proposed amendment from interested persons.

I. Description and Purpose of the Amendment

The current parties to the Symbology Plan are BATS Exchange, Inc. (''BATS''), NASDAQ OMX BX, Inc. (''BSE''), Chicago Board Options Exchange, Incorporated (''CBOE''), CHX, EDGA Exchange, Inc. (''EDGA''), EDGX Exchange, Inc. (''EDGX''), FINRA, the International Securities Exchange, LLC (''ISE''), Nasdaq, New York Stock Exchange LLC (''NYSE''), NYSE Arca, Inc. (''NYSE Arca''), NYSE Amex LLC (''NYSE Amex'') (f/k/a NYSE Alternext US LLC'' (''NYSE Alternext'')), NSX and Phlx.[4] The proposed amendment to the Symbology Plan would add BOX as a party to the Symbology Plan. A self-regulatory organization (''SRO'') may become a party to the Symbology Plan if it satisfies the requirements of Section I(c) of the Plan. Specifically, an SRO may become a party to the Symbology Plan if: (i) It maintains a market for the listing or trading of Plan Securities[5] in accordance with rules approved by the Commission, which securities are identified by one, two, or three character symbols, on the one hand, or four or five character symbols, on the other hand, in each case prior to any suffix or special conditional identifier; (ii) it signs a current copy of the Plan; and (iii) it pays to the other parties a proportionate share of the aggregate development costs, based upon the number of symbols reserved by the new party during the first twelve (12) months of such party's membership.[6]

BOX has submitted a signed copy of the Symbology Plan to the Commission in accordance with the requirement set forth in the Symbology Plan regarding new parties to the plan. Additionally, BOX represented that it maintains a market for the listing or trading of Plan Securities. Finally, BOX has agreed to pay all costs required by BOX pursuant to the Symbology Plan, including its proportionate share of the aggregate development costs previously paid by the other parties to the Processor.

II. Effectiveness of the Proposed Symbology Plan Amendment

The foregoing proposed Symbology Plan amendment has become effective pursuant to Rule 608(b)(3)(iii)[7] because it involves solely technical or ministerial matters. At any time within sixty days of the filing of the amendment, the Commission may summarily abrogate the amendment and require that it be refiled pursuant to paragraph (b)(1) of Rule 608,[8] if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the amendment 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 4–533 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 4–533. 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, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of BOX. 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 4–533 and should be submitted on or before June 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–11792 Filed 5–15–12; 8:45 am]

BILLING CODE 8011–01–P

Stock Exchange, Inc. (''NSX''), and Philadelphia Stock Exchange, Inc. (''Phlx''), subject to certain changes. *See* Securities Exchange Act Release No. 58904, 73 FR 67218 (November 13, 2008) (File No. 4–533).

[4] On November 18, 2008, ISE filed with the Commission an amendment to the Plan to add ISE as a member to the Plan. *See* Securities and Exchange Act Release No. 59024 (November 26, 2008), 73 FR 74538 (December 8, 2008) (File No. 4–533). On December 22, 2008, NYSE, NYSE Arca, and NYSE Alternext (''NYSE Group Exchanges'') and CBOE filed with the Commission amendments to the Plan to add the NYSE Group Exchanges and CBOE as members to the Plan. *See* Securities Exchange Act Release No. 59162 (December 24, 2008), 74 FR 132 (January 2, 2009) (File No. 4–533). On December 24, 2008, BSE filed with the Commission an amendment to the Plan to add BSE as a member to the Plan. *See* Securities Exchange Act Release No. 59187 (December 30, 2008), 74 FR 729 (January 7, 2009) (File No. 4–533). On September 30, 2009, BATS filed with the Commission an amendment to the Plan to add BATS as a member to the Plan. *See* Securities Exchange Act Release No. 60856 (October 21, 2009), 74 FR 55276 (October 27, 2009) (File No. 4–533). On July 7, 2010, EDGA and EDGX filed with the Commission an amendment to the Plan to add EDGA and EDGX, each as a party to the Symbology Plan. *See* Securities Exchange Act Release No. 62573 (July 26, 2010), 75 FR 45682 (August 3, 2010) (File No. 4–533).

[5] ''Plan Securities'' are defined in the Symbology Plan as securities that: (i) Are NMS securities as currently defined in Rule 600(a)(46) under the Act; and (ii) any other equity securities quoted, traded and/or trade reported through an SRO facility.

[6] Sections I(c) and V(a) of the Plan.

[7] 17 CFR 242.608(b)(3)(iii).

[8] 17 CFR 242.608(b)(1).

[9] 17 CFR 200.30–3(a)(29).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66964; File No. SR–NASDAQ–2012–057]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change With Respect to the Authority of NASDAQ or NASDAQ Execution Services To Cancel Orders When a Technical or System Issue Occurs and To Describe the Operation of an Error Account

May 10, 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 April 30, 2012, The NASDAQ Stock Market LLC

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

(''NASDAQ'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ proposes a rule change with respect to the authority of the Exchange or NASDAQ Execution Services (''NES'') to cancel orders when a technical or system issue occurs and to describe the operation of an error account for NES. NASDAQ will implement the proposed change upon approval by the Commission. The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com,* at NASDAQ's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 4758 by adding a new paragraph (d) that addresses the authority of the Exchange or NES to cancel orders when a technical or systems issue occurs and to describe the operation of an error account for NES.[3]

NES is the approved routing broker of the Exchange, subject to the conditions listed in Rule 4758. The Exchange relies on NES to provide outbound routing services from itself to routing destinations of NES (''routing destinations'').[4] When NES routes orders to a routing destination, it does so by sending a corresponding order in its own name to the routing destination. In the normal course, routed orders that are executed at routing destinations are submitted for clearance and settlement in the name of NES, and NES arranges for any resulting securities positions to be delivered to the member that submitted the corresponding order to the Exchange. From time to time, however, the Exchange and NES encounter situations in which it becomes necessary to cancel orders and resolve error positions.[5]

Examples of Circumstances That May Lead to Canceled Orders

A technical or systems issue may arise at NES, a routing destination, or the Exchange that may cause the Exchange or NES to take steps to cancel orders if the Exchange or NES determines that such action is necessary to maintain a fair and orderly market. The examples set forth below describe some of the circumstances in which the Exchange or NES may decide to cancel orders.

Example 1. If NES or a routing destination experiences a technical or systems issue that results in NES not receiving responses to immediate or cancel (''IOC'') orders that it sent to the routing destination, and that issue is not resolved in a timely manner, NES or the Exchange would seek to cancel the routed orders affected by the issue.[6] For instance, if NES experiences a connectivity issue affecting the manner in which it sends or receives order messages to or from routing destinations, it may be unable to receive timely execution or cancellation reports from the routing destinations, and NES or the Exchange may consequently seek to cancel the affected routed orders. Once the decision is made to cancel those routed orders, any cancellation that a member submitted to the Exchange on its initial order during such a situation would be honored.[7]

Example 2. If the Exchange experiences a systems issue, the Exchange may take steps to cancel all outstanding orders affected by that issue and notify affected members of the cancellations. In those cases, the Exchange would seek to cancel any routed orders related to the members' initial orders.

Examples of Circumstances That May Lead to Error Positions

In some instances, the technical or systems issue at NES, a routing destination, the Exchange, or a non-affiliate third party Routing Broker may also result in NES acquiring an error position that it must resolve. The examples set forth below describe some of the circumstances in which error positions may arise.

Example A. Error positions may result from routed orders that the Exchange or NES attempts to cancel but that are executed before the routing destination receives the cancellation message or that are executed because the routing destination is unable to process the cancellation message. Using the situation described in Example 1 above, assume that the Exchange seeks to cancel orders routed to a routing destination because it is not receiving timely execution or cancellation reports from the routing destination. In such a situation, NES may

[3] NES is a facility of the Exchange. Accordingly, under Rule 4758, the Exchange is responsible for filing with the Commission rule changes and fees relating to NES's functions. In addition, the Exchange is using the phrase ''NES or the Exchange'' in this rule filing to reflect the fact that a decision to take action with respect to orders affected by a technical or systems issue may be made in the capacity of NES or the Exchange depending on where those orders are located at the time of that decision.

From time to time, the Exchange also uses non-affiliate third-party broker-dealers to provide outbound routing services (*i.e.,* third-party Routing Brokers). In those cases, orders are submitted to the third-party Routing Broker through NES, the third-party Routing Broker routes the orders to the routing destination in its name, and any executions are submitted for clearance and settlement in the name of NES so that any resulting positions are delivered to NES upon settlement. As described above, NES normally arranges for any resulting securities positions to be delivered to the member that submitted the corresponding order to the Exchange. If error positions (as defined in proposed Rule 4758(d)(2)) result in connection with the Exchange's use of a third-party Routing Broker for outbound routing, and those positions are delivered to NES through the clearance and settlement process, NES would be permitted to resolve those positions in accordance with proposed Rule 4758(d). If the third-party Routing Broker received error positions in connection with its role as a routing broker for the Exchange, and the error positions were not delivered to NES through the clearance and settlement process, then the third-party Routing Broker would resolve the error positions itself, and NES would not be permitted to accept the error positions, as set forth in proposed Rule 4758(d)(2)(B).

[4] The Exchange has authority to receive inbound routes of equities orders by NES from NASDAQ OMX BX (''BX'') and the NASDAQ OMX PSX (''PSX'') of NASDAQ OMX PHLX on a pilot basis. *See* Securities Exchange Act Release No. 65554 (October 13, 2011), 76 FR 65311 (October 20, 2011) (SR–NASDAQ–2011–142).

[5] The examples described in this filing are not intended to be exclusive. Proposed Rule 4758(d) would provide general authority for the Exchange or NES to cancel orders in order to maintain fair and orderly markets when technical and systems issues are occurring, and Rule 4758(d) also would set forth the manner in which error positions may be handled by the Exchange or NES. The proposed rule change is not limited to addressing order cancellation or error positions resulting only from the specific examples described in this filing.

[6] In a normal situation (*i.e.,* one in which a technical or systems issue does not exist), NES should receive an immediate response to an IOC order from a routing destination, and would pass the resulting fill or cancellation on to the Exchange member. After submitting an order that is routed to a routing destination, if a member sends an instruction to cancel that order, the cancellation is held by the Exchange until a response is received from the routing destination. For instance, if the routing destination executes that order, the execution would be passed on to the member and the cancellation instruction would be disregarded.

[7] If a member did not submit a cancellation to the Exchange, however, that initial order would remain ''live'' and thus be eligible for execution or posting on the Exchange, and neither the Exchange nor NES would treat any execution of that initial order or any subsequent routed order related to that initial order as an error.

still receive executions from the routing destination after connectivity is restored, which it would not then allocate to members because of the earlier decision to cancel the affected routed orders. Instead, NES would post those positions into its error account and resolve the positions in the manner described below.

Example B. Error positions may result from an order processing issue at a routing destination. For instance, if a routing destination experienced a systems problem that affects its order processing, it may transmit back a message purporting to cancel a routed order, but then subsequently submit an execution of that same order (*i.e.,* a locked-in trade) to The Depository Trust & Clearing Corporation (''DTCC'') for clearance and settlement. In such a situation, the Exchange would not then allocate the execution to the member because of the earlier cancellation message from the routing destination. Instead, NES would post those positions into its error account and resolve the positions in the manner described below.

Example C. Error positions may result if NES receives an execution report from a routing destination but does not receive clearing instructions for the execution from the routing destination. For instance, assume that a member sends the Exchange an order to buy 100 shares of ABC stock, which causes NES to send an order to a routing destination that is subsequently executed, cleared, and closed out by that routing destination, and the execution is ultimately communicated back to that member. On the next trading day (T+1), if the routing destination does not provide clearing instructions for that execution, NES would still be responsible for settling that member's purchase, but would be left with a short position in its error account.[8] NES would resolve the position in the manner described below.

Example D. Error positions may result from a technical or systems issue that causes orders to be executed in the name of NES that are not related to NES's function as the Exchange's routing broker and are not related to any corresponding orders of members. As a result, NES would not be able to assign any positions resulting from such an issue to members. Instead, NES would post those positions into its error account and resolve the positions in the manner described below.

Example E. Error positions may result from a technical or systems issue through which the Exchange does not receive sufficient notice that a member that has executed trades on the Exchange has lost the ability to clear trades through DTCC. In such a situation, the Exchange would not have valid clearing information, which would prevent the trade from being automatically processed for clearance and settlement on a locked-in basis. Accordingly, NES would assume that member's side of the trades so that the counterparties can settle the trades. NES would post those positions into its error account and resolve the positions in the manner described below.

Example F. Error positions may result from a technical or systems issue at the Exchange that does not involve routing of orders through NES. For example, a situation may arise in which a posted quote/order was validly cancelled but the system erroneously matched that quote/order with an order that was seeking to access it. In such a situation, NES would have to assume the side of the trade opposite the order seeking to access the cancelled quote/order. NES would post the position in its error account and resolve the position in the manner described below.

In the circumstances described above, neither the Exchange nor NES may learn about an error position until T+1, either: (1) During the clearing process when a routing destination has submitted to DTCC a transaction for clearance and settlement for which NES never received an execution confirmation; or (2) when a routing destination does not recognize a transaction submitted by NES to DTCC for clearance and settlement. Moreover, the affected members' trade may not be nullified absent express authority under Exchange rules.[9]

Proposed Amendments to Rule 4758

The Exchange proposes to amend Rule 4758 to add new paragraph (d) to address the cancellation of orders due to technical or systems issues and the use of an error account by NES.

Specifically, under paragraph (d)(1) of the proposed rule, the Exchange or NES would be expressly authorized to cancel orders as may be necessary to maintain fair and orderly markets if a technical or systems issue occurred at the Exchange, NES, or a routing destination.[10] The Exchange or NES would be required to provide notice of the cancellation to affected members as soon as practicable.

Paragraph (d)(2) of the proposed rule would permit NES to maintain an error account for the purpose of addressing positions that result from a technical or systems issue at NES, the Exchange, a routing destination, or a non-affiliate third-party Routing Broker that affects one or more orders (''error positions''). By definition, an error position would not include any position that results from an order submitted by a member to the Exchange that is executed on the Exchange and automatically processed for clearance and settlement on a locked-in basis. NES also would not be permitted to accept any positions in its error account from an account of a member and could not permit any member to transfer any positions from the member's account to NES's error account under the proposed rule.[11] However, if a technical or systems issue results in the Exchange not having valid clearing instructions for a member to a trade, NES may assume that member's side of the trade so that the trade can be processed for clearance and settlement on a locked-in basis.[12]

Under paragraph (d)(3), in connection with a particular technical or systems issue, NES or the Exchange would be permitted to either (i) assign all resulting error positions to members, or (ii) have all resulting error positions liquidated, as described below. Any determination to assign or liquidate error positions, as well as any resulting assignments, would be required to be made in a nondiscriminatory fashion.

NES or the Exchange would be required to assign all error positions resulting from a particular technical or systems issue to the applicable members affected by that technical or systems issue if NES or the Exchange:

- Determined that it has accurate and sufficient information (including valid clearing information) to assign the positions to all of the applicable members affected by that technical or systems issue;
- Determined that it has sufficient time pursuant to normal clearance and settlement deadlines to evaluate the information necessary to assign the

[8] To the extent that NES incurred a loss in covering its short position, it would submit a reimbursement claim to that routing destination.

[9] *See, e.g.,* Rule 11890 (regarding clearly erroneous executions).

[10] Such a situation may not cause the Exchange to declare self-help against the routing destination pursuant to Rule 611 of Regulation NMS. If the Exchange or NES determines to cancel orders routed to a routing destination under proposed Rule 4758(d), but does not declare self-help against that routing destination, the Exchange would continue to be subject to the trade-through requirements in Rule 611 with respect to that routing destination.

[11] The purpose of this provision is to clarify that NES may address error positions under the proposed rule that are caused by a technical or systems issue, but that NES may not accept from a member positions that are delivered to the member through the clearance and settlement process, even if those positions may have been related to a technical or systems issue at NES, the Exchange, a routing destination of NES, or a non-affiliate third-party Routing Broker. This provision would not apply, however, to situations like the one described in Example C in which NES incurred a short position to settle a member's purchase, as the member did not yet have a position in its account as a result of the purchase at the time of NES's action (*i.e.,* NES's action was necessary for the purchase to settle into the member's account). Similarly, the provision would not apply to situations like the one described in Example F, where a system issue caused one member to receive an execution for which there was not an available contraparty, in which case action by NES would be necessary for the position to settle into that member's account. Moreover, to the extent a member receives locked-in positions in connection with a technical or systems issue, that member may seek to rely on NASDAQ Rule 4626 if it experiences a loss. That rule provides members with the ability to file claims against the Exchange for ''losses directly resulting from the [NASDAQ] systems' actual failure to correctly process an order, Quote/Order, message, or other data, provided the Nasdaq Market Center has acknowledged receipt of the order, Quote/Order, message, or data.''

[12] *See* Example E above.

positions to all of the applicable members affected by that technical or systems issue; and

• Had not determined to cancel all orders affected by that technical or systems issue.

For example, a technical or systems issue of limited scope or duration may occur at a routing destination, and the resulting trades may be submitted for clearance and settlement by such routing destination to DTCC. If there were a small number of trades, there may be sufficient time to match positions with member orders and avoid using the error account.

There may be scenarios, however, where NES determines that it is unable to assign all error positions resulting from a particular technical or systems issue to all of the affected members, or determines to cancel all affected routed orders. For example, in some cases, the volume of questionable executions and positions resulting from a technical or systems issue might be such that the research necessary to determine which members to assign those executions to could be expected to extend past the normal settlement cycle for such executions. Furthermore, if a routing destination experiences a technical or systems issue after NES has transmitted IOC orders to it that prevents NES from receiving responses to those orders, NES or the Exchange may determine to cancel all routed orders affected by that issue. In such a situation, NES or the Exchange would not pass on to the members any executions on the routed orders received from the routing destination.

The proposed rule also would require NES to liquidate error positions as soon as practicable.[13] In liquidating error positions, NES would be required to provide complete time and price discretion for the trading to liquidate the error positions to a third-party broker-dealer and could not attempt to exercise any influence or control over the timing or methods of trading to liquidate the error positions.[14] NES also would be required to establish and enforce policies and procedures reasonably designed to restrict the flow of confidential and proprietary information between the third-party broker-dealer and NES/the Exchange associated with the liquidation of the error positions.

Under proposed paragraph (d)(4), NES and the Exchange would be required to make and keep records to document all determinations to treat positions as error positions and all determinations for the assignment of error positions to members or the liquidation of error positions, as well as records associated with the liquidation of error positions through the third-party broker-dealer.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[15] of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5),[16] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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, and it is not designed to permit unfair discrimination among customers, brokers, or dealers. The Exchange believes that this proposal is in keeping with those principles since NES's or the Exchange's ability to cancel orders during a technical and systems issue and to maintain an error account facilitates the smooth and efficient operations of the market. Specifically, the Exchange believes that allowing NES or the Exchange to cancel orders during a technical or systems issue would allow the Exchange to maintain fair and orderly markets. Moreover, the Exchange believes that allowing NES to assume error positions in an error account and to liquidate those positions, subject to the conditions set forth in the proposed amendments to Rule 4758, would be the least disruptive means to correct these errors, except in cases where NES can assign all such error positions to all affected members of the Exchange. Overall, the proposed amendments are designed to ensure full trade certainty for market participants and to avoid disrupting the clearance and settlement process. The proposed amendments are also designed to provide a consistent methodology for handling error positions in a manner that does not discriminate among members. The proposed amendments are also consistent with Section 6 of the Act insofar as they would require NES to establish controls to restrict the flow of any confidential information between the third-party broker and NES/the Exchange associated with the liquidation of error positions.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ 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

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be 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 Number SR–NASDAQ–2012–057 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.

[13] If NES determines in connection with a particular technical or systems issue that some error positions can be assigned to some affected members but other error positions cannot be assigned, NES would be required under the proposed rule to liquidate all such error positions (including those positions that could be assigned to the affected members).

[14] This provision is not intended to preclude NES from providing the third-party broker with standing instructions with respect to the manner in which it should handle all error account transactions. For example, NES might instruct the broker to treat all orders as ''not held'' and to attempt to minimize any market impact on the price of the stock being traded.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

All submissions should refer to File Number SR–NASDAQ–2012–057. 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2012–057, and should be submitted on or before June 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–11819 Filed 5–15–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66958; File No. SR–NSX–2012–07]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Clarify the Purpose of, and Statutory Basis for, the May 1, 2012 Changes to the NSX Fee and Rebate Schedule

May 10, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 9, 2012, National Stock Exchange, Inc. filed with the Securities and Exchange Commission (''Commission'') the proposed rule change, as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comment on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

National Stock Exchange, Inc. (''NSX®'' or ''Exchange'') is proposing to clarify the purpose of, and statutory basis for, its amended Fee and Rebate Schedule (the ''Fee Schedule'') issued pursuant to Exchange Rule 16.1(c) that went into effect on May 1, 2012 pursuant to SR–NSX–2012–06 to adjust the take fee and rebates for certain orders executed in the Exchange's Automatic Execution Mode, adjust the rebates and for certain orders executed in the Exchange's Order Delivery Mode, and re-introduce a market data revenue rebate sharing program, and to reinstate the fee changes that were implemented in SR–NSX–2012–06 which was withdrawn on May 8, 2012.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nsx.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

With this rule change, the Exchange is proposing to more clearly state the purpose of, and statutory basis for, its amended Fee Schedule that went into effect on May 1, 2012, pursuant to SR–NSX–2012–06, and to reinstate the fee changes that were implemented in SR–NSX–2012–06 which was withdrawn on May 8, 2012. No changes to the Fee Schedule are proposed other than those described in SR–NSX–2012–06.[3]

The fee change proposed by SR–NSX–2012–06 modified the Fee Schedule in four respects. First, SR–NSX–2012–06 amended the rebates applicable to liquidity adding order executions in securities priced at least one dollar in the Exchange's Automatic Execution Mode of order interaction (''AutoEx''). Second, SR–NSX–2012–06 amended the take fee applicable to order executions in securities priced at least one dollar in AutoEx. Third, SR–NSX–2012–06 amended the rebate tiers applicable to order executions in securities priced at least one dollar in the Exchange's Order Delivery Mode of order interaction (''Order Delivery''). Finally, with respect to the rebate adjustments in both AutoEx and Order Delivery, SR–NSX–2012–06 re-established a market data rebate sharing program with Exchange ETP Holders. Each of the changes is further addressed below.

1. Rebates for Executions in Securities Priced at Least One Dollar in AutoEx

SR–NSX–2012–06 proposed to modify the rebates applicable to liquidity adding order executions in securities priced one dollar or more in AutoEx. These changes can be found in Section I of the Fee Schedule.

Prior to May 1, 2012, a flat $0.0026 rebate per share applied to an ETP Holder's displayed liquidity adding order executions of securities of at least one dollar in AutoEx. Under SR–NSX–2012–06, progressively greater rebates, of $0.0024, $0.0026, $0.0027, $0.0028 or $0.0029 per share, plus 50% of market data revenues attributable to such orders if the second (or higher) volume tier is achieved, apply depending on an ETP Holder's ''Average Daily Volume'' (''ADV'') (as such term is further discussed below). A $0.0024 per share rebate (with no market data revenue sharing) applies to an ETP Holder's AutoEx, dollar or higher displayed order executions that add liquidity where the ETP Holder's ADV is less than 500,000 shares; a $0.0026 per share rebate (plus 50% market data revenue sharing, as further described below) applies to an ETP Holder's AutoEx, dollar or higher displayed order executions that add liquidity where the ETP Holder's ADV is at least 500,000 shares but less than 1,500,000 shares; a $0.0027 per share rebate (plus 50% market data revenue sharing) applies to an ETP Holder's AutoEx, dollar or higher displayed order executions that add liquidity where the ETP Holder's ADV is at least 1,500,000 shares but less than 5,000,000 shares; a $0.0028 per share rebate (plus 50% market data revenue sharing) applies to an ETP Holder's AutoEx, dollar or higher displayed order executions that add liquidity where the ETP Holder's ADV is at least 5,000,000 shares but less than 10,000,000 shares; and a $0.0029 per share rebate (plus 50% market data revenue sharing) applies to an ETP Holder's AutoEx, dollar or higher

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] As a result of this filing, the fee changes that were implemented on May 1, 2012 will continue uninterrupted despite the withdrawal of SR–NSX–2012–06.

displayed orders that add liquidity where the ETP Holder's ADV is at least 10,000,000 shares.

SR–NSX–2012–06 also introduced the term ''ADV'', as defined in Endnote 3. Endnote 3 provides that ''ADV'' means, with respect to an ETP Holder, the number of shares such ETP Holder has executed on average per trading day (excluding partial trading days) in Auto-Ex or Order Delivery, as applicable, across all tapes in securities priced at least one dollar on NSX for the calendar month (or partial month, as applicable) in which the executions occurred. Endnote 3 further clarifies that ''ADV'', as used with respect to AutoEx, shall mean only those executed shares of the ETP Holder that are submitted in AutoEx mode and that ADV, as used with respect to Order Delivery, shall mean only those executed shares of the ETP Holder that are submitted in Order Delivery mode. The definition of ''ADV'' as proposed was derived from the previously defined term ''Liquidity Adding ADV'', which defined term was eliminated. The term ''ADV'' differs from ''Liquidity Adding ADV'' in that: (i) ADV captures both liquidity adding and taking volume (whereas Liquidity Adding ADV captured only liquidity adding volume); (ii) ADV is limited to volumes in AutoEx or Order Delivery depending on the rebate or take fee that is being calculated, i.e., the rebates in AutoEx only measure for purposes of ADV those executions of orders that the ETP Holder has submitted in AutoEx mode, and the rebates in Order Delivery only measure for purposes of ADV those executions of orders that the ETP Holder has submitted in Order Delivery mode (whereas Liquidity Adding ADV captured volumes in both modes of order interaction); and (iii) ADV does not include sub-dollar securities for any purpose (whereas Liquidity Adding ADV carved out sub-dollar securities only with respect to rebates in order delivery, notwithstanding that no rebate or taking volume tiers previously applied in AutoEx).

2. Take Fee for Execution of Securities Priced at Least One Dollar in AutoEx

Prior to May 1, 2012, a flat fee of $0.0030 per share applied to order executions that take liquidity in securities of at least one dollar in AutoEx. SR–NSX–2012–06 offered a progressively lower take fee of $0.0030, $0.0029, $0.0028, or $0.0026 per share depending on an ETP Holder's ADV. A $0.0030 per share take fee applies to an ETP Holder's AutoEx, dollar or higher order executions that take liquidity where the ETP Holder's ADV is less than 5,000,000 shares; a $0.0029 per share take fee applies to an ETP Holder's AutoEx, dollar or higher order executions that take liquidity where the ETP Holder's ADV is at least 5,000,000 shares but less than 10,000,000 shares; a $0.0028 per share take fee applies to an ETP Holder's AutoEx, dollar or higher order executions that take liquidity where the ETP Holder's ADV is at least 10,000,000 shares but less than 20,000,000 shares; and a $0.0026 per share take fee applies to an ETP Holder's AutoEx, dollar or higher order executions that take liquidity where the ETP Holder's ADV is at least 20,000,000 shares. As noted above, ADV with respect to the take fee is calculated to include only the ETP Holder's volumes in AutoEx and excludes sub-dollar securities.

3. Rebates for Executions of Displayed Orders of Securities Priced at Least One Dollar in Order Delivery

As previously reflected in Section II of the Fee Schedule, for all liquidity adding displayed orders of securities priced at least one dollar in Order Delivery, the Exchange prior to May 1, 2012 offered an $0.0008 per share rebate for each Order Delivery displayed order execution that adds liquidity where an ETP Holder's Liquidity Adding ADV was less than 15 million, or a $0.0024 per share rebate for each such order execution where an ETP Holder's Liquidity Adding ADV was at least 15 million. Under SR–NSX–2012–06, progressively greater rebates, of $0.0008, $0.0024 or $0.0027 per share, plus 25% of market data revenues attributable to such orders if the third volume tier is achieved or 50% of market data revenues if the fourth volume tier is achieved, applies depending on an ETP Holder's ADV. A $0.0008 per share rebate (with no market data revenue sharing) applies to an ETP Holder's Order Delivery, dollar or higher displayed order executions that add liquidity where the ETP Holder's ADV is less than 15,000,000 shares; a $0.0024 per share rebate (with no market data revenue sharing) applies to an ETP Holder's Order Delivery, dollar or higher displayed order executions that add liquidity where the ETP Holder's ADV is at least 15,000,000 shares but less than 25,000,000 shares; a $0.0027 per share rebate (plus 25% market data revenue sharing, as further described below) applies to an ETP Holder's Order Delivery, dollar or higher displayed order executions that add liquidity where the ETP Holder's ADV is at least 25,000,000 shares but less than 30,000,000 shares; and a $0.0027 per share rebate (plus 50% market data revenue sharing) applies to an ETP Holder's Order Delivery, dollar or higher displayed order executions that add liquidity where the ETP Holder's ADV is at least 30,000,000 shares. As noted above, ADV with respect to the rebate in Order Delivery is calculated to include only the ETP Holder's volumes in Order Delivery and excludes sub-dollar securities.

4. Market Data Rebate Sharing Program

Prior to May 1, 2012, market data revenues attributable to quoting and trading were not shared with ETP Holders. Under SR–NSX–2012–06, the Fee Schedule provides a rebate to each ETP Holder equal to a specified percentage (not exceeding 50%) of the market data revenue received by the Exchange that is attributable to such ETP Holder's trading and quoting of displayed orders priced at one dollar or higher in both AutoEx and Order Delivery, provided that the ETP Holder achieves the required ADV during the measurement period as described above.

Explanatory Endnote 8 of the Fee Schedule describes the market data revenue rebate program.[4] Explanatory Endnote 8 makes explicit that no market data rebates will be provided with respect to Zero Display Reserve Orders or securities priced less than a dollar. Explanatory Endnote 8 provides that ETP Holders that have achieved an ADV as required in Section I (AutoEx) or Section II (Order Delivery) of the Fee Schedule shall receive a specified percentage rebate of Tape A, B and C market data revenue attributable to such ETP Holder's trading and quoting of displayed orders priced at or above one dollar.

Explanatory Endnote 8 also established that market data rebates paid or payable to ETP Holders may be modified based on market data revenue adjustments applicable to the Exchange

[4] Explanatory Endnote 8 is based on prior Exchange Rule 16.4, which was deleted from NSX Rules pursuant to a rule change effective April 1, 2011. *See* Securities Exchange Act Release No. 64208 (April 6, 2011), 76 FR 20412 (April 12, 2011) (SR–NSX–2011–02). The Exchange had previously established other iterations of market data rebate sharing programs as approved by the Commission which shared up to 50% of trade and quote market data revenue; *see* Securities Exchange Act Release No. 61103 (December 3, 2009), 74 FR 65576 (December 10, 2009) (SR–NSX–2009–07); Securities Exchange Act Release No. 58935 (November 13, 2008), 73 FR 69703 (November 19, 2008) (SR–NSX–2008–19); and Securities Exchange Act Release No. 56890 (December 4, 2007), 72 FR 70360 (December 11, 2007) (SR–NSX–2007–13). While the volume tiers and certain other aspects of the current market data revenue sharing program differ from prior programs offered by the Exchange, the methodology utilized by the Exchange to calculate an ETP Holder's market data rebates under the program remains identical to the previously utilized methodology.

that may be made from time to time by the securities information processors. Explanatory Endnote 8 also specifies that such rebates shall be paid quarterly and that, notwithstanding the foregoing, an ETP Holder shall not be eligible for market data revenue rebates which aggregate less than $250 per quarter with respect to such ETP Holder. This exception for *de minimis* payments is based the Exchange's belief that the monetary value of such rebate is outweighed by the associated administrative burden both to the Exchange and to the recipient ETP Holders.[5]

Rationale

In adjusting the volume thresholds necessary to achieve progressively higher rebates and lower take fees[6] in SR–NSX–2012–06, the Exchange regarded these changes as necessary to create incentives for ETP Holders to submit increased volumes of orders in to the Exchange and, ultimately, to increase the revenues of the Exchange for the purpose of continuing to adequately fund its regulatory and general business functions. The Exchange believes that these rebate changes, and in particular the reintroduced market data rebate program, will not impair its ability to carry out its regulatory responsibilities. The modifications are reasonable and equitably allocated to those ETP Holders that opt to submit orders in AutoEx (as liquidity provider or taker) and Order Delivery, and are not unfairly discriminatory because ETP Holders are free to elect whether or not to send such orders to the Exchange. In addition, the modifications, by providing a market data rebate for displayed orders only (and not Zero Display Reserve Orders), will tend to incentivize ETP Holders to submit displayed orders over Zero Display Reserve Orders. Based upon the information above, the Exchange believes that the adjustments to the Fee Schedule are consistent with the protection of investors and the public interest.

2. Statutory Basis

The Exchange believes that the rule changes as described in SR–NSX–2012–06 and as clarified herein are consistent with the provisions of Section 6(b) of the Act, in general, and Section 6(b)(4) of the Act,[7] in particular in that each change is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using the facilities of the Exchange.

The changes to the rebates payable for executions in securities priced at least one dollar in AutoEx are reasonable because they are designed to incentivize the submission of such orders and increase order volume on the Exchange. The changes are equitably allocated and not unfairly discriminatory because all qualified ETP Holders are eligible to submit (or not submit) displayed liquidity providing orders of securities priced at least one dollar in AutoEx on the Exchange. The volume adjustments are reasonable methods to incentivize the submission of such orders. All similarly situated members are subject to the same fee structure, and access to the Exchange is offered on terms that are not unfairly-discriminatory. Volume-based rebates and discounts have been widely adopted in the equities markets, and are equitable because they are open to all members on an equal basis and provide rebates that are reasonably related to the value of an exchange's market quality associated with the requirements for the favorable pricing tier.

The changes to the take fees for executions in securities priced at least one dollar in AutoEx are reasonable because they are designed to incentivize the submission of such orders and increase order volume on the Exchange. The changes are equitably allocated and not unfairly discriminatory because all qualified ETP Holders are eligible to submit (or not submit) displayed liquidity taking orders of securities priced at least one dollar in AutoEx on the Exchange. The volume adjustments are reasonable methods to incentivize the submission of such orders. All similarly situated members are subject to the same fee structure, and access to the Exchange is offered on terms that are not unfairly-discriminatory. Volume-based take fee discounts have been widely adopted in the equities markets, and are equitable because they are open to all members on an equal basis and offer fees that are reasonably related to the value of an exchange's market quality associated with the requirements for the favorable pricing tier.

The changes to the rebates payable for executions in securities priced at least one dollar in Order Delivery are reasonable because they are designed to incentivize the submission of such orders and increase order volume on the Exchange. The changes are equitably allocated and not unfairly discriminatory because all qualified ETP Holders are eligible to submit (or not submit) displayed liquidity providing orders of securities priced at least one dollar in Order Delivery on the Exchange. The volume adjustments are reasonable methods to incentivize the submission of such orders. All similarly situated members are subject to the same fee structure, and access to the Exchange is offered on terms that are not unfairly-discriminatory. Volume-based rebates and discounts have been widely adopted in the equities markets, and are equitable because they are open to all members on an equal basis and provide rebates that are reasonably related to the value of an exchange's market quality associated with the requirements for the favorable pricing tier.

The market data rebate sharing program that is applicable to providers of displayed liquidity in both AutoEx and Order Delivery for executions of orders in securities priced at least one dollar is reasonable because it is designed to incentivize ETP Holders to provide such order flow to the Exchange. The changes are equitably allocated and not unfairly discriminatory because all qualified ETP Holders are eligible to submit (or not submit) displayed liquidity providing orders of securities priced at least one dollar in AutoEx and Order Delivery on the Exchange. The volume adjustments are reasonable methods to incentivize the submission of such orders. All similarly situated members are subject to the same fee structure, and access to the Exchange is offered on terms that are not unfairly-discriminatory. Volume-based take discounts in the form of market data rebates have been historically widely adopted in the equities markets, and are equitable because they are open to all members on an equal basis and offer rebates that are reasonably related to the value of an exchange's market quality associated with the requirements for the favorable pricing tier. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other market centers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose

[5] *See* Securities Exchange Act Release No. 57316 (February 12, 2008), 73 FR 9379 (February 20, 2008) (NSX–2008–01).

[6] At the higher ADV volume tiers, the fees and rebate schematic will be inverted in that the displayed liquidity provider rebates will be greater than the liquidity taker fees.

[7] 15 U.S.C. 78f(b)(4).

any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [8] and subparagraph (f)(2) of Rule 19b–4 thereunder.[9] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NSX–2012–07 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NSX–2012–07. 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 10:00 a.m. and 3:00 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–NSX–2012–07 and should be submitted on or before June 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–11793 Filed 5–15–12; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66959; File No. SR–NYSEAmex–2012–28]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the NYSE Amex Equities Price List for Certain Fees Relating To Transactions in Exchange-Listed Securities and Trading Pursuant to Unlisted Trading Privileges of Securities Listed on the Nasdaq Stock Market LLC

May 10, 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 April 30, 2012, NYSE Amex LLC (''NYSE Amex'' or the ''Exchange'') filed with the Securities and Exchange Commission (''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 NYSE Amex Equities Price List (''Price List'') for certain fees relating to transactions in Exchange-listed securities and trading pursuant to unlisted trading privileges (''UTP'') of securities listed on the Nasdaq Stock Market LLC (''Nasdaq''). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Price List for certain fees relating to transactions in Exchange-listed securities and trading pursuant to UTP of securities listed on Nasdaq.

The Exchange proposes to charge a transaction fee of $0.0005 for at the opening and at the opening only orders for Exchange-listed securities with a per share price of $1.00 or more. In addition, the Exchange proposes to charge a transaction fee of 0.3% of the total dollar value of the transaction for at the opening and at the opening only orders for Exchange-listed securities with a per share price below $1.00. The aggregate fees for at the opening and at the opening only orders with a per share price of $1.00 or more and a per share price below $1.00 will be capped at $15,000 per month per member organization. Currently there are no charges for these transactions. The proposed fees will be the same as those currently charged on the New York Stock Exchange (''NYSE'') for at the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

opening and at the opening only orders.[3]

Additionally, the Exchange proposes certain changes to equity transaction fees and credits for Nasdaq securities traded pursuant to UTP. For fees and credits applicable to market participants, the Exchange proposes to eliminate the $0.0030 equity per share credit per transaction when adding liquidity, including displayed and non-displayed orders, when the share price is $1.00 or more.[4] The Exchange proposes to change the $0.0027 equity per share charge for all other transactions (i.e., when taking liquidity) with a per share price of $1.00 or more to a $0.0003 equity per share credit and eliminate the fee for all other transactions with a per share price below $1.00. The Exchange proposes to reduce the equity per share credit per transaction for displayed liquidity when adding liquidity in orders that originally display a minimum of 2,000 shares with a trading price of at least $5.00 per share, as long as the order is not cancelled in an amount that would reduce the original displayed amount below 2,000 shares, from $0.0036 to $0.0020.

For fees and credits applicable to Designated Market Makers (''DMMs'') for transactions in Nasdaq securities traded pursuant to UTP, the Exchange proposes to reduce the equity per share credit per transaction when adding liquidity from $0.0031 to $0.0020 when the share price is $1.00 or more. The Exchange proposes to change the $0.0027 equity per share charge for all other transactions with a per share price of $1.00 or more to a $0.0003 equity per share credit and eliminate the fee for all other transactions with a per share price below $1.00. The Exchange proposes to reduce the equity per share credit per transaction for the displayed portion of s-Quotes when adding liquidity in s-Quotes that display 2,000 shares or more at the time of execution with a trading price of at least $5.00 per share from $0.0036 to $0.0020.

For fees and credits applicable to Supplemental Liquidity Providers (''SLPs'') for transactions in Nasdaq securities traded pursuant to UTP, the Exchange proposes to reduce the equity per share credit per transaction when adding liquidity, if the SLP meets quoting requirements pursuant to Rule 107B, from $0.0031 to $0.0005 when the share price is $1.00 or more. The Exchange proposes to eliminate the $0.0030 equity per share credit per transaction when adding liquidity, if the SLP does not meet the quoting requirement pursuant to Rule 107B when the share price is $1.00 or more. Lastly, the Exchange proposes to reduce the equity per share credit per transaction for displayed liquidity when adding liquidity in orders that originally display a minimum of 2,000 shares with a trading price of at least $5.00 per share, as long as the order is not cancelled in an amount that would reduce the original displayed amount below 2,000 shares, from $0.0036 to $0.0020.

The Exchange also proposes to make certain conforming changes to the footnotes in the Price List.

The Exchange proposes to make the rule change operative on May 1, 2012.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[5] in general, and Section 6(b)(4) of the Act,[6] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange believes that the proposed fee changes are equitably allocated because all similarly situated DMMs, SLPs, and market participants will be subject to the same fee structure, and access to the Exchange's market is offered on fair and non-discriminatory terms.

With respect to the fees for at the opening and at the opening only orders for Exchange-listed securities, the Exchange believes that the proposed changes are reasonable because both the fees and the fee cap are the same as those charged by the NYSE.[7] With respect to the proposed elimination of transaction fees for market participants and DMMs that take liquidity in UTP securities at all prices and creation of a new credit for taking liquidity in UTP securities priced at $1.00 or more, the Exchange believes that the change will attract more volume to the Exchange from market participants and DMMs that are seeking to lower their overall transaction costs and thereby will result in a more competitive market in the trading of Nasdaq securities pursuant to UTP. The Exchange further believes that the proposed elimination or reduction of other credits for market participants, DMMs, and SLPs that add liquidity in UTP securities is appropriate in light of the proposed elimination of the transaction fees and creation of the new credit for taking liquidity.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. The Exchange believes that the proposed rule change reflects this competitive environment because it will broaden the conditions under which customers may qualify for higher liquidity provider credits.

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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[8] of the Act and subparagraph (f)(2) of Rule 19b–4[9] thereunder, because it establishes a due, fee, or other charge imposed by the NYSE Amex.

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.

[3] *See* NYSE Price List 2012, dated March 1, 2012, available at *https://usequities.nyx.com/sites/usequities.nyx.com/files/nyse_price_list_04_01_12.pdf*.

[4] The Exchange also proposes to make conforming changes to reflect that a credit is ''Not Applicable'' rather than ''No Charge.''

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] *See supra* note 4.

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(2).

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–NYSEAmex–2012–28 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–NYSEAmex–2012–28. 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAmex–2012–28 and should be submitted on or before June 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–11794 Filed 5–15–12; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66961; File No. SR–ISE–2012–38]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Transaction Fees and Rebates for Certain Complex Orders Traded on the Exchange

May 10, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 9, 2012, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE is proposing to amend transaction fees and rebates for certain complex orders traded on the Exchange. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange currently assesses per contract transaction fees and rebates to market participants that add or remove liquidity from the Exchange (''maker/taker fees and rebates'') in a number of options classes (the ''Select Symbols'').[3] The Exchange's maker/taker fees and rebates are applicable to regular and complex orders executed in the Select Symbols. The Exchange also currently assesses maker/taker fees and rebates for complex orders in symbols that are in the Penny Pilot program but are not a Select Symbol (Non-Select Penny Pilot Symbols)[4] and for complex orders in all symbols that are not in the Penny Pilot Program (''Non-Penny Pilot Symbols'').[5] The purpose of this proposed rule change is to amend the maker/taker fees and rebates for complex orders in the Non-Select Penny Pilot Symbols traded on the Exchange.

For complex orders in the Non-Select Penny Pilot Symbols, the Exchange currently charges a ''taker'' fee of: (i) $0.34 per contract for ISE Market Maker,[6] Market Maker Plus,[7] Firm Proprietary and Customer (Professional)[8] orders; and (ii) $0.38 per contract for Non-ISE Market Maker[9]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Options classes subject to maker/taker fees are identified by their ticker symbol on the Exchange's Schedule of Fees.

[4] *See* Exchange Act Release No. 65724 (November 10, 2011), 76 FR 71413 (November 17, 2011) (SR–ISE–2011–72).

[5] *See* Exchange Act Release Nos. 66084 (January 3, 2012), 77 FR 1103 (January 9, 2012) (SR–ISE–2011–84); and 66392 (February 14, 2012), 77 FR 10016 (February 21, 2012) (SR–ISE–2012–06).

[6] The term ''Market Makers'' refers to ''Competitive Market Makers'' and ''Primary Market Makers'' collectively. *See* ISE Rule 100(a)(25).

[7] A Market Maker Plus is an ISE Market Maker who is on the National Best Bid or National Best Offer 80% of the time for series trading between $0.03 and $5.00 (for options whose underlying stock's previous trading day's last sale price was less than or equal to $100) and between $0.10 and $5.00 (for options whose underlying stock's previous trading day's last sale price was greater than $100) in premium in each of the front two expiration months and 80% of the time for series trading between $0.03 and $5.00 (for options whose underlying stock's previous trading day's last sale price was less than or equal to $100) and between $0.10 and $5.00 (for options whose underlying stock's previous trading day's last sale price was greater than $100) in premium across all expiration months in order to receive the rebate. The Exchange determines whether a Market Maker qualifies as a Market Maker Plus at the end of each month by looking back at each Market Maker's quoting statistics during that month. If at the end of the month, a Market Maker meets the Exchange's stated criteria, the Exchange rebates $0.10 per contract for transactions executed by that Market Maker during that month. The Exchange provides Market Makers a report on a daily basis with quoting statistics so that Market Makers can determine whether or not they are meeting the Exchange's stated criteria.

[8] A Customer (Professional) is a person who is not a broker/dealer and is not a Priority Customer.

[9] A Non-ISE Market Maker, or Far Away Market Maker (''FARMM''), is a market maker as defined in Section 3(a)(38) of the Securities Exchange Act of 1934, as amended (''Exchange Act''), registered in the same options class on another options exchange.

orders. Priority Customer[10] orders are not charged a ''taker'' fee for complex orders in the Non-Select Penny Pilot Symbols. For complex orders in these same symbols, the Exchange currently charges a ''maker'' fee of: (i) $0.10 per contract for ISE Market Maker, Market Maker Plus, Firm Proprietary and Customer (Professional) orders; and (ii) $0.20 per contract for Non-ISE Market Maker orders. Priority Customer orders are not charged a ''maker'' fee for complex orders in these symbols.

The Exchange now proposes to increase the ''taker'' fee for complex orders in the Non-Select Penny Pilot Symbols to (i) $0.35 per contract for ISE Market Maker, Market Maker Plus, Firm Proprietary and Customer (Professional) orders; and (ii) $0.39 for Non-ISE Market Maker orders.

Further, the Exchange currently provides volume-based tiered rebates for Priority Customer complex orders in the Non-Select Penny Pilot Symbols when these orders trade with non-Priority Customer orders in the complex order book. Specifically, the Exchange currently provides a rebate of $0.26 per contract, per leg, for Priority Customer complex orders when these orders trade with non-Priority Customer complex orders in the complex order book. Additionally, Members who achieve certain average daily volume (ADV) of Priority Customer complex order contracts across all symbols executed during a calendar month are provided a rebate of $0.28 per contract per leg in these symbols, if a Member achieves an ADV of 75,000 Priority Customer complex order contracts, and $0.30 per contract per leg in these symbols, if a Member achieves an ADV of 125,000 Priority Customer complex order contracts. The highest rebate amount achieved by the Member for the current calendar month applies retroactively to all Priority Customer complex order contracts that trade with non-Priority Customer complex orders in the complex order book executed by the Member during such calendar month.

In order to enhance the Exchange's competitive position and to incentivize Members to increase the amount of Priority Customer complex orders in the Non-Select Penny Pilot Symbols that they send to the Exchange, the Exchange now proposes to increase the base amount of the rebate to $0.28 per contract. Additionally, the Exchange proposes to increase the amount of that rebate even further, on a month-by-month and Member-by-Member basis, if such Member achieves an ADV of Priority Customer complex order contracts across all symbols executed during the calendar month, as follows: If the Member achieves an ADV of 75,000 Priority Customer complex order contracts, the rebate amount shall be $0.30 per contract per leg; if the Member achieves an ADV of 125,000 Priority Customer complex order contracts, the rebate amount shall be $0.32 per contract per leg.

Additionally, ISE Market Makers who remove liquidity in the Non-Select Penny Pilot Symbols from the complex order book by trading with orders that are preferenced to them are currently charged $0.32 per contract. With the proposed increase to the ''taker'' fees for complex orders in the Non-Select Penny Pilot Symbols noted above, the Exchange also proposes to increase the fee charged to ISE Market Makers who remove liquidity in these symbols to $0.33 per contract when trading with orders that are preferenced to them.

Further, pursuant to Securities and Exchange Commission (''SEC'') approval, the Exchange currently allows Market Makers to enter quotations for complex order strategies in the complex order book.[11] The Exchange has adopted maker fees that apply to transactions in the complex order book when they interact with Priority Customer orders in a number of option classes, including XOP.[12] Specifically, the Exchange currently charges $0.30 per contract in XOP for ISE Market Maker orders when these orders interact with Priority Customer orders. ISE Market Makers who add liquidity in XOP from the complex order book by trading with Priority Customer orders that are preferenced to them are charged $0.28 per contract. In order to maintain the two cent differential, the Exchange proposes to amend the rule text in footnote 12 on page 20 of the Exchange's Schedule of Fees. Specifically, the Exchange proposes to remove ''(excluding XOP)'' from the first sentence of footnote 12 in order to specify that the two cent discount for ISE Market Makers who remove liquidity from the complex order book by trading with orders that are preferenced to them applies to XOP. Further, the Exchange proposes to remove ''remove or'' from the second sentence of footnote 12 since the discounted fee for ISE Market Makers who remove liquidity in XOP is already addressed in the first sentence. As a result, the second sentence of footnote 12 will only address the fee for ISE Market Makers who add liquidity in XOP from the complex order book by trading with orders that are preferenced to them and that rate is currently $0.28 per contract, which is two cents less than the rate currently charged to non-preferenced ISE Market Makers, which is $0.30 per contract.

2. Statutory Basis

The Exchange believes that its proposal to amend its Schedule of Fees is consistent with Section 6(b) of the Exchange Act[13] in general, and furthers the objectives of Section 6(b)(4) of the Exchange Act[14] in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members and other persons using its facilities. The impact of the proposal upon the net fees paid by a particular market participant will depend on a number of variables, most important of which will be its propensity to interact with and respond to certain types of orders.

The Exchange believes that it is reasonable and equitable to provide rebates for Priority Customer complex orders when these orders trade with Non-Priority Customer complex orders in the complex order book because paying a rebate would continue to attract additional order flow to the Exchange and create liquidity in the symbols that are subject to the rebate, which the Exchange believes ultimately will benefit all market participants who trade on ISE. The Exchange already provides these types of rebates, and is now merely proposing to increase those rebate amounts. The Exchange believes that the proposed rebates are competitive with rebates provided by other exchanges and are therefore reasonable and equitably allocated to those members that direct orders to the Exchange rather than to a competing exchange.

The Exchange believes that its proposal to assess a $0.35 per contract ''taker'' fee for ISE Market Maker, Market Maker Plus, Firm Proprietary and Customer (Professional) orders in the Non-Select Penny Pilot Symbols that are subject to the Exchange's maker/taker fees and rebates is reasonable and equitably allocated because the fee is

[10] A Priority Customer is defined in ISE Rule 100(a)(37A) as a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).

[11] *See* Securities Exchange Act Release No. 65548 (October 13, 2011), 76 FR 64980 (October 19, 2011) (SR–ISE–2011–39).

[12] *See* Securities Exchange Act Release Nos. 65958 (December 15, 2011), 76 FR 79236 (December 21, 2011) (SR–ISE–2011–81); and 66406 (February 16, 2012), 77 FR 10579 (February 22, 2012) (SR–ISE–2012–07). The Exchange notes that XOP is currently a Non-Select Penny Pilot Symbol.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(4).

within the range of fees assessed by other exchanges employing similar pricing schemes and in some cases, is lower that the fees assessed by other exchanges. For example, NASDAQ OMX PHLX, Inc. (''PHLX'') currently charges $0.37 per contract for removing liquidity in complex orders for Specialist orders and $0.38 per contract for Firm and Professional orders.[15] Therefore, while ISE is proposing a fee increase for ISE Market Maker, Market Maker Plus, Firm Proprietary and Customer (Professional) orders, the resulting fee remains lower than the fee currently charged by PHLX for similar orders. ISE's proposed increase for Non-ISE Market Maker orders to $0.39 per contract is a nominal increase over the rate currently in place at PHLX. PHLX currently charges $0.35 per contract for these orders.[16] In addition, the Exchange believes that charging Non-ISE Market Maker orders a higher rate than the fee charged to ISE Market Maker, Firm Proprietary and Customer (Professional) orders is appropriate and not unfairly discriminatory because Non-ISE Market Makers are not subject to many of the non-transaction based fees that these other categories of membership are subject to, e.g., membership fees, access fees, API/Session fees, market data fees, etc. Therefore, it is appropriate and not unfairly discriminatory to assess a higher transaction fee on Non-ISE Market Makers because the Exchange incurs costs associated with these types of orders that are not recovered by non-transaction based fees paid by members.

The Exchange believes that it is reasonable and equitable to provide a two cent discount to ISE Market Makers on preferenced orders as an incentive for them to quote in the complex order book. The Exchange notes that PHLX currently provides a similar discount. Accordingly, ISE Market Makers who remove liquidity in the Non-Select Penny Pilot Symbols from the complex order book will be charged $0.33 per contract when trading with orders that are preferenced to them. For XOP, which is a Non-Select Penny Pilot Symbol, ISE Market Makers who remove liquidity in this symbol from the complex order book by trading with orders that are preferenced to them will also be charged $0.33 per contract while ISE Market Makers who add liquidity in this symbol from the complex order book by trading with Priority Customer orders that are preferenced to them will be charged $0.28 per contract. ISE notes that with this proposed fee change, the Exchange will continue to maintain a two cent differential that was previously in place.

The complex order pricing employed by the Exchange has proven to be an effective pricing mechanism and attractive to Exchange participants and their customers. The Exchange believes that this proposed rule change will continue to attract additional complex order business in the Non-Select Penny Pilot Symbols traded on the Exchange.

The Exchange further believes that the Exchange's maker/taker fees and rebates are not unfairly discriminatory because the fee structure is consistent with fee structures that exist today at other options exchanges. Additionally, the Exchange believes that the proposed fees are fair, equitable and not unfairly discriminatory because the proposed fees are consistent with price differentiation that exists today at other option exchanges. The Exchange operates in a highly competitive market in which market participants can readily direct order flow to another exchange if they deem fee levels at a particular exchange to be excessive. With this proposed fee change, the Exchange believes it remains an attractive venue for market participants to trade complex orders in the Non-Select Penny Pilot Symbols.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act.[17] At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange 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 Exchange 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–ISE–2012–38 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2012–38. 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–

[15] *See* PHLX Fee Schedule at *http://www.nasdaqtrader.com/content/marketregulation/membership/phlx/feesched.pdf.*

[16] *Id.*

[17] 15 U.S.C. 78s(b)(3)(A)(ii).

2012–38 and should be submitted on or before June 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–11795 Filed 5–15–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66962; File No. SR–ISE–2012–35]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Transaction Fees and Rebates for Complex Orders Executed on the Exchange

May 10, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 1, 2012, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE is proposing to amend transaction fees and rebates for complex orders executed on the Exchange. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange currently assesses per contract transaction fees and rebates to market participants that add or remove liquidity from the Exchange (''maker/taker fees and rebates'') in a number of options classes (the ''Select Symbols'').[3] The Exchange's maker/taker fees and rebates are applicable to regular and complex orders executed in the Select Symbols. The Exchange also currently assesses maker/taker fees and rebates for complex orders in symbols that are in the Penny Pilot program but are not a Select Symbol (Non-Select Penny Pilot Symbols) [4] and for complex orders in all symbols that are not in the Penny Pilot Program (''Non-Penny Pilot Symbols'').[5] The purpose of this proposed rule change is to amend maker/taker fees and rebates for complex orders in the Non-Penny Pilot Symbols.

For complex orders in the Non-Penny Pilot Symbols, the Exchange currently charges a ''taker'' fee of: (i) $0.70 per contract for ISE Market Maker,[6] Firm Proprietary and Customer (Professional) [7] orders; and (ii) $0.75 per contract for Non-ISE Market Maker [8] orders. Priority Customer [9] orders are not charged a ''taker'' fee for complex orders in the Non-Penny Pilot Symbols. For complex orders in these same symbols, the Exchange currently charges a ''maker'' fee of $0.10 per contract for ISE Market Maker, Non-ISE Market Maker, Firm Proprietary and Customer (Professional) orders. Priority Customer orders are not charged a ''maker'' fee for complex orders in these symbols.

The Exchange now proposes to increase the ''taker'' fee for complex orders in the Non-Penny Pilot Symbols to (i) $0.73 per contract for ISE Market Maker, Firm Proprietary and Customer (Professional) orders; and (ii) $0.78 per contract for Non-ISE Market Maker orders.

For responses to special orders in the Non-Penny Pilot Symbols,[10] ISE currently charges $0.70 per contract for ISE Market Maker, Firm Proprietary and Customer (Professional) orders. For Non-ISE Market Maker orders, this fee is currently $0.75 per contract. The Exchange now proposes to increase the fee for responses to special orders in the Non-Penny Pilot Symbols to $0.73 per contract for ISE Market Maker, Firm Proprietary and Customer (Professional) orders, and to $0.78 per contract for Non-ISE Market Maker orders.

Further, the Exchange currently provides volume-based tiered rebates for Priority Customer complex orders in the Non-Penny Pilot Symbols when these orders trade with non-Priority Customer orders in the complex order book. Specifically, the Exchange currently provides a rebate of $0.52 per contract, per leg, for Priority Customer complex orders when these orders trade with non-Priority Customer complex orders in the complex order book. Additionally, Members who achieve certain average daily volume (ADV) of Priority Customer complex order contracts across all symbols executed during a calendar month are provided a rebate of $0.54 per contract per leg, if a Member achieves an ADV of 75,000 Priority Customer complex order contracts, and $0.56 per contract per leg, if a Member achieves an ADV of 125,000 Priority Customer complex order contracts. The highest rebate amount achieved by the Member for the current calendar month applies retroactively to all Priority Customer complex order contracts that trade with non-Priority Customer complex orders in the complex order book executed by the Member during such calendar month.

In order to enhance the Exchange's competitive position and to incentivize Members to increase the amount of Priority Customer complex orders that

[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Options classes subject to maker/taker fees are identified by their ticker symbol on the Exchange's Schedule of Fees.

[4] *See* Exchange Act Release No. 65724 (November 10, 2011), 76 FR 71413 (November 17, 2011) (SR–ISE–2011–72).

[5] *See* Exchange Act Release Nos. 66084 (January 3, 2012), 77 FR 1103 (January 9, 2012) (SR–ISE–2011–84); and 66392 (February 14, 2012), 77 FR 10016 (February 21, 2012) (SR–ISE–2012–06).

[6] The term ''Market Makers'' refers to ''Competitive Market Makers'' and ''Primary Market Makers'' collectively. *See* ISE Rule 100(a)(25).

[7] A Customer (Professional) is a person who is not a broker/dealer and is not a Priority Customer.

[8] A Non-ISE Market Maker, or Far Away Market Maker (''FARMM''), is a market maker as defined in Section 3(a)(38) of the Securities Exchange Act of 1934, as amended (''Exchange Act''), registered in the same options class on another options exchange.

[9] A Priority Customer is defined in ISE Rule 100(a)(37A) as a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).

[10] A response to a special order is any contra-side interest submitted after the commencement of an auction in the Exchange's Facilitation Mechanism, Solicited Order Mechanism, Block Order Mechanism and Price Improvement Mechanism. This fee applies to ISE Market Maker, Non-ISE Market Maker, Firm Proprietary, Customer (Professional) and Priority Customer interest.

they send to the Exchange, the Exchange now proposes to increase the base amount of the rebate to $0.57 per contract. Additionally, the Exchange proposes to increase the amount of that rebate even further, on a month-by-month and Member-by-Member basis, if such Member achieves an ADV of Priority Customer complex order contracts across all symbols executed during the calendar month, as follows: if the Member achieves an ADV of 75,000 Priority Customer complex order contracts, the rebate amount shall be $0.59 per contract per leg; if the Member achieves an ADV of 125,000 Priority Customer complex order contracts, the rebate amount shall be $0.61 per contract per leg.

Additionally, ISE Market Makers who remove liquidity in the Non-Penny Pilot Symbols from the complex order book by trading with orders that are preferenced to them are currently charged $0.68 per contract. With the proposed increase to the ''taker'' fees for complex orders in the Non-Penny Pilot Symbols noted above, the Exchange also proposes to increase the fee charged to ISE Market Makers who remove liquidity in these symbols to $0.71 per contract when trading with orders that are preferenced to them in the Non-Penny Pilot Symbols.

2. Statutory Basis

The Exchange believes that its proposal to amend its Schedule of Fees is consistent with Section 6(b) of the Exchange Act [11] in general, and furthers the objectives of Section 6(b)(4) of the Exchange Act [12] in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members and other persons using its facilities. The impact of the proposal upon the net fees paid by a particular market participant will depend on a number of variables, most important of which will be its propensity to interact with and respond to certain types of orders.

The Exchange believes that it is reasonable and equitable to provide rebates for Priority Customer complex orders when these orders trade with Non-Priority Customer complex orders in the complex order book because paying a rebate would continue to attract additional order flow to the Exchange and create liquidity in the symbols that are subject to the rebate, which the Exchange believes ultimately will benefit all market participants who trade on ISE. The Exchange already provides these types of rebates, and is now merely proposing to increase those rebate amounts. The Exchange believes that the proposed rebates are competitive with rebates provided by other exchanges and are therefore reasonable and equitably allocated to those members that direct orders to the Exchange rather than to a competing exchange.

The Exchange believes it is reasonable and equitable to charge ISE Market Maker, Firm Proprietary and Customer (Professional) orders a ''taker'' fee of $0.73 per contract ($0.78 per contract for Non-ISE Market Maker orders) for complex orders in the Non-Penny Pilot Symbols because the Exchange is seeking to recoup the cost associated with paying increased rebates for Priority Customer complex orders. The Exchange further believes it is reasonable and equitable to charge ISE Market Maker, Firm Proprietary and Customer (Professional) orders a fee of $0.73 per contract ($0.78 per contract for Non-ISE Market Maker orders) when such members are responding to special orders because a response to a special order is akin to taking liquidity, thus the Exchange is proposing an identical fee for taking liquidity in the Non-Penny Pilot Symbols. The Exchange believes the proposed fees are also reasonable and equitably allocated because they are within the range of fees assessed by other exchanges employing similar pricing schemes. In addition, the Exchange believes that charging Non-ISE Market Maker orders a higher rate than the fee charged to ISE Market Maker, Firm Proprietary and Customer (Professional) orders is appropriate and not unfairly discriminatory because Non-ISE Market Makers are not subject to many of the non-transaction based fees that these other categories of membership are subject to, *e.g.,* membership fees, access fees, API/Session fees, market data fees, *etc.* Therefore, it is appropriate and not unfairly discriminatory to assess a higher transaction fee on Non-ISE Market Makers because the Exchange incurs costs associated with these types of orders that are not recovered by non-transaction based fees paid by members.

The Exchange believes that it is reasonable and equitable to provide a two cent discount to ISE Market Makers on preferenced orders as an incentive for them to quote in the complex order book. The Exchange notes that PHLX currently provides a similar discount, albeit the differential at that exchange is five cents. Accordingly, ISE Market Makers who remove liquidity in the Non-Penny Pilot Symbols from the complex order book will be charged $0.71 per contract when trading with orders that are preferenced to them. The Exchange notes that with this proposed fee change, the Exchange, while increasing this fee, will continue to maintain a two cent differential that was previously in place.

The complex order pricing employed by the Exchange has proven to be an effective pricing mechanism and attractive to Exchange participants and their customers. The Exchange believes that increasing its complex order rebates will attract additional complex order business. The Exchange further believes that the Exchange's complex order rebates and its maker/taker fees are not unfairly discriminatory because these fee structures are consistent with fee structures that exist today at other options exchanges. Additionally, the Exchange believes that the proposed fees and rebates are fair, equitable and not unfairly discriminatory because the proposed fees and rebates are consistent with price differentiation that exists today at other option exchanges. The Exchange operates in a highly competitive market in which market participants can readily direct order flow to another exchange if they deem fee levels at a particular exchange to be excessive. With this proposed rebate change, the Exchange believes it remains an attractive venue for market participants to trade complex orders.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act.[13] 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

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(4).

[13] 15 U.S.C. 78s(b)(3)(A)(ii).

public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange 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 Exchange 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–ISE–2012–35 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2012–35. 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2012–35 and should be submitted on or before June 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–11796 Filed 5–15–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66963; File No. SR–NYSEArca–2012–22]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change To Amend NYSE Arca Equities Rule 7.45 To Address the Authority of NYSE Arca or Archipelago Securities LLC To Cancel Orders When a Technical or Systems Issue Occurs and Describe the Operation of an Error Account for Archipelago Securities

May 10, 2012.

I. Introduction

On March 15, 2012, 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 amend NYSE Arca Equities Rule 7.45 to address the authority of NYSE Arca or Archipelago Securities LLC (''Arca Securities'') to cancel orders when a technical or systems issue occurs at NYSE Arca, Arca Securities, or a routing destination, and to describe the operation of an error account for Arca Securities. The proposed rule change was published for comment in the **Federal Register** on March 30, 2012.[3] The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposal

Arca Securities is a broker-dealer that is a facility, and an affiliate, of the Exchange that provides outbound routing services from the Exchange to other market centers pursuant to Exchange rules.[4] In its proposal, the Exchange states that a technical or systems issue may occur at NYSE Arca, Arca Securities, or a routing destination that causes NYSE Arca or Arca Securities to cancel orders, if the Exchange or Arca Securities determines that such action is necessary to maintain a fair and orderly market.[5] The Exchange also states that a technical or systems issue that occurs at NYSE Arca, Arca Securities, a routing destination, or a non-affiliate third-party Routing Broker[6] may result in Arca Securities acquiring an error position that it must resolve.[7]

New paragraph (d) to NYSE Arca Equities Rule 7.45 provides NYSE Arca and Arca Securities with general authority to cancel orders to maintain fair and orderly markets when a technical or systems issue occurs at NYSE Arca, Arca Securities, or a routing destination. It also provides authority for Arca Securities to maintain an error account for the purpose of addressing, and sets forth the procedures for resolving, error positions. Specifically, paragraph (d)(1) of NYSE Arca Equities Rule 7.45 authorizes NYSE Arca or Arca Securities to cancel orders as either deems necessary to maintain fair and orderly markets if a technical or systems issue occurs at NYSE Arca, Arca Securities, or a routing destination. NYSE Arca and Arca Securities will be required to provide notice of the cancellation to all Electronic Trading Permit Holders (''ETP Holders'') as soon as practicable.[8]

Paragraph (d)(2) of NYSE Arca Equities Rule 7.45 will allow Arca Securities to maintain an error account

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[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 66656 (March 26, 2012), 77 FR 19401 (March 30, 2012) (SR–NYSEArca–2012–22) (''Notice'').

[4] *See* Notice, 77 FR at 19402, n.4 and accompanying text, and text accompanying n.5. *See also* NYSE Arca Equities Rule 7.45; and Securities Exchange Act Release No. 65455 (September 30, 2011) 76 FR 62119 (October 6, 2011) (SR–NYSEArca–2011–61) at n.4.

The Exchange also receives equities orders routed inbound to the Exchange by Arca Securities from the New York Stock Exchange LLC and NYSE Amex LLC. *See* Notice, 77 FR at 19402, n.5. *See also* NYSE Arca Equities Rule 7.45(c).

[5] *See* Notice, 77 FR at 19402. For examples of some of the circumstances in which NYSE Arca or Arca Securities may decide to cancel orders, see *id.*

[6] The Exchange states that, from time to time, it also uses non-affiliate third-party broker-dealers to provide outbound routing services. *See* Notice, 77 FR at 19402, n.4. *See also* NYSE Arca Equities Rule 7.45(a) (defining ''Routing Broker'' to include Arca Securities and any other non-affiliate third-party broker-dealer that acts as a facility of NYSE Arca routing orders from the Exchange to other market centers).

[7] *See* Notice, 77 FR at 19402. Specifically, the proposed rule defines ''error positions'' as ''positions that result from a technical or systems issue at Arca Securities, the Exchange, a routing destination, or a non-affiliate third-party Routing Broker that affects one or more orders.'' *See* proposed Rule 7.45(d)(2).

For examples of some of the circumstances that may lead to error positions, see Notice, 77 FR at 19402–03.

[8] *See* NYSE Arca Equities Rule 7.45(d)(1).

for the purpose of addressing error positions that result from a technical or systems issue at NYSE Arca, Arca Securities, a routing destination, or a non-affiliate third-party Routing Broker.

For purposes of NYSE Arca Equities Rule 7.45(d), an error position will not include any position that results from an order submitted by an ETP Holder to NYSE Arca that is executed on the Exchange and processed pursuant to NYSE Arca Equities Rule 7.41(a).[9] Arca Securities will not be permitted to (i) accept any positions in its error account from an ETP Holder's account or (ii) permit any ETP Holder to transfer any positions from the ETP Holder's account to Arca Securities' error account.[10] In other words, Arca Securities may not accept from an ETP Holder positions that are delivered to the ETP Holder through the clearance and settlement process, even if those positions may have been related to a technical or systems issue at NYSE Arca, Arca Securities, a routing destination, or a non-affiliate third-party Routing Broker.[11] If an ETP Holder receives such positions through the clearance and settlement process and experiences a loss in unwinding those positions, that ETP Holder may seek to rely on NYSE Arca Equities Rule 13.2, which provides ETP Holders with the ability to file claims against the Exchange ''for the failure of its systems or facilities.'' [12] If, however, a technical or systems issue results in NYSE Arca not having valid clearing instructions for an ETP Holder to a trade, Arca Securities may assume that ETP Holder's side of the trade so that the trade can be processed pursuant to NYSE Arca Equities Rule 7.41(a).[13]

Paragraph (d)(3) of NYSE Arca Equities Rule 7.45 permits NYSE Arca or Arca Securities, in connection with a particular technical or systems issue, to either (i) assign all resulting error positions to ETP Holders or (ii) have all resulting error positions liquidated. Any determination to assign or liquidate error positions, as well as any resulting assignments, will be made in a nondiscriminatory fashion.[14]

NYSE Arca and Arca Securities will be required to assign all error positions resulting from a particular technical or systems issue to the ETP Holders affected by that technical or systems issue if NYSE Arca or Arca Securities:

(i) Determines that it has accurate and sufficient information (including valid clearing information) to assign the positions to all of the ETP Holders affected by that technical or systems issue;

(ii) Determines that it has sufficient time pursuant to normal clearance and settlement deadlines to evaluate the information necessary to assign the positions to all of the ETP Holders affected by that technical or systems issue; and

(iii) Has not determined to cancel all orders affected by that technical or systems issue in accordance with NYSE Arca Equities Rule 7.45(d)(1).[15]

If NYSE Arca or Arca Securities is unable to assign all error positions resulting from a particular technical or systems issue to all of the affected ETP Holders, or if NYSE Arca or Arca Securities determines to cancel all orders affected by the technical or systems issue, then Arca Securities will be required to liquidate the error positions as soon as practicable.[16] Arca Securities will be required to provide complete time and price discretion for the trading to liquidate the error positions to a third-party broker-dealer, and would be prohibited from attempting to exercise any influence or control over the timing or methods of such trading.[17] Further, Arca Securities will be required to establish and enforce policies and procedures that are reasonably designed to restrict the flow of confidential and proprietary information between the third-party broker-dealer, on one hand, and the Exchange and Arca Securities on the other, associated with the liquidation of the error positions.[18]

Finally, proposed paragraph (d)(4) of NYSE Arca Equities Rule 7.45 requires NYSE Arca and Arca Securities to make and keep records to document all determinations to treat positions as error positions; all determinations to assign error positions to ETP Holders or liquidate error positions; and the liquidation of error positions through the third-party broker-dealer.

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b) of the Act [19] and the rules and regulations thereunder applicable to a national securities exchange.[20] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[21] which requires, among other things, that the rules of a national securities exchange 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 regulating, clearing, settling, processing information with respect to, and 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. In addition, the Commission believes the proposed rule change is consistent with Section 11A(a)(1)(C) of the Act [22] in that it seeks to assure economically efficient execution of securities transactions.

The Commission recognizes that technical or systems issues may occur, and believes that NYSE Arca Equities Rule 7.45, in allowing NYSE Arca or Arca Securities to cancel orders affected by technical or systems issues, should provide a reasonably efficient means for the Exchange to handle such orders, and appears reasonably designed to permit NYSE Arca to maintain fair and orderly markets.[23]

The Commission also believes that allowing the Exchange to resolve error

[9] *See* NYSE Arca Equities Rule 7.45(d)(2)(A).

[10] *See* NYSE Arca Equities Rule 7.45(d)(2)(B).

[11] *See* Notice, 77 FR at 19403, n.13. This provision would not apply if Arca Securities incurred a short position to settle an ETP Holder's purchase, as the ETP Holder would not have had a position in its account as a result of the purchase at the time of Arca Securities' action. *See id.*

If error positions result in connection with the Exchange's use of a third-party broker-dealer for outbound routing and those positions are delivered to Arca Securities through the clearance and settlement process, Arca Securities would be permitted to resolve those positions. If, however, such positions were not delivered to Arca Securities through the clearance and settlement process, then the third-party broker-dealer would resolve the error positions itself, and Arca Securities would not be permitted to accept the positions. *See* Notice, 77 FR at 19402, n.4.

[12] *See* Notice, 77 FR at 19403, n.13.

[13] *See* NYSE Arca Equities Rule 7.45(d)(2)(C).

[14] *See* NYSE Arca Equities Rule 7.45(d)(3).

[15] *See* NYSE Arca Equities Rule 7.45(d)(3)(A)(i)–(iii).

[16] *See* NYSE Arca Equities Rule 7.45(d)(3)(B).

[17] *See* NYSE Arca Equities Rule 7.45(d)(3)(B)(i).

[18] *See* NYSE Arca Equities Rule 7.45(d)(3)(B)(ii).

[19] 15 U.S.C. 78f(b).

[20] 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).

[21] 15 U.S.C. 78f(b)(5).

[22] 15 U.S.C. 78k–1(a)(1)(C).

[23] The Commission notes that NYSE Arca states that the proposed amendments to NYSE Arca Equities Rule 7.45 are designed to maintain fair and orderly markets, ensure full trade certainty for market participants, and avoid disrupting the clearance and settlement process. *See* Notice, 77 FR at 19404. The Commission also notes that NYSE Arca states that a decision to cancel orders due to a technical or systems issue is not equivalent to the Exchange declaring self-help against a routing destination pursuant to Rule 611 of Regulation NMS. *See* 17 CFR 242.611(b). *See also* Notice, 77 FR at 19403, n.11.

positions through the use of an error account maintained by Arca Securities pursuant to the procedures set forth in the rule, and as described above, is consistent with the Act. The Commission notes that the rule establishes criteria for determining which positions are error positions,[24] and that NYSE Arca or Arca Securities, in connection with a particular technical or systems issue, will be required to either (i) assign all resulting error positions to ETP Holders or (ii) have all resulting error positions liquidated.[25] Also, NYSE Arca or Arca Securities will assign error positions that result from a particular technical or systems issue to ETP Holders only if all such error positions can be assigned to all of the ETP Holders affected by that technical or systems issue.[26] If NYSE Arca or Arca Securities cannot assign all error positions to all ETP Holders, Arca Securities will liquidate all of those error positions.[27] In this regard, the Commission believes that the new rule appears reasonably designed to further just and equitable principles of trade and the protection of investors and the public interest, and to help prevent unfair discrimination, in that it should help assure the handling of error positions will be based on clear and objective criteria, and that the resolution of those positions will occur promptly through a transparent process.

Additionally, the Commission notes that it has previously expressed concern about the potential for unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members.[28] The Commission is also concerned about the potential for misuse of confidential and proprietary information. The Commission believes that the requirement that Arca Securities provide complete time and price discretion for the liquidation of error positions to a third-party broker-dealer, including that Arca Securities not attempt to exercise any influence or control over the timing or methods of such trading, combined with the requirement that the Exchange establish and enforce policies and procedures that are reasonably designed to restrict the flow of confidential and proprietary information to the third-party routing broker liquidating such positions, should help mitigate the Commission's concerns. In particular, the Commission believes that these requirements should help assure that none of the Exchange, Arca Securities, or the third-party broker-dealer is able to misuse confidential or proprietary information obtained in connection with the liquidation of error positions for its own benefit.

Finally, the Commission notes that NYSE Arca and Arca Securities would be required to make and keep records to document all determinations to treat positions as error positions; all determinations to assign error positions to ETP Holders or liquidate error positions; and the liquidation of error positions through the third-party broker-dealer.[29]

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[30] that the proposed rule change (SR–NYSEArca–2012–22) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–11797 Filed 5–15–12; 8:45 am]

BILLING CODE 8011–01–P

[24] *See* NYSE Arca Equities Rule 7.45(d)(2).

[25] *See* NYSE Arca Equities Rule 7.45(d)(3).

[26] *See* NYSE Arca Equities Rule 7.45(d)(3)(A).

[27] *See* NYSE Arca Equities Rule 7.45(d)(3)(B).

[28] *See, e.g.,* Securities Exchange Act Release No. 65455, 76 FR at 62120, n.16 and accompanying text.

[29] *See* NYSE Arca Equities Rule 7.45(d)(4).

[30] 15 U.S.C. 78s(b)(2).

[31] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 7885]

30-Day Notice of Proposed Information Collection: DS–260, Electronic Application for Immigration Visa and Alien Registration, 1405–0185

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Electronic Application for Immigration Visa and Alien Registration.
- *OMB Control Number:* 1405–0185.
- *Type of Request:* Extension.
- *Originating Office:* CA/VO/L/R.
- *Form Number:* DS–260.
- *Respondents:* Immigrant Visa Applicants.
- *Estimated Number of Respondents:* 700,000.
- *Estimated Number of Responses:* 700,000.
- *Average Hours per Response:* 2 hours.
- *Total Estimated Burden:* 1,400,000.
- *Frequency:* Once per Respondent.
- *Obligation to Respond:* Required to Obtain Benefits.

DATES: Submit comments to the Office of Management and Budget (OMB) for up to 30 days from May 16, 2012.

ADDRESSES: Direct comments to the Department of State, Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *Email:* *oira_submission@omb.eop.gov*. You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: You may obtain copies of the proposed information collection and supporting documents from Sydney Taylor, Visa Services, Department of State, 2401 E Street NW., L–603, Washington, DC 20522, at (202) 663–3721.

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary to properly perform our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond.

Abstract of proposed collection:

Form DS–260 will be used to elicit information to determine the eligibility of aliens applying for immigrant visas.

Methodology:

The DS–260 will be submitted electronically to the Department via the Internet. The applicant will be instructed to print a confirmation page containing a 2–D bar code record locator, which will be scanned at the time of adjudication. Applicants who submit the electronic application will no longer submit paper-based applications to the Department.

Dated: May 4, 2012.

David T. Donahue,

Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.

[FR Doc. 2012–11861 Filed 5–15–12; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice 7887]

60-Day Notice of Proposed Information Collection: DS–1884, Petition To Classify Special Immigrant Under INA 203(b)(4) as an Employee or Former Employee of the U.S. Government Abroad, OMB 1405–0082

ACTION: Notice of request for public comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Petition to Classify Special Immigrant Under INA 203(b)(4) as an employee or former employee of the U.S. Government Abroad.
- *OMB Control Number:* 1405–0082.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* CA/VO/L/R.
- *Form Number:* DS–1884.
- *Respondents:* Aliens petitioning for immigrant visas under INA 203(b)(4).
- *Estimated Number of Respondents:* 300.
- *Estimated Number of Responses:* 300.
- *Average Hours per Response:* 10 minutes.
- *Total Estimated Burden:* 50 hours.
- *Frequency:* Once per petition.
- *Obligation to Respond:* Required to Obtain Benefit.

DATES: The Department will accept comments from the public up to 60 days from May 16, 2012.

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

- *Web:* Persons with access to the Internet may view and comment on this notice by going to the Federal regulations Web site at *www.regulations.gov.* You can search for the document by: Selecting ''Notice'' under Document Type, entering the Public Notice number as the ''Keyword or ID'', checking the ''Open for Comment'' box, and then click ''Search''. If necessary, use the ''Narrow by Agency'' option on the Results page.
- *Mail (paper, or CD–ROM submissions):* Chief, Legislation and Regulations Division, Visa Services—DS–1884, 2401 E Street NW., Washington DC 20520–30106.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Sydney Taylor of the Office of Visa Services, U.S Department of State, 2401 E Street NW., L–630, Washington, DC who may be reached at *taylors2@state.gov.*

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of proposed collection:

DS–1884 solicits information from petitioners for special immigrant classification under Section 203(b)(4) of the Immigration and Nationality Act. An alien is classifiable as a special immigrant under Section 203(b)(4) if they meet the statutory qualifications in INA Section 101(a)(27)(D). A petitioner may apply within one year of notification by the Department of State that the Secretary has approved a recommendation that special immigrant status be accorded to the alien. DS–1884 solicits information that will assist the consular officer in ensuring that the petitioner is statutorily qualified to receive such status, including meeting the years of service and exceptional service requirements.

Methodology:

This form can be obtained from posts abroad or through the Department's eForms intranet site. The application available through eForms allows the applicant to complete the application online and then print the application. Most applicants are current federal government employees abroad and have access to the intranet system. Once the form is printed, it is submitted to post.

Dated: April 27, 2012.

David T. Donahue,

Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.

[FR Doc. 2012–11858 Filed 5–15–12; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice: 7884]

30-Day Notice of Proposed Information Collection: DS–261, Electronic Choice of Address and Agent, OMB Control Number 1405–0186

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Electronic Choice of Address and Agent.
- *OMB Control Number:* 1405–0186.
- *Type of Request:* Extension.
- *Originating Office:* CA/VO/L/R.
- *Form Number:* DS–261.
- *Respondents:* Immigrant beneficiaries requesting change of address or designation of an authorized agent.
- *Estimated Number of Respondents:* 700,000.
- *Estimated Number of Responses:* 700,000.
- *Average Hours per Response:* 10 minutes.
- *Total Estimated Burden:* 116,666.
- *Frequency:* Once per Respondent.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

DATES: Submit comments to the Office of Management and Budget (OMB) for up to 30 days from May 16, 2012.

ADDRESSES: Please direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *Email:* *oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: You may obtain copies of the proposed information collection and supporting documents from Sydney Taylor, Visa Services, U.S. Department of State, 2401 E Street NW., L–603, Washington, DC 20522, who may be reached at *taylors2@state.gov.*

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary to properly perform our functions.

• Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond.

Abstract of Proposed Collection

The DS–261 allows the beneficiary of an approved immigrant visa petition to provide the Department with his current address, which will be used for communications with the beneficiary. The DS–261 also allows the beneficiary to appoint an agent to receive communications relevant to the beneficiary's visa application from the National Visa Center (NVC) and assist in the filing of various application forms and/or paying the required fees. The beneficiary is not required to use an agent. The NVC can contact them directly. If the beneficiary chooses to serve as their own agent and have the NVC contact them directly, they will need to provide the NVC with their current contact information. All cases will be held at NVC until the DS–261 is electronically submitted to the Department.

Methodology

Applicants will submit the DS–261 electronically to the Department via the internet. Applicants who submit the electronic form will no longer submit paper-based applications to the Department.

Dated: May 4, 2012.

David Donahue,

Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.

[FR Doc. 2012–11862 Filed 5–15–12; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice 7888]

Culturally Significant Objects Imported for Exhibition Determinations: ''Unearthed: Recent Archeological Discoveries From Northern China''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Unearthed: Recent Archeological Discoveries from Northern China,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Sterling and Francine Clark Art Institute, Williamstown, Massachusetts, from on or about June 15, 2012 until on or about October 21, 2012, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: May 9, 2012.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2012–11865 Filed 5–15–12; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 7886]

Shipping Coordinating Committee; Notice of Committee Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 9:30 a.m. on Wednesday, June 6, 2012, in Room 51222 of the United States Coast Guard Headquarters Building, 2100 Second Street SW., Washington, DC 20593–0001. The primary purpose of the meeting is to prepare for the fifty-eighth Session of the International Maritime Organization's (IMO) Sub-Committee on Safety of Navigation to be held at the IMO Headquarters, United Kingdom, July 2 to 6, 2012.

The primary matters to be considered include:

—Adoption of the Agenda

—Decisions of other IMO bodies

—Routeing of ships, ship reporting and related matters

—Amendments to the General Provisions on Ships' Routeing (resolution A.572(14), as amended)

—International Telecommunication Union (ITU) matters, including Radiocommunication ITU–R Study Group matters

—Development of an e-navigation strategy implementation plan

—Development of policy and new symbols for Automatic Identification System (AIS) aids to navigation

—Casualty analysis

—Consideration of International Association of Classification Societies (IACS) unified interpretations

—Development of performance standards for inclinometers

—Biennial agenda and provisional agenda for NAV 59

—Election of Chairman and Vice-Chairman for 2013

—Any other business

—Report to the Maritime Safety Committee

Members of the public may attend this meeting up to the seating capacity of the room. To facilitate the building security process, and to request reasonable accommodation, those who plan to attend should contact the meeting coordinator, Mr. George H. Detweiler, Jr., by email at *George.H.Detweiler@uscg.mil*, by phone at (202) 372–1566, by fax at (202) 372–1991, or in writing at Commandant (CG–NAV–3), U.S. Coast Guard, 2100 2nd Street SW., Stop 7580, Washington, DC 20593–7580 not later than May 30, 2012, 7 days prior to the meeting. Requests made after May 30, 2012, might not be able to be accommodated. Please note that due to security considerations, two valid, government issued photo identifications must be presented to gain entrance to the Headquarters building. The Headquarters building is accessible by taxi and privately owned conveyance (public transportation is not generally available). However, parking in the vicinity of the building is extremely limited. Additional information regarding this and other IMO SHC public meetings may be found at: *www.uscg.mil/imo*.

Dated: May 7, 2012.

Brian Robinson,

Executive Secretary, Shipping Coordinating Committee, Department of State.

[FR Doc. 2012–11864 Filed 5–15–12; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2012–0059]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel ANDANTE; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before June 15, 2012.

ADDRESSES: Comments should refer to docket number MARAD–2012–0059. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, Email *Joann.Spittle@dot.gov*.

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel ANDANTE is:

Intended Commercial Use of Vessel: ''Temporary housing, sightseeing (not fishing charters), part-time operation, no marketing, family and friends only. Waiver is intended to allow family and friends to contribute to the operating expenses without conflicting with the Jones Act.''

Geographic Region: ''Alaska (primarily northern SE Alaska, excluding the area north of a line from Cape Suckling to Gore Point), and Washington.''

The complete application is given in DOT docket MARAD–2012–0059 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: May 10, 2012.

By Order of the Maritime Administrator.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2012–11887 Filed 5–15–12; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2012–0060]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel VAN'S CATCH TWO; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before June 15, 2012.

ADDRESSES: Comments should refer to docket number MARAD–2012–0060. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov*. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W21–203, Washington, DC 20590. Telephone 202–366–5979, Email *Joann.Spittle@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel VAN'S CATCH TWO is:

Intended Commercial Use of Vessel: ''Sport Fishing Charter.''

Geographic Region: ''Wisconsin.''

The complete application is given in DOT docket MARAD–2012–0060 at *http://www.regulations.gov*. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the

comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: May 10, 2012.

By Order of the Maritime Administrator.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2012–11892 Filed 5–15–12; 8:45 am]

BILLING CODE 4910–81–P

FEDERAL REGISTER

Vol. 77 Wednesday,

No. 95 May 16, 2012

Part II

Department of Energy

10 CFR Part 431

Energy Conservation Program for Certain Industrial Equipment: Energy Conservation Standards and Test Procedures for Commercial Heating, Air-Conditioning, and Water-Heating Equipment; Final Rule

DEPARTMENT OF ENERGY

10 CFR Part 431

[Docket No. EERE–2011–BT–STD–0029]

RIN 1904–AC47

Energy Conservation Program for Certain Industrial Equipment: Energy Conservation Standards and Test Procedures for Commercial Heating, Air-Conditioning, and Water-Heating Equipment

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

ACTION: Final rule.

SUMMARY: The U.S. Department of Energy (DOE) is amending its energy conservation standards for small, large, and very large water-cooled and evaporatively-cooled commercial package air conditioners, and variable refrigerant flow (VRF) water-source heat pumps less than 17,000 Btu/h. DOE is adopting new energy conservation standards for computer room air conditioners and VRF water-source heat pumps with a cooling capacity at or greater than 135,000 Btu/h and less than 760,000 Btu/h. Pursuant to the Energy Policy and Conservation Act of 1975 (EPCA), as amended, DOE must assess whether the uniform national standards for these covered equipment need to be updated each time the corresponding industry standard—the American National Standards Institute (ANSI)/American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE)/Illuminating Engineering Society of North America (IESNA) Standard 90.1 (ASHRAE Standard 90.1)—is amended, which most recently occurred on October 29, 2010. The levels DOE is adopting are the same as the efficiency levels specified in ASHRAE Standard 90.1–2010. DOE has determined that the ASHRAE Standard 90.1–2010 efficiency levels for the equipment types listed above are more stringent than existing Federal energy conservation standards and will result in economic and energy savings compared existing energy conservation standards. Furthermore, DOE has concluded that clear and convincing evidence does not exist, as would justify more-stringent standard levels than the efficiency levels in ASHRAE Standard 90.1–2010 for any of the equipment classes. DOE is also updating the current Federal test procedures or, for certain equipment, adopting new test procedures to incorporate by reference the most current versions of the relevant industry test procedures specified in ASHRAE Standard 90.1–2010. Furthermore, DOE is adopting additional test procedure provisions to include with modification certain instructions from Air-Conditioning, Heating, and Refrigeration Institute (AHRI) operations manuals in that organization's test procedures that would clarify the application of the DOE test procedures and harmonize DOE testing with the testing performed by industry.

DATES: This rule is effective July 16, 2012.

Compliance Dates:

See Table 1 of section II.C of the **SUPPLEMENTARY INFORMATION** section of this final rule for the compliance dates associated with the new/amended test procedures, the new/amended energy conservation standards, and the representation requirements by equipment type.

The incorporation by reference of certain publications listed in this rule was approved by the Director of the Federal Register on July 16, 2012.

ADDRESSES: The docket for this rulemaking is available for review at *www.regulations.gov,* including **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials. All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

A link to the docket Web page can be found at: *http://www.regulations.gov/#!docketDetail;dct=FR%252BPR%252BN%252BO%252BSR%252BPS;rpp=25;po=0;D=EERE-2011-BT-STD-0029.* The *www.regulations.gov* Web page contains simple instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket, contact Ms. Brenda Edwards at (202) 586–2945 or by email: *Brenda.Edwards@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Mohammed Khan, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–7892. Email: *Mohammed.Khan@ee.doe.gov.*

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

SUPPLEMENTARY INFORMATION: This final rule incorporates by reference into part 431 the following standards:

- American National Standards Institute Z21.47–2006 (ANSI Z21.47–2006), ''*Gas-Fired Central Furnaces,*'' approved on July 27, 2006.
- American National Standards Institute Z21.10.3–2011, (ANSI Z21.10.3–2011), ''*Gas Water Heaters, Volume III, Storage Water Heaters With Input Ratings Above 75,000 Btu Per Hour, Circulating and Instantaneous,*'' approved on March 7, 2011.

Copies of ANSI Z21.47–2006 and ANSI Z21.10.3–2011 can be obtained from the American National Standards Institute, 25 W. 43rd Street, 4th Floor, New York, NY 10036, (212) 642–4900, or go to *http://www.ansi.org.*

- Air-Conditioning, Heating, and Refrigeration Institute Standard 210/240–2008 (AHRI 210/240–2008), ''*Performance Rating of Unitary Air-Conditioning & Air-Source Heat Pump Equipment,*'' approved by ANSI on October 27, 2011 and updated by addendum 1 in June 2011 and addendum 2 in March 2012.
- Air-Conditioning, Heating, and Refrigeration Institute Standard 340/360–2007 (AHRI 340/360–2007), ''*Performance Rating of Commercial and Industrial Unitary Air-Conditioning and Heat Pump Equipment,*'' approved by ANSI on October 27, 2011 and updated by addendum 1 in December 2010 and addendum 2 in June 2011.
- Air-Conditioning, Heating, and Refrigeration Institute Standard 390–2003 (AHRI 390–2003), dated 2003, ''*Performance Rating of Single Package Vertical Air-Conditioners and Heat Pumps.*''
- Air-Conditioning, Heating, and Refrigeration Institute Standard 1230–2010 (AHRI 1230–2010), ''*Performance Rating of Variable Refrigerant Flow (VRF) Multi-Split Air-Conditioning and Heat Pump Equipment,*'' approved by ANSI on August 2, 2010 and updated by addendum 1 in March 2011.

Copies of AHRI 210/240–2008, AHRI 340/360–2007, AHRI 390–2003, and AHRI 1230–2010 can be obtained from the Air-Conditioning, Heating, and Refrigeration Institute, 2111 Wilson Blvd., Suite 500, Arlington, VA 22201, (703) 524–8800, or go to *http://www.ahrinet.org.*

- American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) Standard 127–2007, (ASHRAE 127–2007), ''*Method of Testing for Rating Computer and Data Processing Room Unitary Air*

Conditioners,'' approved on June 28, 2007

Copies of ASHRAE 127–2007 can be obtained from American Society of Heating, Refrigerating, and Air-Conditioning Engineers, 1791 Tullie Circle, NE., Atlanta, Georgia 30329, (404) 636–8400, or go to *http://www.ashrae.org.*

• Underwriters Laboratories, Inc. Standard 727–2006 (UL 727–2006), ''*Standard for Safety for Oil-Fired Central Furnaces,*'' approved April 7, 2006.

Copies of UL 727–2006 can be obtained from Underwriters Laboratories, Inc., 333 Pfingsten Road, Northbrook, IL 60062, (847) 272–8800, or go to *http://www.ul.com.*

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I. Summary of the Final Rule

The Energy Policy and Conservation Act (EPCA) (42 U.S.C. 6291 *et seq.*), as amended, requires DOE to consider amending the existing Federal energy conservation standard for certain types of listed commercial and industrial equipment (generally, commercial water heaters, commercial packaged boilers, commercial air-conditioning and heating equipment, and packaged terminal air conditioners and heat pumps) each time ASHRAE Standard 90.1, *Energy Standard for Buildings Except Low-Rise Residential Buildings,* is amended with respect to such equipment. (42 U.S.C. 6313(a)(6)(A)) For each type of equipment, EPCA directs that if ASHRAE Standard 90.1 is amended,[1] DOE must adopt amended energy conservation standards at the new efficiency level in ASHRAE Standard 90.1, unless clear and convincing evidence supports a determination that adoption of a more-stringent efficiency level as a national standard would produce significant additional energy savings and be technologically feasible and economically justified. (42 U.S.C. 6313(a)(6)(A)(ii)) If DOE decides to adopt as a national standard the efficiency levels specified in the

[1] Although EPCA does not explicitly define the term ''amended'' in the context of ASHRAE Standard 90.1, DOE provided its interpretation of what would constitute an ''amended standard'' in a final rule published in the **Federal Register** on March 7, 2007 (hereafter referred to as the ''March 2007 final rule''). 72 FR 10038. In that rule, DOE stated that the statutory trigger requiring DOE to adopt uniform national standards based on ASHRAE action is for ASHRAE to change a standard for any of the equipment listed in EPCA section 342(a)(6)(A)(i) (42 U.S.C. 6313(a)(6)(A)(i)) by increasing the energy efficiency level for that equipment type. *Id.* at 10042. In other words, if the revised ASHRAE Standard 90.1 leaves the standard level unchanged or lowers the standard, as compared to the level specified by the national standard adopted pursuant to EPCA, DOE does not have the authority to conduct a rulemaking to consider a higher standard for that equipment pursuant to 42 U.S.C. 6313(a)(6)(A). DOE subsequently reiterated this position in a final rule published in the **Federal Register** on July 22, 2009. 74 FR 36312, 36313.

amended ASHRAE Standard 90.1, DOE must establish such standard not later than 18 months after publication of the amended industry standard. (42 U.S.C. 6313(a)(6)(A)(ii)(I)) If DOE determines that a more-stringent standard is appropriate under the statutory criteria, DOE must establish such more-stringent standard not later than 30 months after publication of the revised ASHRAE Standard 90.1. (42 U.S.C. 6313(a)(6)(B)) ASHRAE officially released ASHRAE Standard 90.1–2010 on October 29, 2010, thereby triggering DOE's above-referenced obligations pursuant to EPCA to determine for those equipment with efficiency level changes beyond the current Federal standard, whether: (1) The amended industry standard should be adopted; or (2) clear and convincing evidence exists to justify more-stringent standard levels.

DOE published a notice of proposed rulemaking on January 17, 2012 (January 2012 NOPR), in the **Federal Register** describing DOE's determination of scope for considering new and amended energy conservation standards with respect to certain heating, ventilating, air-conditioning, and water-heating equipment addressed in ASHRAE Standard 90.1–2010. 77 FR 2356, 2366–79. ASHRAE Standard 90.1–2010 amended its efficiency levels for small, large, and very large water-cooled and evaporatively-cooled air conditioners and variable refrigerant flow water-source heat pumps with a cooling capacity less than 17,000 Btu/h, and adopted new efficiency levels for variable refrigerant flow water-source heat pumps with a cooling capacity equal to or greater than 135,000 Btu/h and less than 760,000 Btu/h,with and without heat recovery. In addition, ASHRAE Standard 90.1–2010 expanded its scope to include certain process cooling equipment, namely ''air conditioners and condensing units serving computer rooms'' (hereafter referred to as ''computer room air conditioners''). ASHRAE Standard 90.1–2010 also updated its referenced test procedures for several equipment types.

In determining the scope of the rulemaking, DOE is statutorily required to ascertain whether the revised ASHRAE efficiency levels have become more stringent than the current Federal energy conservation standard, thereby ensuring that any new amended national standard would not result in ''backsliding,'' which is prohibited under 42 U.S.C. 6295(o)(1). For those equipment classes for which ASHRAE set more-stringent or new efficiency levels (*i.e.,* small, large, and very large water-cooled and evaporatively-cooled air conditioners; variable refrigerant flow water-source heat pumps with a cooling capacity either less than 17,000 Btu/h or equal to or greater than 135,000 Btu/h and less than 760,000 Btu/h, with and without heat recovery; and computer room air conditioners), DOE analyzed the energy savings potential of amended national energy conservation standards (at both the new ASHRAE Standard 90.1 efficiency levels and more-stringent efficiency levels) in the May 5, 2011 notice of data availability (NODA) (76 FR 25622) and the January 17, 2012 NOPR (77 FR 2356). For equipment where more-stringent standard levels than the ASHRAE efficiency levels would result in significant energy savings (*i.e.,* computer room air conditioners), DOE analyzed the economic justification for more-stringent levels in the January 2012 NOPR. 77 FR 2356, 2382–98 (Jan. 17, 2012).

The energy conservation standards being adopted in today's final rule, which apply to small, large, and very large water-cooled and evaporatively-cooled air conditioners; variable refrigerant flow water-source heat pumps with a cooling capacity either less than 17,000 Btu/h or equal to or greater than 135,000 Btu/h and less than 760,000 Btu/h, with and without heat recovery; and computer room air conditioners, satisfy all applicable requirements of EPCA and will achieve the maximum improvements in energy efficiency that are technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) DOE has concluded that, based on the information presented and its analyses, there is not clear and convincing evidence justifying adoption of more-stringent efficiency levels for this equipment.

Thus, in accordance with the criteria discussed in this notice, DOE is amending the energy conservation standards (or for certain equipment adopting new standards) for small, large, and very large water-cooled and evaporatively-cooled air conditioners; variable refrigerant flow water-source heat pumps with a cooling capacity either less than 17,000 Btu/h or equal to or greater than 135,000 Btu/h and less than 760,000 Btu/h, with and without heat recovery; and computer room air conditioners by adopting the efficiency levels specified by ASHRAE Standard 90.1–2010. Pursuant to EPCA, the compliance date for amended energy conservation standards based upon the levels in ASHRAE Standard 90.1 is either two or three years after the effective date of the requirement in the amended ASHRAE standard, depending on the type and size of the equipment. (See 42 U.S.C. 6313(a)(6)(D)) In the present case, the amended standards apply to equipment manufactured on and after the date either 2 or 3 years after the effective date specified in ASHRAE Standard 90.1–2010, depending on the type of equipment. Table I.1 presents the energy conservation standards that DOE is adopting in today's final rule and their respective compliance dates.

TABLE I.1—CURRENT AND AMENDED/NEW FEDERAL ENERGY CONSERVATION STANDARDS FOR CERTAIN ASHRAE EQUIPMENT

Equipment class	Current Federal energy conservation standard	Amended or new Federal energy conservation standard	Compliance date of amended/new Federal energy conservation standard
Commercial Package Air Conditioning and Heating Equipment—Water-Cooled			
Water-cooled Air Conditioner, ≥65,000 Btu/h and <135,000 Btu/h, Electric Resistance Heating or No Heating.	11.5 EER	12.1 EER	6/1/2013
Water-cooled Air Conditioner, ≥65,000 Btu/h and <135,000 Btu/h, All Other Heating.	11.3 EER	11.9 EER	6/1/2013
Water-cooled Air Conditioner, ≥135,000 Btu/h and <240,000 Btu/h, Electric Resistance Heating or No Heating.	11.0 EER	12.5 EER	6/1/2014
Water-cooled Air Conditioner, ≥135,000 Btu/h and <240,000 Btu/h, All Other Heating.	11.0 EER	12.3 EER	6/1/2014

TABLE I.1—CURRENT AND AMENDED/NEW FEDERAL ENERGY CONSERVATION STANDARDS FOR CERTAIN ASHRAE EQUIPMENT—Continued

Equipment class	Current Federal energy conservation standard	Amended or new Federal energy conservation standard	Compliance date of amended/new Federal energy conservation standard
Water-cooled Air Conditioner, ≥240,000 Btu/h and <760,000 Btu/h, Electric Resistance Heating or No Heating.	11.0 EER	12.4 EER	6/1/2014
Water-cooled Air Conditioner, ≥240,000 Btu/h and <760,000 Btu/h, All Other Heating.	10.8 EER	12.2 EER	6/1/2014
Commercial Package Air Conditioning and Heating Equipment—Evaporatively-Cooled			
Evaporatively-cooled Air Conditioner, ≥65,000 Btu/h and <135,000 Btu/h, Electric Resistance Heating or No Heating.	11.5 EER	12.1 EER	6/1/2013
Evaporatively-cooled Air Conditioner, ≥65,000 Btu/h and <135,000 Btu/h, All Other Heating.	11.3 EER	11.9 EER	6/1/2013
Evaporatively-cooled Air Conditioner, ≥135,000 Btu/h and <240,000 Btu/h, Electric Resistance Heating or No Heating.	11.0 EER	12.0 EER	6/1/2014
Evaporatively-cooled Air Conditioner, ≥135,000 Btu/h and <240,000 Btu/h, All Other Heating.	11.0 EER	11.8 EER	6/1/2014
Evaporatively-cooled Air Conditioner, ≥240,000 Btu/h and <760,000 Btu/h, Electric Resistance Heating or No Heating.	11.0 EER	11.9 EER	6/1/2014
Evaporatively-cooled Air Conditioner, ≥240,000 Btu/h and <760,000 Btu/h, All Other Heating.	10.8 EER	11.7 EER	6/1/2014
Variable Refrigerant Flow Water-Source Heat Pumps			
VRF Mulit-Split Heat Pumps, Water-source, <17,000 Btu/h, without heat recovery.	11.2 EER	12.0 EER, 4.2 COP	10/29/2012
VRF Mulit-Split Heat Pumps, Water-source, <17,000 Btu/h, with heat recovery.	11.2 EER	11.8 EER, 4.2 COP	10/29/2012
VRF Mulit-Split Heat Pumps, Water-source, ≥135,000 and <760,000 Btu/h, without heat recovery.	N/A	10.0 EER, 3.9 COP	10/29/2013
VRF Mulit-Split Heat Pumps, Water-source, ≥135,000 and <760,000 Btu/h, with heat recovery.	N/A	9.8 EER, 3.9 COP	10/29/2013
Computer Room Air Conditioners			
Computer Room Air Conditioner, air-cooled, <65,000 Btu/h	N/A	2.20 SCOP (downflow), 2.09 SCOP (upflow).	10/29/2012
Computer Room Air Conditioner, air-cooled, ≥65,000 Btu/h and <240,000 Btu/h.	N/A	2.10 SCOP (downflow), 1.99 SCOP (upflow).	10/29/2013
Computer Room Air Conditioner, air-cooled, ≥240,000 Btu/h and <760,000 Btu/h.	N/A	1.90 SCOP (downflow), 1.79 SCOP (upflow).	10/29/2013
Computer Room Air Conditioner, water-cooled, <65,000 Btu/h	N/A	2.60 SCOP (downflow), 2.49 SCOP (upflow).	10/29/2012
Computer Room Air Conditioner, water-cooled, ≥65,000 Btu/h and <240,000 Btu/h.	N/A	2.50 SCOP (downflow), 2.39 SCOP (upflow).	10/29/2013
Computer Room Air Conditioner, water-cooled, ≥240,000 Btu/h and <760,000 Btu/h.	N/A	2.40 SCOP (downflow), 2.29 SCOP (upflow).	10/29/2013
Computer Room Air Conditioner, water-cooled with fluid economizer, <65,000 Btu/h.	N/A	2.55 SCOP (downflow), 2.44 SCOP (upflow).	10/29/2012
Computer Room Air Conditioner, water-cooled with fluid economizer, ≥65,000 Btu/h and <240,000 Btu/h.	N/A	2.45 SCOP (downflow), 2.34 SCOP (upflow).	10/29/2013
Computer Room Air Conditioner, water-cooled with fluid economizer, ≥240,000 Btu/h and <760,000 Btu/h.	N/A	2.35 SCOP (downflow), 2.24 SCOP (upflow).	10/29/2013
Computer Room Air Conditioner, glycol-cooled, <65,000 Btu/h	N/A	2.50 SCOP (downflow), 2.39 SCOP (upflow).	10/29/2012
Computer Room Air Conditioner, glycol-cooled, ≥65,000 Btu/h and <240,000 Btu/h.	N/A	2.15 SCOP (downflow), 2.04 SCOP (upflow).	10/29/2013
Computer Room Air Conditioner, glycol-cooled, ≥240,000 Btu/h and <760,000 Btu/h.	N/A	2.10 SCOP (downflow), 1.99 SCOP (upflow).	10/29/2013
Computer Room Air Conditioner, glycol-cooled with fluid economizer, <65,000 Btu/h.	N/A	2.45 SCOP (downflow), 2.34 SCOP (upflow).	10/29/2012
Computer Room Air Conditioner, glycol-cooled with fluid economizer, ≥65,000 Btu/h and <240,000 Btu/h.	N/A	2.10 SCOP (downflow), 1.99 SCOP (upflow).	10/29/2013
Computer Room Air Conditioner, glycol-cooled with fluid economizer, ≥240,000 Btu/h and <760,000 Btu/h.	N/A	2.05 SCOP (downflow), 1.94 SCOP (upflow).	10/29/2013

In addition, DOE is adopting amendments to its test procedures for a number of ASHRAE equipment types, which manufacturers will be required to use to certify compliance with energy conservation standards mandated under EPCA. *See* 42 U.S.C. 6314(a)(4) and 10 CFR parts 429 and 431. Specifically, these amendments, which were proposed in the January 2012 NOPR, update the citations and incorporations by reference to the most recent version of the following industry standards: (1) AHRI 210/240–2008 (Performance Rating of Unitary Air-Conditioning & Air-Source Heat Pump Equipment); (2) AHRI 340/360–2007 (Performance Rating of Unitary Commercial and Industrial Unitary Air-Conditioning and Heat Pump Equipment); (3) UL 727–2006 (Standard for Safety for Oil-Fired Central Furnaces); (4) ANSI Z21.47–2006 (Standard for Gas-Fired Central Furnaces); and (5) ANSI Z21.10.3–2011 [2] (Gas Water Heaters, Volume III, Storage Water Heaters with Input Ratings Above 75,000 Btu Per Hour, Circulating and Instantaneous). DOE is also adopting three new test procedures for VRF equipment (AHRI 1230–2010), computer room air conditioners (ASHRAE 127–2007), and single package vertical units (AHRI 390–2003). In addition to harmonizing the test procedures with the latest versions in ASHRAE Standard 90.1, DOE also reviewed each of these test procedures in their totality as part of DOE's seven-year review required by EPCA. DOE is including several additional provisions in its test procedures based on a review of AHRI operations manuals. The additional provisions include an optional ''break-in'' period for testing for commercial air-conditioning and heating equipment, which was proposed in the January 2012 NOPR (77 FR 2356, 2374 and 2378 (Jan. 17, 2012)), as well as provisions for setting up the equipment (determining refrigerant charge and indoor air flow quantity), allowing for manufacturer involvement and for the use of correction factors for refrigerant line length in VRF testing, which were proposed in DOE's March 2012 supplemental notice of proposed rulemaking (SNOPR). 77 FR 16769, 16777–79 (March 22, 2012).

[2] At certain places in the January 2012 NOPR, DOE mistakenly referred to ''ANSI Z.21.10.3–2006,'' which does not exist, so DOE clarified in the March 2012 SNOPR that it meant to refer to ''ANSI Z.21.10.3–2004'' in all instances where ANSI Z21.10.3–2006 was mentioned in the January 2012 NOPR. 77 FR 16769, 16779–80 (March 22, 2012). However, as explained in section IV.B of this final rule, DOE has decided to adopt an updated version of that standard, ANSI Z.21.10.3–2011, based on comments from interested parties.

II. Introduction

The following section briefly discusses the statutory authority underlying today's final rule, as well as some of the relevant historical background related to the establishment of energy conservation standards for water-cooled and evaporatively-cooled air conditioners, variable refrigerant flow water-source heat pump systems, and computer room air conditioners.

A. Authority

Title III, Part C [3] of the Energy Policy and Conservation Act of 1975 (EPCA or the Act), Public Law 94–163 (42 U.S.C. 6311–6317, as codified), added by Public Law 95–619, Title IV, § 441(a), established the Energy Conservation Program for Certain Industrial Equipment, which includes the commercial heating, air-conditioning, and water-heating equipment that is the subject of this rulemaking.[4] In general, this program addresses the energy efficiency of certain types of commercial and industrial equipment. Relevant provisions of the Act specifically include definitions (42 U.S.C. 6311), energy conservation standards (42 U.S.C. 6313), test procedures (42 U.S.C. 6314), labelling provisions (42 U.S.C. 6315), and the authority to require information and reports from manufacturers (42 U.S.C. 6316).

EPCA contains mandatory energy conservation standards for commercial heating, air-conditioning, and water-heating equipment. (42 U.S.C. 6313(a)) Specifically, the statute sets standards for small, large, and very large commercial package air-conditioning and heating equipment, packaged terminal air conditioners (PTACs) and packaged terminal heat pumps (PTHPs), warm-air furnaces, packaged boilers, storage water heaters, instantaneous water heaters, and unfired hot water storage tanks. *Id.* In doing so, EPCA established Federal energy conservation standards that generally correspond to the levels in ASHRAE Standard 90.1, as in effect on October 24, 1992 (*i.e.,* ASHRAE Standard 90.1–1989), for each type of covered equipment listed in 42 U.S.C. 6313(a). The Energy Independence and Security Act of 2007 (EISA 2007) amended EPCA by adding definitions and setting minimum energy conservation standards for single-package vertical air conditioners (SPVACs) and single-package vertical heat pumps (SPVHPs). (42 U.S.C. 6313(a)(10)(A)) The efficiency standards for SPVACs and SPVHPs established by EISA 2007 correspond to the levels contained in ASHRAE Standard 90.1–2004, which originated as addendum ''d'' to ASHRAE Standard 90.1–2001.

In acknowledgement of technological changes that yield energy efficiency benefits, Congress further directed DOE through EPCA to consider amending the existing Federal energy conservation standard for each type of equipment listed, each time ASHRAE Standard 90.1 is amended with respect to such equipment. (42 U.S.C. 6313(a)(6)(A)) For each type of equipment, EPCA directs that if ASHRAE Standard 90.1 is amended, DOE must publish in the **Federal Register** an analysis of the energy savings potential of amended energy efficiency standards within 180 days of the amendment of ASHRAE Standard 90.1. (42 U.S.C. 6313(a)(6)(A)(i)) EPCA further directs that DOE must adopt amended standards at the new efficiency level in ASHRAE Standard 90.1, unless clear and convincing evidence supports a determination that adoption of a more-stringent level would produce significant additional energy savings and be technologically feasible and economically justified. (42 U.S.C. 6313(a)(6)(A)(ii)) If DOE decides to adopt as a national standard the efficiency levels specified in the amended ASHRAE Standard 90.1, DOE must establish such standard not later than 18 months after publication of the amended industry standard. (42 U.S.C. 6313(a)(6)(A)(ii)(I)) However, if DOE determines that a more-stringent standard is justified under 42 U.S.C. 6313(a)(6)(A)(ii)(II), then it must establish such more-stringent standard not later than 30 months after publication of the amended ASHRAE Standard 90.1. (42 U.S.C. 6313(a)(6)(B)) (In addition, DOE notes that pursuant to the EISA 2007 amendments to EPCA, under 42 U.S.C. 6313(a)(6)(C), the agency must periodically review its already-established energy conservation standards for ASHRAE equipment. Under this requirement, the next review that DOE would need to conduct must occur no later than six years from the issuance of a final rule establishing or amending a standard for a covered type of equipment.)

EISA 2007 also amended EPCA to require that DOE review the most recently published ASHRAE Standard 90.1 (*i.e.,* ASHRAE Standard 90.1–2010) with respect to SPVACs and SPVHPs in accordance with the procedures established for ASHRAE equipment under 42 U.S.C. 6313(a)(6). (42 U.S.C.

[3] For editorial reasons, upon codification in the U.S. Code, Part C was redesignated Part A–1.

[4] All references to EPCA in this document refer to the statute as amended through the Energy Independence and Security Act of 2007, Public Law 110–140.

6313(a)(10)(B)) However, DOE believes that this one-time requirement is separate and independent from the requirement described in the paragraph above for all ASHRAE products and that it requires DOE to evaluate potential standards higher than the ASHRAE Standard 90.1–2010 level for single-package vertical air conditioners and heat pumps, even if the efficiency levels for SPVACs and SPVHPs have not changed since the last version of ASHRAE Standard 90.1.[5] DOE is conducting a separate rulemaking to further evaluate the efficiency levels for this equipment class.

EPCA also requires that if a test procedure referenced in ASHRAE Standard 90.1 is updated, DOE must update its test procedure to be consistent with the amended test procedure in ASHRAE Standard 90.1, unless DOE determines that the amended test procedure is not reasonably designed to produce test results which reflect the energy efficiency, energy use, or estimated operating costs of the ASHRAE equipment during a representative average use cycle. In addition, DOE must determine that the amended test procedure is not unduly burdensome to conduct. (42 U.S.C. 6314(a)(2) and (4))

Additionally, the Energy Independence and Security Act of 2007 (EISA 2007; Pub. L. 110–140) amended EPCA to require that at least once every 7 years, DOE must conduct an evaluation of each test procedure for any covered equipment and either amend the test procedure (if the Secretary determines that the amended test procedure would more accurately or fully comply with the requirements of 42 U.S.C. 6314(a)(2)–(3)) or publish notice in the **Federal Register** of any determination not to amend a test procedure. (42 U.S.C. 6314(a)(1)(A)) Under this requirement, DOE must review each test procedure for the various types of ASHRAE equipment not later than December 19, 2014 (*i.e.,* 7 years after the enactment of EISA 2007). Thus, the final rule resulting from this rulemaking will satisfy the requirement to review the test procedures for the certain types of ASHRAE equipment addressed in this rulemaking (*i.e.,* those equipment for which DOE has been triggered) within seven years.

On October 29, 2010, ASHRAE officially released and made public ASHRAE Standard 90.1–2010. This action triggered DOE's obligations under 42 U.S.C. 6313(a)(6), as outlined above.

When considering the possibility of a more-stringent standard, DOE's more typical rulemaking requirements under EPCA apply (*i.e.,* a determination of technological feasibility, economic justification, and significant energy savings). For example, EPCA provides that in deciding whether such a standard is economically justified, DOE must determine, after receiving comments on the proposed standard, whether the benefits of the standard exceed its burdens by considering, to the greatest extent practicable, the following seven factors:

(1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the product in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses of the products likely to result from the standard;

(3) The total projected amount of energy savings likely to result directly from the standard;

(4) Any lessening of the utility or the performance of the products likely to result from the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

(6) The need for national energy conservation; and

(7) Other factors the Secretary considers relevant.

(42 U.S.C. 6295(o)(2)(B)(i)–(ii); 42 U.S.C. 6316(a))

EPCA, as codified, also contains what is known as an ''anti-backsliding'' provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that such standard would likely result in the unavailability in the United States of any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding. (42 U.S.C. 6295(o)(4))

Further, EPCA, as codified, establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy (and, as applicable, water) savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii) and 42 U.S.C. 6316(a))

Additionally, when a type or class of covered equipment such as ASHRAE equipment, has two or more subcategories, DOE often specifies more than one standard level. DOE generally will adopt a different standard level than that which applies generally to such type or class of products for any group of covered products that have the same function or intended use if DOE determines that products within such group: (A) Consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and which justifies a higher or lower standard. (42 U.S.C. 6295(q)(1); 42 U.S.C. 6316(a)) In determining whether a performance-related feature justifies a different standard for a group of products, DOE generally considers such factors as the utility to the consumer of the feature and other factors DOE deems appropriate. In a rule prescribing such a standard, DOE includes an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2); 6316(a)) DOE followed a similar process in the context of today's rulemaking.

DOE has also reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281 (Jan. 21, 2011)). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other

[5] Once DOE has completed its rulemaking obligations under 42 U.S.C. 6313(a)(10)(B), SPVACs and SPVHPs will be treated similar to other ASHRAE equipment going forward.

advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, DOE believes that today's final rule is consistent with these principles, including the requirement that, to the extent permitted by law, benefits justify costs and that net benefits are maximized.

Consistent with Executive Order 13563, and the range of impacts analyzed in this rulemaking, the energy efficiency standard adopted herein by DOE achieves maximum net benefits.

B. Background

1. ASHRAE Standard 90.1–2010

As noted above, ASHRAE released a new version of ASHRAE Standard 90.1 on October 29, 2010. The ASHRAE standard addresses efficiency levels for many types of commercial heating, ventilating, air-conditioning (HVAC), and water-heating equipment covered by EPCA. ASHRAE Standard 90.1–2010 revised its efficiency levels for certain commercial equipment and revised its scope to include additional equipment, but for the remaining equipment, ASHRAE left in place the preexisting levels (*i.e.,* the efficiency levels specified in EPCA or the efficiency levels in ASHRAE Standard 90.1–2007). Specifically, DOE determined in the January 2012 NOPR that ASHRAE updated its efficiency levels for small, large, and very large water-cooled and evaporatively-cooled commercial package air conditioners; variable refrigerant flow (VRF) water-source heat pumps less than 17,000 Btu/h; and VRF water-source heat pumps at or greater than 135,000 Btu/h and less than 760,000 Btu/h. ASHRAE Standard 90.1–2010 also revised its scope to include certain commercial equipment used for industrial and process cooling, namely ''air conditioners and condensing units serving computer rooms.'' 77 FR 2356, 2361–63 (Jan. 17, 2012).

In addition, ASHRAE Standard 90.1–2010 updated the following referenced test procedures to the most recent version of the industry standards: AHRI 210/240–2008 (small commercial package air-conditioning and heating equipment); AHRI 340/360–2007 (large and very large commercial package air-conditioning and heating equipment); Underwriters Laboratories (UL) 727–2006 (oil-fired commercial warm-air furnaces); ANSI Z21.47–2006 (gas-fired commercial warm-air furnaces); and ANSI Z21.10.3–2004 [6] (commercial water heaters). Lastly, ASHRAE Standard 90.1–2010 specified new test procedures for certain equipment, including: ASHRAE 127–2007 (computer room air conditioners); and AHRI 1230–2010 (variable refrigerant flow air conditioners and heat pumps).

2. Previous Rulemaking Documents

Subsequent to the release of ASHRAE Standard 90.1–2010, DOE published a notice of data availability (NODA) in the **Federal Register** on May 5, 2011 (May 2011 NODA) and requested public comment as a preliminary step required pursuant to EPCA when DOE considers amended energy conservation standards for certain types of commercial equipment covered by ASHRAE Standard 90.1. 76 FR 25622. Specifically, in the May 2011 NODA, DOE presented a discussion of the changes found in ASHRAE Standard 90.1–2010, which included a description of DOE's evaluation of each ASHRAE equipment type in order for DOE to determine whether the amendments in ASHRAE Standard 90.1–2010 have increased efficiency levels. *Id.* at 25630–37. As an initial matter, DOE sought to determine which requirements for covered equipment in ASHRAE Standard 90.1, if any, were revised solely to reflect the level of the current Federal energy conservation standard (where ASHRAE is merely ''catching up'' to the current national standard), were revised but lowered, were revised to include design requirements without changes to the efficiency level, or were revised to include any other revisions made that did not increase the standard level, in which case, DOE was not triggered to act under 42 U.S.C. 6313(a)(6) for that particular equipment type. For those types of equipment in ASHRAE Standard 90.1 for which ASHRAE actually increased efficiency levels above the current Federal standard (*i.e.,* water-cooled and evaporatively-cooled air conditioners; two classes of VRF water-source heat pumps with and without heat recovery; and computer room air conditioners (which were not previously covered)), DOE subjected that equipment to the potential energy savings analysis for amended national energy conservation standards based on: (1) The modified efficiency levels contained within ASHRAE Standard 90.1–2010; and (2) more-stringent efficiency levels. DOE presented its methodology, data, and results for the preliminary energy savings analysis developed for the water-cooled and evaporatively-cooled equipment classes in the May 2011 NODA for public comment. *Id.* at 25637–46. For the remaining equipment classes, DOE requested data and information that would allow it to accurately assess the energy savings potential of those equipment classes. Additionally, for single package vertical air conditioners and heat pumps, although the levels in ASHRAE Standard 90.1–2010 were unchanged, DOE performed an analysis of their potential energy savings as required by 42 U.S.C. 6313(a)(10)(B). Lastly, DOE presented an initial assessment of the test procedure changes included in ASHRAE Standard 90.1–2010. *Id.* at 25644–47.

Following the NODA, DOE published a notice of proposed rulemaking in the **Federal Register** on January 17, 2012 (the January 2012 NOPR), and requested public comment. 77 FR 2356. In the January 2012 NOPR, DOE proposed amended energy conservation standards for small, large, and very large water-cooled and evaporatively-cooled commercial package air conditioners; variable refrigerant flow (VRF) water-source heat pumps less than 17,000 Btu/h; VRF water-source heat pumps at or greater than 135,000 Btu/h and less than 760,000 Btu/h; and new energy conservation standards for computer room air conditioners. DOE presented its methodology, data, and results for its analysis of two classes of variable refrigerant flow water-source heat pumps and for its analysis of computer room air conditioners.

In addition, DOE's NOPR also proposed the adoption of amended test procedures for small commercial package air-conditioning and heating equipment; large and very large commercial package air-conditioning and heating equipment; commercial warm-air furnaces; and commercial water heaters. Furthermore, DOE proposed to adopt new test procedures

[6] A later edition of the ANSI Z21.10.3 standard, ANSI Z21.10.3–2011, was approved by ANSI on March 7, 2011.

for variable refrigerant flow equipment, single package vertical air conditioners and heat pumps, and computer room air conditioners. Following the publication of the NOPR, DOE held a public meeting on February 14, 2012, to receive feedback from interested parties on its proposals and analyses.

At the public meeting, a variety of issues were discussed, including DOE's proposed definition for ''computer room air conditioner,'' DOE's proposed adoption of the ASHRAE Standard 90.1–2010 efficiency levels for computer room air conditioners and other equipment, and DOE's proposed adoption of the most recent industry test methods. In response to concerns raised at the public meeting regarding DOE's proposed definition of ''computer room air conditioner'' and recommendations to include in DOE's test procedures certain provisions in AHRI operations manuals, DOE published an SNOPR on March 22, 2012, which proposed a refined definition of ''computer room air conditioner'' and proposed to adopt several clarifications to its test procedures based on information found in AHRI operations manuals. 77 FR 16769.

C. Compliance Dates for Amended/New Federal Test Procedures, Amended/New Federal Energy Conservation Standards, and Representations for Certain ASHRAE Equipment

This final rule specifies the compliance dates for new and amended test procedures, new and amended energy conservation standards, and representations as shown in Table 1 below.

TABLE 1—COMPLIANCE DATES FOR AMENDED/NEW FEDERAL TEST PROCEDURES, AMENDED/NEW FEDERAL ENERGY CONSERVATION STANDARDS, AND REPRESENTATIONS FOR CERTAIN ASHRAE EQUIPMENT

Equipment class	Compliance with the amended/new test procedure is required on or after:	All representations of energy use/efficiency must be made using the amended test procedures on or after:	Compliance with the amended/new standard is required on or after:
Commercial Warm Air Furnaces			
Gas-fired and Oil-fired Commercial Warm Air Furnaces	May 13, 2013	May 13, 2013	N/A
Commercial Package Air-Conditioning and Heating Equipment—Air-Cooled			
Air-cooled Air Conditioner and Heat Pump, <65,000 Btu/h	May 13, 2013	May 13, 2013	N/A
Air-cooled Air Conditioner and Heat Pump, ≥65,000 Btu/h and <135,000 Btu/h.	May 13, 2013	May 13, 2013	N/A
Air-cooled Air Conditioner and Heat Pump, ≥135,000 Btu/h and <240,000 Btu/h.	May 13, 2013	May 13, 2013	N/A
Air-cooled Air Conditioner and Heat Pump, ≥240,000 Btu/h and <760,000 Btu/h.	May 13, 2013	May 13, 2013	N/A
Commercial Package Air-Conditioning and Heating Equipment—Water-Cooled			
Water-cooled Air Conditioner, ≥65,000 Btu/h and <135,000 Btu/h	May 13, 2013	May 13, 2013	6/1/2013
Water-cooled Air Conditioner, ≥135,000 Btu/h and <240,000 Btu/h	May 13, 2013	May 13, 2013	6/1/2014
Water-cooled Air Conditioner, ≥240,000 Btu/h and <760,000 Btu/h	May 13, 2013	May 13, 2013	6/1/2014
Commercial Package Air-Conditioning and Heating Equipment—Evaporatively-Cooled			
Evaporatively-cooled Air Conditioner, ≥65,000 Btu/h and <135,000 Btu/h.	May 13, 2013	May 13, 2013	6/1/2013
Evaporatively-cooled Air Conditioner, ≥135,000 Btu/h and <240,000 Btu/h.	May 13, 2013	May 13, 2013	6/1/2014
Evaporatively-cooled Air Conditioner, ≥240,000 Btu/h and <760,000 Btu/h.	May 13, 2013	May 13, 2013	6/1/2014
Packaged Terminal Air Conditioners and Heat Pumps			
Packaged Terminal Air Conditioners and Heat Pumps	May 13, 2013	May 13, 2013	N/A
Variable Refrigerant Flow Equipment*			
VRF Multi-Split Air Conditioners and Heat Pumps, Air-Cooled, <760,000 Btu/h.	May 13, 2013	May 13, 2013	N/A
VRF Multi-Split Heat Pumps, Water-source, <17,000 Btu/h	October 29, 2012	May 13, 2013	10/29/2012
VRF Multi-Split Heat Pumps, Water-source, ≥17,000 Btu/h and <135,000 Btu/h.	May 13, 2013	May 13, 2013	N/A
VRF Multi-Split Heat Pumps, Water-source, ≥135,000 and <760,000 Btu/h.	May 13, 2013	May 13, 2013	10/29/2013
Computer Room Air Conditioners			
Computer Room Air Conditioner, air-cooled/water-cooled/water-cooled with fluid economizer/glycol-cooled, <65,000 Btu/h.	October 29, 2012	May 13, 2013	10/29/2012
Computer Room Air Conditioner, air-cooled/water-cooled/water-cooled with fluid economizer/glycol-cooled, ≥65,000 Btu/h and <240,000 Btu/h.	May 13, 2013	May 13, 2013	10/29/2013

TABLE 1—COMPLIANCE DATES FOR AMENDED/NEW FEDERAL TEST PROCEDURES, AMENDED/NEW FEDERAL ENERGY CONSERVATION STANDARDS, AND REPRESENTATIONS FOR CERTAIN ASHRAE EQUIPMENT—Continued

Equipment class	Compliance with the amended/new test procedure is required on or after:	All representations of energy use/efficiency must be made using the amended test procedures on or after:	Compliance with the amended/new standard is required on or after:
Computer Room Air Conditioner, air-cooled/water-cooled/water-cooled with fluid economizer/glycol-cooled, ≥240,000 Btu/h and <760,000 Btu/h.	May 13, 2013	May 13, 2013	10/29/2013
Single Package Vertical Units			
Single Package Vertical Air Conditioners and Heat Pumps	July 16, 2012	May 13, 2013	N/A
Commercial Water Heaters and Hot Water Supply Boilers			
Gas-fired Storage and Instantaneous Water Heaters and Hot Water Supply Boilers, Oil-fired Storage and Instantaneous Water Heaters and Hot Water Supply Boilers, and Electric Storage and Instantaneous Water Heaters.	May 13, 2013	May 13, 2013	N/A

* For those basic models of variable refrigerant flow equipment currently being tested using a test procedure waiver, the methods prescribed by the test procedure waiver may continue to be used until the mandatory compliance date of the amended test procedure prescribed by this final rule.

III. General Discussion of Comments Received

In response to its request for comment on the January 2012 NOPR and March 2012 SNOPR, DOE received nine written comments from manufacturers, trade associations, utilities, and energy efficiency advocates. As discussed above, these comments are available in the docket for this rulemaking and are available for review by following the instructions in the **ADDRESSES** section. The following sections summarize the issues raised in these comments, along with DOE's responses.

A. The Definition of ''Amendment'' With Respect to the Efficiency Levels in ASHRAE Standard 90.1

In the January 2012 NOPR, DOE reiterated its position about what constitutes an amendment to ASHRAE Standard 90.1, thereby triggering DOE review. 77 FR 2356, 2364 (Jan. 17, 2012). DOE maintained its position originally taken in the July 22, 2009 final rule for ASHRAE equipment (74 FR 36312, 36320 (July 22, 2009)) that the trigger to review the Federal standard levels for ASHRAE equipment is an increase in the ASHRAE Standard 90.1 efficiency level, and that other changes do not qualify as a trigger for review. *Id.* Further, DOE noted that because EPCA does not explicitly define the term ''amended'' in the context of ASHRAE Standard 90.1, DOE provided its interpretation of what would constitute an ''amended standard'' in a final rule published in the **Federal Register** on March 7, 2007. 72 FR 10038. In that rule, DOE stated that the statutory trigger requiring DOE to adopt uniform national standards based on ASHRAE action is for ASHRAE to change a standard for any of the equipment listed in EPCA section 342(a)(6)(A)(i) (42 U.S.C. 6313(a)(6)(A)) by increasing the energy efficiency level for that equipment type. *Id.* at 10042. DOE noted in the January 2012 NOPR that the section cited above refers to ''the minimum level * * * specified in the amended ASHRAE standard,'' which DOE interprets as referring to an energy efficiency level. 77 FR 2356, 2364 (Jan. 17, 2012). Consequently, DOE did not review the standard levels for commercial warm-air furnaces because the incorporation of design requirements did not meet DOE's interpretation of an amendment to ASHRAE Standard 90.1 that would trigger DOE action. *Id.*

Earthjustice stated that ASHRAE Standard 90.1 has amended levels for warm-air furnaces requiring incorporation of an interrupted or intermittent ignition device, a maximum level of jacket losses, and either power venting or a flue damper, and that this amendment triggers DOE to review the efficiency levels for commercial warm-air furnaces. (Earthjustice, No. 34 at p. 3) Earthjustice stated that DOE's reasoning for why no review of commercial warm-air furnaces is needed is flawed, because there is nothing in the language of EPCA that suggests that only amendments that alter a numeric performance metric trigger DOE's obligation for review. (Earthjustice, No. 34 at p. 3)

Earthjustice commented that in the NOPR, DOE's view that ''the minimum level'' only refers to the numeric value of an ASHRAE Standard 90.1 performance standard ignores the fact that EPCA frequently uses ''level'' and ''standard'' interchangeably. It stated that the language of section 342(a)(6)(A)(ii)(II) shows that Congress meant for the total content of ASHRAE Standard 90.1 to serve as the baseline for DOE's amended standards, and not for any ASHRAE Standard 90.1 numeric performance metric alone to be definitive. (Earthjustice, No. 34 at p. 4) Earthjustice also stated that EPCA uses the word ''level'' to characterize both performance standards and design requirements, arguing that section 342(a)(5) specifies ''standard levels'' for storage water heaters, instantaneous water heaters, and unfired water storage tanks, and includes under this heading design requirements for tank insulation and ignition devices. Earthjustice also stated that section 325(o)(2)(B)(iii) of EPCA provides that there is a rebuttable presumption that a ''standard level'' is justified if its costs to the consumer can be recouped in three years, and that DOE has applied this provision when evaluating design requirements for gas cooking products. Earthjustice commented that these other uses of ''level'' in EPCA indicates that Congress did not intend to withhold DOE's obligation to review the standards for warm-air furnaces when ASHRAE increases the stringency of Standard 90.1 while leaving the existing thermal efficiency level unchanged. (Earthjustice, No. 34 at p. 4–5)

Earthjustice stated that even if DOE adopts the position that it cannot adopt the particular standards contained in ASHRAE Standard 90.1, DOE still is

obligated to examine potential standards for warm-air furnaces. (Earthjustice, No. 34 at p. 3) Earthjustice also asserted that DOE's view that EPCA bars it from adopting standards that impose multiple metric requirements has been refuted in multiple analyses and is erroneous, and attached a memorandum on the central air conditioner rule as an example and justification of why multiple metrics are allowable. (Earthjustice, No. 34 at p. 5) Earthjustice argued that DOE's refusal to grant any weight to the acceptance of multiple design requirements for warm-air furnaces into ASHRAE Standard 90.1 contrasts with the Department's recognition in the residential furnace rulemaking that consensus recommendations enabling the achievement of the congressional objectives underlying EPCA should be given special consideration when resolving ambiguities in the statutory language. The commenter stated that DOE has recognized in the NOPR that the ''efficiency levels in ASHRAE Standard 90.1–2010 are the result of a consensus process'' (77 FR 2356, 2364 (Jan. 17, 2012)) and that ''EPCA generally directs DOE to follow ASHRAE Standard 90.1 when it is amended'' (77 FR 2356, 2372 (Jan. 17, 2012)). (Earthjustice, No. 34 at p. 5)

DOE does not agree with Earthjustice's assertion that DOE is required to review changes in ASHRAE Standard 90.1–2010 that do not increase the efficiency level when compared to the current Federal energy conservation standards for a given type of equipment. As it did in the July 2009 final rule for ASHRAE products, DOE views the trigger as attached to an increased efficiency level. 74 FR 36312, 36320 (July 22, 2009). Further, as noted above, since EPCA does not explicitly define the term ''amended'' in the context of ASHRAE Standard 90.1, DOE provided its interpretation of what would constitute an ''amended standard'' in a final rule published in the **Federal Register** on March 7, 2007. 72 FR 10038. In that rule, DOE stated that the statutory trigger requiring DOE to adopt uniform national standards based on ASHRAE action is for ASHRAE to change a standard for any of the equipment listed in EPCA section 342(a)(6)(A)(i) (42 U.S.C. 6313(a)(6)(A)) by increasing the energy efficiency level for that equipment type. *Id.* at 10042. The section cited above refers to ''the minimum level specified in the amended ASHRAE/IES Standard 90.1,'' which DOE interprets as referring to an energy efficiency level.

If ASHRAE adds a prescriptive requirement for equipment where an efficiency level is already specified, DOE has concluded that it does not have the authority to use a dual descriptor for a single equipment type. Pursuant to 42 U.S.C. 6313(a)(6), the Secretary has authority to amend the energy conservation standards for specified equipment, but under 42 U.S.C. 6311(18), the statute's definition of the term ''energy conservation standard'' is limited to: (A) A performance standard that prescribes a minimum level of energy efficiency or a maximum quantity of energy use for a product; or (B) a design requirement for a product.

The language of EPCA authorizes DOE to establish a performance standard or a single design standard. As such, DOE maintains its position stated in the July 2009 final rule that a standard that establishes both a performance standard and a design requirement is beyond the scope of DOE's legal authority, as would be a standard that included more than one design requirement. 74 FR 36312, 36322 (July 22, 2009). In this case, ASHRAE Standard 90.1–2010 recommends three design requirements, which goes beyond EPCA's limit of one design requirement for the specified covered equipment.

In summary, the statutory scheme envisions DOE being triggered by ASHRAE action which provides DOE with a regulatory choice between increased ASHRAE levels and even more stringent levels. If ASHRAE has not changed the standard level, the regulatory choice contemplated under 42 U.S.C. 6313(a)(6)(A) cannot be made. Furthermore, DOE disagrees with the suggestion that Earthjustice's views on the issue of the ASHRAE trigger reflects the broad consensus of interested parties, thereby deserving special consideration; although ASHRAE Standard 90.1–2010 may be the result of a consensus process, DOE believes Earthjustice's view does not represent a broad consensus position among all stakeholders, particularly among manufacturers. Moreover, in seeking greater deference for consensus recommendations, the commenter is alluding to a separate EPCA provision (codified at 42 U.S.C. 6295(p)(4)) in which Congress authorized publication of direct final rules upon DOE's receipt of a consensus agreement with recommended standards submitted by interested parties who are fairly representative of relevant points of view. However, that statutory provision is not applicable to the ASHRAE products at issue here. In light of the above, DOE maintains its position that if the revised ASHRAE Standard 90.1 leaves the standard level unchanged or lowers the standard, as compared to the level specified by the national standard adopted pursuant to EPCA, DOE does not have the authority to conduct a rulemaking to consider a higher standard for that equipment pursuant to 42 U.S.C. 6313(a)(6)(A).

B. DOE's Review of ASHRAE Equipment Independent of the ASHRAE Standards Process

In the January 2012 NOPR, DOE noted that it plans to implement the six-year look back provision in EPCA prospectively and believes that the clock for the six-year look back does not commence until a final rule is published for a given product or equipment after the enactment of EISA 2007 (which occurred on December 19, 2007). 77 FR 2356, 2365–66 (Jan. 17, 2012). For any type of ASHRAE equipment that has not been the subject of a final rule since the enactment of EISA 2007, review under the look back provision will not be required until after the next update of standards is completed following a trigger by updates to the corresponding ASHRAE Standard 90.1 efficiency levels. After that point, if ASHRAE does not update standards within six years, DOE will be compelled to review the standards under the six-year look back provision. *Id.*

ASAP and NRDC stated that DOE must consider updating standards for the ASHRAE products for which there was not a revision if DOE last set standards more than six years ago. The commenters referred to the Joint Comment on the NODA for the basis of the argument. (ASAP and NRDC, No. 35 at p. 1–2) Earthjustice also alleged that the NOPR failed to fulfill EPCA's legal mandates with respect to multiple products. (Earthjustice, No. 34 at p. 1) Earthjustice stated that DOE's position that it has no authority to act pursuant to section 342(a)(6)(A)(i) to amend standards for ASHRAE equipment until ASHRAE first amends its own standards undermines the plain intent of Congress by insulating equipment from review, potentially in perpetuity. (Earthjustice, No. 34 at p. 2) Earthjustice stressed that ''any final rule'' in section 342(a)(6) includes all final rules for a covered product no matter when it was finalized. (Earthjustice, No. 34 at p. 2)

Earthjustice stated that Congress granted DOE the authority to proceed in the face of ASHRAE inaction through a provision added to EPCA by section 342(a)(6) of EPACT 2005, which gave DOE the ability to act on ASHRAE standards without a trigger. (42 U.S.C. 6313(a)(6), subsequently amended by EISA 2007) In the EISA 2007 amendments to EPCA, Earthjustice stated that Congress then directed DOE to review standards when ASHRAE left

them unaltered for too long. (42 U.S.C. 6313(a)(6)(C)) Earthjustice asserted that the NOPR's reading of 42 U.S.C. 6313(a)(6) rolls back the clock to 2004, leaving in limbo equipment as to which ASHRAE has been inattentive. (Earthjustice, No. 34 at p. 2–3) Earthjustice expressed its view that DOE must abandon the NOPR's flawed rationale and commence a review of the standards for all products for which the existing standards are more than six years old. (Earthjustice, No. 34 at p. 3)

In response, DOE notes that it has determined previously that it plans to implement the six-year look back provision prospectively and believes that the clock for the six-year look back does not commence until a final rule is published for a given product or equipment after the enactment of EISA 2007 (which occurred on December 19, 2007). DOE does not believe it was Congress's intention to apply these requirements retroactively, so that DOE would immediately be in violation of its legal obligations upon passage of the statute, thereby failing from its inception.

C. General Discussion of the Changes to ASHRAE Standard 90.1–2010 and Determination of Scope

As discussed above, before beginning an analysis of economic impacts and energy savings that would result from adopting the efficiency levels specified by ASHRAE Standard 90.1–2010 or more-stringent efficiency levels, DOE first sought to determine whether the amended ASHRAE Standard 90.1 efficiency levels represented an increase in efficiency above the current Federal standard levels. DOE discussed each equipment class where these levels differ from the current Federal standard level, along with DOE's preliminary conclusion as to the action DOE would take with respect to that equipment in the January 2012 NOPR. *See* 77 FR 2356, 2366–73 (Jan. 17, 2012). DOE tentatively concluded from this analysis that the only efficiency levels that represented an increase in efficiency above the current Federal standards were those for certain classes of water-cooled and evaporatively-cooled commercial package air conditioners, VRF water-source heat pumps, and computer room air conditioners. For a more detailed discussion of this approach, readers should refer to the preamble to the January 2012 NOPR. *See Id.* DOE received two comments on this approach.

AHRI did not agree with DOE's conclusion that it cannot adopt separate minimum efficiency standards for three-phase Small Duct High-Velocity Heat Pumps. AHRI stated that these products are a unique subcategory of commercial package air-conditioning and heating equipment and that the removal of minimum efficiency standards for these products from ASHRAE Standard 90.1–2010 was an error. Accordingly, AHRI recommended that DOE specify distinct minimum efficiency standards for these models. (AHRI, No. 30 at p. 2)

In response, DOE maintains its position as stated in the January 2012 NOPR. 77 FR 2356, 2370–71 (Jan. 17, 2012). More specifically, DOE notes that EPCA does not separate small-duct high-velocity (SDHV) heat pumps from other types of small commercial package air-conditioning and heating equipment in its definitions. (42 U.S.C. 6311(8)) Therefore, EPCA's definition of ''small commercial package air conditioning and heating equipment'' would include SDHV heat pumps. (42 U.S.C. 6311(8)(B)) Furthermore, ASHRAE Standard 90.1–2010 did not propose a higher standard for this equipment, and the minimum Federal efficiency standards for three-phase, less than 65,000 Btu/h small commercial package air-conditioning and heating equipment, at 13 SEER and 7.7 HSPF, are more stringent than the levels originally proposed for SDHV in ASHRAE Standard 90.1–2010. DOE cannot adopt lower efficiency levels due to the prohibition against ''backsliding.'' As such, DOE is prohibited from adopting the original ASHRAE Standard 90.1–2007 SEER requirement for three-phase SDHVs as the Federal standard, and DOE has no requirement to consider higher levels for three-phase SDHV equipment.

Mitsubishi expressed its support for DOE's proposal to adopt the amended efficiency standards in ASHRAE Standard 90.1–2010 for small, large, and very large water-cooled and evaporatively-cooled commercial package air conditioners and especially for the two categories of VRF water-source heat pumps. However, Mitsubishi also recommended that DOE adopt the full range of capacities for both categories of VRF systems. (Mitsubishi, No. 33 at p. 1)

In response, DOE reiterates its position as stated in the January 2012 NOPR. 77 FR 2356, 2368–69 (Jan. 17, 2012). The efficiency requirements in ASHRAE Standard 90.1–2010 for air-cooled VRF heat pumps with heat recovery are equivalent to the Federal minimum energy conservation standards defined for air-cooled heat pumps with ''all other heating system types that are integrated into the equipment,'' and the efficiency requirements for air-cooled VRF heat pumps without heat recovery are equivalent to the Federal minimum standards for air-cooled heat pumps with electric resistance or no heating. The VRF systems with heat recovery specified by ASHRAE may also be provided with electric resistance heating systems as a back-up. For air-cooled VRF heat pump systems that have both electric resistance heating and heat recovery heating capability, the Department has concluded that these systems must meet the efficiency requirements contained in EPCA for small, large, and very large air-cooled central air-conditioning heat pumps with electric resistance heating, which are codified at 10 CFR 431.97(b). (42 U.S.C. 6313(a)(7)–(9)) In addition, the Department has concluded that air-cooled VRF systems without electric resistance heating but with heat recovery can qualify as having an ''other'' means of heating, and that these systems must meet the efficiency requirements contained in EPCA for small, large, and very large air-cooled central air-conditioning heat pumps with other heating, which are codified at 10 CFR 431.97(b). (42 U.S.C. 6313(a)(7)–(9))

For water-source VRF heat pumps, ASHRAE Standard 90.1–2010 generally maintains efficiency levels equivalent to the existing Federal minimum energy conservation standards for water-source heat pumps. DOE has decided that under the statutory scheme for commercial equipment standards, a water-source heat pump in which condenser heat is rejected to water, not air, is the corresponding existing product class for water-source VRF heat pumps. There are only two equipment classes for which ASHRAE Standard 90.1–2010 levels are not equivalent to the existing Federal minimum energy conservation standards: (1) For VRF water-source heat pumps under 17,000 Btu/h, ASHRAE Standard 90.1–2010 raises the efficiency levels above current Federal energy conservation standards; (2) For VRF water-source heat pumps over 135,000 Btu/h and less than 760,000 Btu/h, ASHRAE sets standards for products where DOE did not previously have standards.

In addition to the changes for the equipment classes discussed above, ASHRAE Standard 90.1–2010 includes efficiency levels for VRF water-source heat pumps that provide for a 0.2 EER reduction in the efficiency requirement for systems with heat recovery. However, the current Federal minimum standards for water-source heat pumps do not provide for any reduction in the EER requirements for equipment with ''other'' heating types. Therefore, the 0.2

EER reduction below the current Federal standard levels for the VRF water-source heat pump equipment classes in which ASHRAE did not raise the standard from the existing Federal minimum for water-source heat pumps (*i.e.,* water-source heat pumps with cooling capacities greater than or equal to 17,000 Btu/h and less than 65,000 Btu/h and for water-source heat pumps with cooling capacities greater than or equal to 65,000 Btu/h and less than 135,000 Btu/h) would result in a decrease in stringency in comparison to current standards.

As such, DOE is prohibited from adopting an efficiency level lower than the current Federal standards for water-source heat pumps less than 135,000 Btu/h cooling capacity due to the ''anti-backsliding'' provision, regardless of the provision in 42 U.S.C. 6313(a)(6)(A)) providing for adoption of ASHRAE Standard 90.1 efficiency levels.

In summary, after considering the public comments, DOE has decided to retain its approach, as stated in the January 2012 NOPR, that the only efficiency levels that represented an increase in efficiency above the current Federal standards were those for certain classes of water-cooled and evaporatively-cooled commercial package air conditioners and heat pumps, VRF water-source heat pumps less than 17,000 Btu/h and at or above 135,000 Btu/h and less than 760,000 Btu/h in cooling capacity, and computer room air conditioners.

D. The Proposed Energy Conservation Standards

In the January 2012 NOPR, DOE proposed to adopt the efficiency levels in ASHRAE Standard 90.1–2010 for twelve classes of water-cooled and evaporatively-cooled air conditioners, four classes of VRF water-source heat pumps, and thirty classes of computer room air conditioners. 77 FR 2356, 2415–18 (Jan. 17, 2012). DOE received several comments in response to its proposal.

EEI endorsed DOE's proposal to adopt the energy efficiency standards for the equipment that were updated and published in ASHRAE Standard 90.1–2010. (EEI, No. 29 at p. 2) AHRI and Mitsubishi supported DOE's adoption of the amended efficiency standards for small, large, and very large water-cooled and evaporatively-cooled commercial package air conditioners and the two categories of variable refrigerant flow water-source heat pumps. (AHRI, No. 30 at p. 1; Mitsubishi, No. 33 at p. 1) The Department of Justice (DOJ) concluded that the proposed standards are not likely to have an adverse effect on competition. (DOJ, No. 37 at p. 2) In reaching this conclusion, DOJ noted the absence of any competitive concerns raised by industry participants at the public meeting and that the proposed levels corresponded to the latest version of the relevant industry consensus standard. *Id.* Thus, for the reasons stated previously, in today's final rule, DOE is adopting efficiency levels at the levels published in ASHRAE Standard 90.1–2010 for twelve classes of water-cooled and evaporatively-cooled air conditioners and four classes of VRF water-source heat pumps.

Regarding computer room air conditioners (CRACs), ASAP expressed concern that the levels set by DOE should not be weaker than the existing California energy conservation standards or lower than the levels for other commercial package air conditioners. (ASAP, NOPR Public Meeting Transcript at p. 78, 149) ASAP argued: (1) That significantly higher efficiency levels are technically feasible for CRACs; (2) that there are many models of CRACs on the market that exceed the levels specified in ASHRAE Standard 90.1–2010; and (3) that the potential energy savings associated with CRACs are significant and should be fully captured to the extent possible. (ASAP, NOPR Public Meeting Transcript at p. 132) ASAP and NRDC stated that DOE should evaluate whether greater cost-effective savings could be achieved through more-stringent standards for CRACs. These commenters suggested that the efficiency levels set by the California Energy Commission (CEC) may be higher than the levels in ASHRAE Standard 90.1 for air-cooled CRACs. In particular, they urged DOE to further evaluate raising the standard for air-cooled CRACs ≥65,000 Btu/h and <240,000 Btu/h and air-cooled CRACs ≥240,000 Btu/h, stating that according to DOE's analysis in the NOPR, efficiency level three for units at and above 65,000 Btu/h but less than 240,000 Btu/h would be cost-effective and would save 0.20 quads, and that efficiency level four for units at and above 240,000 Btu/h would be cost-effective and would save 0.21 quads. (NRDC and ASAP, No. 35 at p. 2)

In response, DOE notes that the requirements for adopting Federal energy conservation standards for ASHRAE equipment are explicitly set forth in EPCA. (42 U.S.C. 6313(a)(6)) Of particular relevance here, DOE must determine if clear and convincing evidence exists that standards that are more stringent than the levels in ASHRAE Standard 90.1 would save a significant additional amount of energy and would be technologically feasible and economically justified. (42 U.S.C. 6313(a)(6)(A)(ii)(II)) In the January 2012 NOPR, DOE determined that more-stringent levels would save a significant amount of energy and are technologically feasible. 77 FR 2356, 2416–17 (Jan. 17, 2012). Accordingly, as required by EPCA, DOE undertook an analysis to examine the economic justification of more-stringent energy conservation standards for computer room air conditioners. As explained in further detail in section VI.D.3 of this notice, due to the limited amount of data available regarding equipment cost and efficiency and shipments, and the resulting uncertainties in the economic analysis, DOE has concluded that it lacks clear and convincing evidence as would justify the adoption of more-stringent levels. In considering the comments from ASAP and NRDC, DOE examined the analysis leading to the adoption of the CEC computer room air conditioner standards. Upon reviewing the documentation of the CEC efficiency requirements, DOE did not discover any data or information that provided clear and convincing evidence that the levels set by the CEC were economically justified on a National level. Therefore, consistent with its earlier position, DOE has concluded that clear and convincing evidence does not exist that would allow the adoption of Federal energy conservation standards for computer room air conditioners that are more stringent than the efficiency levels in ASHRAE Standard 90.1–2010. However, DOE anticipates that the adoption of CRAC energy conservation standards in today's final rule will lead to the generation of CRAC shipments data and other information that will be useful in considering more-stringent standards in DOE's next rulemaking related to computer room air conditioners.

E. Coverage of Commercial Package Air-Conditioning and Heating Equipment Used Exclusively as Part of Industrial or Manufacturing Processes

In the January 2012 NOPR, DOE offered clarification of how it views equipment that is used exclusively for industrial or manufacturing processes. DOE explained that if equipment meets the definition of ''commercial package air conditioning and heating equipment'' in 10 CFR 431.92, is used exclusively for manufacturing and/or industrial processes, and is not listed as one of the equipment types specifically added to ASHRAE Standard 90.1, then DOE believes it is not covered under DOE's regulatory program. 77 FR 2356, 2372–73 (Jan. 17, 2012). Further, DOE stated that it will make this

determination on a case-by-case basis after considering the facts of the particular model in question, including how the model is advertised, marketed, and/or sold for use in buildings, the extent to which the equipment provides comfort conditioning to occupants, and how the equipment is designed and manufactured. *Id.* DOE requested comment on ways that manufacturers differentiate between equipment that is used solely for manufacturing and industrial processes and that used for comfort cooling in buildings.

In response, AHRI commented that manufacturers differentiate air conditioners used for manufacturing and industrial processing by: (1) Omission (by not rating the model to the Federal efficiency test procedure or not listing the model in the manufacturer's catalog of comfort cooling and heating products); (2) by incorporating special operation features which would not be appropriate for the purpose of comfort cooling or heating; or (3) by listing the equipment as complying with a safety standard specific for industrial uses and processes. (AHRI, No. 30 at p. 2) Carrier commented that it does not differentiate between commercial package air-conditioning and heating equipment used in buildings versus those used solely for manufacturing and industrial processes. (Carrier, No. 28 at p. 3) Engineered Air stated that a unit for a single-focus, process-driven use should be exempt from standards, and the company provided the specific example of preconditioned air units that are used under jet bridges at airports to cool jet planes. (Engineered Air, No. 36 at p. 1)

DOE notes that none of the responses provide DOE with a set of feature(s) or characteristic(s) associated with the equipment, such as a physical characteristic or component, that would allow manufacturers and DOE to objectively and consistently differentiate between comfort-cooling equipment and equipment that is intended solely for industrial processes. But the comment responses, in particular Carrier's, point to the fact that some manufacturers use the same equipment to serve both markets. DOE believes the comment responses illustrate the importance for DOE to clearly explain the decision process for DOE and manufacturers to determine whether a given basic model is covered by DOE's regulatory program.

As mentioned in the March 2012 SNOPR, ASHRAE Standard 90.1–2010 expanded the scope of its coverage as compared to previous versions of ASHRAE Standard 90.1. 77 FR 16769, 16770 (March 22, 2012). Previous versions of ASHRAE Standard 90.1 did not apply to equipment and portions of building systems that use energy primarily to provide for industrial, manufacturing, or commercial processes (see ASHRAE Standard 90.1–2007, section 2.3(c)). As discussed in the March 2012 SNOPR, DOE still believes it is ASHRAE's intent to continue to exclude most of those equipment types that are used for manufacturing and industrial processes, despite the fact that ASHRAE Standard 90.1–2010 now applies to new equipment or building systems used in manufacturing or industrial processes that are specifically identified in the standard (*i.e.,* ''air conditioners and condensing units serving computer rooms''). *Id.* at 16774. DOE did not receive any comments suggesting that ASHRAE intended a general, rather than limited, broadening of coverage regarding these types of equipment.

In order to aid regulated entities in determining whether their equipment falls within the scope of DOE's definition of ''commercial package air conditioning and heating equipment'' and, thus, is subject to DOE's regulatory requirements, DOE is providing the following guidance. If the equipment meets the definition of ''commercial package air conditioning and heating equipment'' in 10 CFR 431.92, is used exclusively for manufacturing and/or industrial processes, and is not listed as one of the equipment types specifically added to ASHRAE Standard 90.1's scope, then DOE does not consider such equipment to be covered under DOE's regulatory program. Manufacturers need to make this determination by comparing the characteristics of each basic model to DOE's regulatory definitions. Just like manufacturers, DOE will make this determination on a case-by-case basis after considering the facts of the particular basic model in question if questions arise regarding coverage. In making such determination, DOE will consider factors such as how the model is advertised, marketed, and/or sold for use in buildings, the extent to which the equipment provides comfort conditioning to occupants, and how the equipment is designed and manufactured. For equipment that is used in commercial or industrial buildings, that has a design similar to that of equipment used in manufacturing processes, but provides comfort conditioning, DOE considers such equipment to meet the definition of ''commercial package air conditioning and heating equipment'' and consequently to be covered under ASHRAE Standard 90.1–2010. DOE notes that the fact that equipment may be advertised, marketed, and/or sold as part of industrial or manufacturing processes is not a mutually exclusive determination that the models are exempt them from coverage by DOE's standards for equipment in buildings. In the example of identical equipment used to serve both markets, DOE would consider that covered under DOE's regulatory program unless a specific basic model had an attribute that would preclude it from meeting the definition of ''commercial package air conditioning and heating equipment.''

All equipment distributed in U.S. commerce that meets DOE's definition of ''commercial package air conditioning and heating equipment'' and is not subject to the Department's exclusion guidance set forth above must meet the applicable Federal energy conservation standards regardless of technology or design.

F. Definitions for Variable Refrigerant Flow Systems

In the January 2012 NOPR, DOE proposed the following three definitions relating to the newly-covered variable refrigerant flow equipment classes—''variable refrigerant flow multi-split air conditioners,'' ''variable refrigerant flow multi-split heat pumps,'' and ''heat recovery'':

Variable Refrigerant Flow Multi-Split Air Conditioner means a unit of commercial package air conditioning and heating equipment that is configured as a split system air-conditioner incorporating a single refrigerant circuit, with one or more outdoor units, at least one variable-speed compressor or an alternate compressor combination for varying the capacity of the system by three or more steps, and multiple indoor fan coil units, each of which is individually metered and individually controlled by an integral control device and common communications network and which can operate independently in response to multiple indoor thermostats. Variable refrigerant flow implies three or more steps of capacity control on common, inter-connecting piping.

Variable Refrigerant Flow Multi-Split Heat Pump means a unit of commercial package air conditioning and heating equipment that is configured as a split system heat pump that uses reverse cycle refrigeration as its primary heating source and which may include secondary supplemental heating by means of electrical resistance, steam, hot water, or gas. The equipment incorporates a single refrigerant circuit, with one or more outdoor units, at least one variable-speed compressor or an alternate compressor combination for varying the capacity of the system by three or more steps, and multiple indoor fan coil units, each of which is individually metered and individually controlled by a control device and common communications network and which can operate independently in response to multiple indoor thermostats. Variable

refrigerant flow implies three or more steps of capacity control on common, inter-connecting piping.

Heat Recovery (in the context of variable refrigerant flow multi-split air conditioners or variable refrigerant flow multi-split heat pumps) means that the air conditioner or heat pump is also capable of providing simultaneous heating and cooling operation, where recovered energy from the indoor units operating in one mode can be transferred to one or more other indoor units operating in the other mode. A variable refrigerant flow multi-split heat recovery heat pump is a variable refrigerant flow multi-split heat pump with the addition of heat recovery capability.

77 FR 2356, 2379–80 (Jan. 17, 2012).

On this issue, AHRI, Mitsubishi, and Carrier submitted comments agreeing with these proposed definitions. (AHRI, No. 30 at p. 5, Mitsubishi, No. 33 at p. 2, and Carrier, No. 28 at p. 3) DOE received no other comments from stakeholders on these definitions. Thus, DOE is adopting the definitions as proposed in today's final rule.

IV. Test Procedure Amendments and Discussion of Related Comments

In the January 2012 NOPR, DOE proposed to update the DOE test procedures for several types of ASHRAE equipment by incorporating the most recent version of the industry test methods referenced in ASHRAE Standard 90.1–2010. For certain types of equipment that had not previously been subject to energy conservation standards, DOE proposed to adopt new test procedures referenced in ASHRAE Standard 90.1–2010. Additionally, DOE conducted a substantive review of all of the test procedures that were updated in ASHRAE Standard 90.1–2010 in their entirety in order to satisfy the 7-year review provision for test procedures discussed in section II.A. As part of its review, DOE proposed to allow for an optional break-in period to allow the unit to achieve optimal performance before testing for small, large, and very large commercial air conditioners, variable refrigerant flow air conditioners and heat pumps, and single package vertical air conditioners and single package vertical heat pumps. 77 FR 2356, 2424–33 (Jan. 17, 2012). In the March 2012 SNOPR, DOE proposed to include in its test procedures several clarifying provisions, along with certain provisions (with some modification) from AHRI operations manuals (AHRI OMs) that would harmonize equipment testing so that it is performed consistently at all test laboratories. 77 FR 16769, 16781–82 (March 22, 2012). The updates to the test procedures being adopted as part of today's rule are discussed in the subsections immediately below.

DOE received a general comment about the 7-year review process for test procedure updates from AHRI. AHRI commented that the 7-year review requirement is too infrequent, because most AHRI and ASHRAE standards are amended at intervals of 5 years or less. Therefore, AHRI asserted that DOE should conduct test procedure rulemakings to incorporate by reference new or revised industry test procedures once they are referenced in ASHRAE Standard 90.1. (AHRI, No. 30 at p. 2)

In response, DOE notes that the 7-year requirement stems from 42 U.S.C. 6314(a)(1)(A), which requires that DOE shall conduct an evaluation of the test procedures for any covered equipment class and either amend the test procedures (if the Secretary determines that amended test procedures would more accurately or fully comply with the requirements of 42 U.S.C. 6314(a)(2)–(3)) or publish a notice in the **Federal Register** of any determination not to amend a test procedure. This requirement compels DOE to take action on any test procedure that has not been reviewed within a 7-year timeframe. For the test procedures for covered ASHRAE equipment, DOE is also guided by EPCA that if an industry test procedure referenced in DOE's regulations is updated, DOE must assess the updated industry procedure and amend the test procedure for the product as necessary to be consistent with the amended industry test procedure or rating procedure, unless DOE determines that the amended test procedure is not reasonably designed to produce test results which reflect the energy efficiency, energy use, or estimated annual operating costs of the ASHRAE product during a representative average use cycle. (42 U.S.C. 6314(a)(2)–(4)) Thus, given that DOE has two triggers for reviewing the test procedures for covered ASHRAE equipment—the 7-year review requirement and the requirement for review subsequent to an update of the industry standard—DOE will consider any industry test procedure revisions in a timely manner.

As noted above, in the March 2012 SNOPR, DOE examined the AHRI operations manuals to identify areas where potential clarification to the DOE test procedure for commercial package air-conditioning and heating equipment may be needed and proposed to include several clarifications in the Federal test procedures. 77 FR 16769, 16774–79 (March 22, 2012). In the March 2012 SNOPR, DOE proposed to omit section 6.5 from AHRI 210/240–2008, section 6.3 of AHRI 340/360–2007, section 5.11 from ASHRAE 127–2007, section 6.4 from AHRI 390–2003, and section 6.6 from AHRI 1230–2010 from its regulations at 10 CFR 431.96, which provide tolerance values for ratings of tested equipment to comply with that standard. Instead, DOE clarified that manufacturers must follow the equipment type-specific procedures in 10 CFR 429 when determining whether equipment ratings are within acceptable tolerance limits. DOE also issued guidance on various other aspects of testing, including defective samples, test set-up, enhancement devices, refrigerant charge, and rating air flow rates. 77 FR 16769, 16777–78 (March 22, 2012). DOE determines whether a unit is defective on a case-by-case basis as part of its certification and enforcement program as listed in 10 CFR 429.110(d)(3). As a general guidance for remaining topics, DOE will only consider information contained in the equipment's installation and operations manual (I&O manual) for conducting assessment and enforcement testing. That is, DOE will install the equipment for testing as is outlined in the I&O manual using any enhancement devices that are documented in the I&O manual as being a part of the equipment's basic model. If the I&O manual specifies a range of refrigerant charge or pressure, it will be valid for the equipment to be tested using any refrigerant charge within that range, unless the manufacturer specifies otherwise in the I&O manual. If the I&O manual does not specify a rating air flow rate for testing, DOE will use the nominal air flow rate (typically 400 scfm/ton) for testing.

In response to the SNOPR, stakeholders submitted comments on DOE's clarifications related to tolerances in its test procedures. Rheem did not support DOE's decision with regard to the tolerances. Rheem stated that the current DOE regulations clearly incorporate by reference the entire ARI Standard 340/360–2004, including section 6.3 relating to tolerances, and that DOE's attempt to excise this protocol is procedurally inappropriate and at odds with the congressional balancing or regulatory determination that resulted in the current energy conservation standards; and, thus, it is illegal. (Rheem, No. 32 at p. 2) EEI recommended that DOE not tighten the tolerance of test procedure results because this would increase costs to the manufacturers of testing equipment and to commercial customers. (EEI, No. 29 at p. 1) Carrier commented that the issue of AHRI 340/360 tolerances does not apply to initial ratings, and it also stated that AHRI is in the process of modifying

this requirement to adopt the note in section 6.5 of AHRI 210/240, which states that ''[p]roducts covered by the National Appliance Energy Conservation Act (NAECA) shall be rated in accordance with 10 CFR Part 430, Section 24 m (1)(i)–(ii)'' so that DOE will not have to make an exception to the AHRI procedure. (Carrier, No. 28 at p. 5) AHRI stated that the tolerances specified in AHRI 340/360 do not apply to ratings that are certified to DOE but applies only to verification testing conducted by AHRI. (AHRI, No. 30 at p. 3) AHRI also commented that any issues pertaining to certification and enforcement should be addressed in a future NOPR for that topic. However, AHRI commented that DOE's policy of not applying a tolerance to the results of an assessment test is inconsistent with both DOE's certification procedures and the fundamental nature of any empirical test method. AHRI reasoned that is it wrong for DOE to employ a ''zero tolerance'' policy for assessment tests, arguing that DOE should try to harmonize the sampling plan probability levels between enforcement and assessment testing and further noting that the sampling plan for three-phase HVAC systems should not be more stringent than residential HVAC systems. (AHRI, No. 30 at p. 6–8) Rheem also encouraged DOE to open a separate rulemaking, including public hearings and stakeholder discussions, with regard to the proposed changes related to testing and compliance with energy conservation standards. (Rheem, No. 32 at p. 1)

In response, DOE reiterates what it stated in the March 2012 SNOPR, that it has its own tolerances as part of its certification and enforcement program that have been established since 2006. 77 FR 16769, 16777 (March 22, 2012). As AHRI notes in its comments, the tolerances in the AHRI standards do not apply to DOE's regulatory program and only apply to AHRI's verification program. Omitting the specific section on the tolerances used in AHRI's verification program from being incorporated by reference in the DOE test procedure does not change how manufacturers have to conduct testing for DOE's regulatory program and how DOE conducts verification or enforcement testing. Omission of the AHRI verification program tolerances only serves to clarify to manufacturers that DOE does not employ AHRI's verification tolerance, which is a flat 5-percent tolerance, in its regulatory program. DOE believes this will help alleviate any confusion that may be introduced from the different tolerances used as part of DOE's regulatory program and AHRI's verification program.

As to AHRI's specific comment regarding a tolerance associated with assessment testing conducted by DOE, DOE's regulations do not include a specific tolerance that is applied to an assessment test. DOE disagrees with commenters who suggest that DOE employs a zero-percent tolerance policy on any assessment test conducted. DOE specifically adopted provisions, which allow it to conduct enforcement testing if DOE has reason to believe that a basic model is not in compliance. 10 CFR 429.110. While DOE has the authority under the statute to, at any time, test a basic model to assess whether the basic model is in compliance with the applicable energy conservation standard(s), assessment testing is only one method DOE utilizes to better inform its decision making when deciding whether to pursue enforcement testing. *See* 10 CFR 429.104; 76 FR 12422, 12495 (March 7, 2011). Should DOE decide to revisit its current approach for assessment testing, it would do so in the next certification, compliance, and enforcement rulemaking.

DOE also received other comments on its guidance on other aspects of testing as well. AHRI stated that the AHRI operation manuals only provide clarification and detailed instructions on how the AHRI certification program conducts those test procedures and do not counter or revise the Federal efficiency test methods. The commenter acknowledged that DOE is not required to consider including guidelines or checklists in AHRI operations manuals in the Federal test procedure, but it did encourage DOE to use the guidelines in any verification testing. (AHRI, No. 30 at p. 6) Rheem commented that DOE should use the guidelines in the AHRI operations manual in any testing done by DOE to ensure proper and consistent testing and evaluation of a product's performance. (Rheem, No. 32 at p. 2) Rheem also commented that DOE's proposed changes in 10 CFR 431.96(e) are new and previously unannounced, and the company does not see the logic or utility in providing certification or testing specifications in installation and operations manuals used in the field. Rheem argued that the industry would need a minimum of 6 months to revise its technical literature if this requirement were to be imposed and that the industry should be allowed to supplement printed material through its Web site or other electronic means. (Rheem, No. 32 at p. 2)

In response to these comments, DOE agrees that testing should be done in a consistent manner to achieve a level playing field for all manufacturers, as reflected in the proposed test procedure amendments which DOE published for notice and comment. By adopting some of the guidance in the AHRI OMs, DOE hopes to clarify what is and is not allowed during testing conducted by manufacturers for DOE's regulatory program and DOE-initiated testing. In certain cases, the AHRI OMs require manufacturers to provide information related to testing that is not publically disclosed. DOE reiterates its position in the January 2012 NOPR and the March 2012 SNOPR that if manufacturers have specific conditions or instructions used in generating their energy efficiency ratings, they must be clearly provided in the I&O manual shipped with the unit. 77 FR 2356, 2378 (Jan. 17, 2012); 77 FR 16769, 16778 (March 22, 2012). In DOE's view, the commercial customer has a right to know the operating conditions that are used to generate the certified efficiency values, including rated airflow and rated capacity.

Regarding Rheem's assertion that a minimum of 6 months would be required to update technical literature to accommodate this requirement, DOE notes that the compliance dates are as specified in the **DATES** section of this notice and any testing done after the compliance dates would incorporate all additions to the DOE test procedure in this final rule; these compliance dates generally provide 6 months or more for manufacturers to make any requisite changes to their I&O manuals. DOE may also reference online specification sheets for rated information prior to the compliance date of the test procedure amendments, provided that those specification sheets contain specific version numbers, revision dates, and rating information; however, DOE reiterates that it is adopting provisions that require manufacturers to disclose any rated conditions for testing in the information shipped with the units themselves in this final rule. DOE notes that when manufacturers are required to comply with the certification provisions for most types of the commercial equipment subject to this rulemaking, DOE will use the rated values certified by the manufacturers in addition to any information in the installation and operation manuals.

A. Commercial Package Air-Conditioning and Heating Equipment

As explained in the May 2011 NODA and the January 2012 NOPR, DOE examined the differences between the current DOE test procedure and the

updated industry test procedures referenced in ASHRAE Standard 90.1–2010 for small,[7] large, and very large commercial package air-conditioning and heating equipment. 76 FR 25622, 25634–36 (May 5, 2011); 77 FR 2356, 2373–74 (Jan. 17, 2012). In the January 2012 NOPR, DOE proposed to incorporate by reference AHRI 210/240–2008 into the Federal test procedure for small (<65,000 Btu/h cooling capacity) commercial package air-conditioning and heating equipment and AHRI 340/360–2007 into the Federal test procedure for small (≥65,000 Btu/h and <135,000 Btu/h cooling capacity), large, and very large commercial package air-conditioning and heating equipment. *Id.* Additionally, in the January 2012 NOPR, DOE also proposed to add an optional ''break-in'' period (no more than 16 hours) for small, large, and very large commercial package air conditioning and heating equipment. *Id.*

Mitsubishi and EEI supported DOE's proposed adoption of AHRI 210/240–2008 and AHRI 340/360–2007. (Mitsubishi, No. 33 at p. 1–2 and EEI, No. 29 at p. 2) Rheem and Engineered Air also supported DOE's proposed adoption of AHRI 340/360–2007. (Rheem, No. 32 at p. 3 and Engineered Air, No. 36 at p. 2) AHRI recommended that DOE should also include addenda 1 and 2 to AHRI 210/240–2008 as part of the review process and adopt them as appropriate. (AHRI, No. 30 at p. 3) These addenda made several updates to the test standard, which are discussed in detail in the paragraphs immediately below. Carrier urged DOE to adopt addenda 1 and 2 to AHRI 210/240–2008 as well. (Carrier, No. 28 at p. 2) Carrier also noted that DOE should also adopt addenda 1 and 2 to AHRI 340/360–2007, which specify tolerances on external static pressures and include a correction on the test method for integrated energy efficiency ratio (IEER), and encouraged DOE to check with AHRI regarding the latest addenda prior to finalizing its rulemaking. (Carrier, No. 28 at p. 2)

In response to stakeholder comments, DOE reviewed the addenda to AHRI 210/240–2008 and to AHRI 340/360–2007. The addenda to AHRI 210/240–2008 generally replace any references to the part-load metric (*i.e.,* integrated part load value (IPLV)) with references to the new part load metric (*i.e.,* IEER). The addenda to AHRI 340/360–2007 expand the scope of the standard to include air-cooled package unitary air conditioners with cooling capacities from 250,000 Btu/h to less than 760,000 Btu/h, add a -0.00 inch H_2O to a 0.05 inch H_2O tolerance to the external static pressure test condition, and add an external static pressure equation and a tolerance to the leaving dry-bulb temperature to the IEER part-load test. Because DOE does not regulate part-load performance of commercial package air-conditioning and heating equipment and because the external static pressure tolerance update harmonizes the required measurements with those in the test procedure for residential air-conditioning equipment, DOE determined that the addenda would not impact the Federal energy efficiency ratings for small, large, and very large commercial air conditioners and heat pumps. As noted above, EPCA directs DOE to review and adopt the most recent version of industry test procedures for equipment covered by ASHRAE Standard 90.1, provided that the industry test procedures are not unduly burdensome to conduct and provide an accurate assessment of the energy efficiency or energy use of the equipment. Accordingly, DOE is incorporating by reference AHRI 210/240–2008 with addenda 1 and 2 and AHRI 340/360–2008 with addenda 1 and 2 in 10 CFR 431.96.

On the topic of compressor break-in periods, Rheem supported DOE's proposal of a break-in period of 16 hours for small commercial equipment and recommended the same amount of time for large and very large equipment. (Rheem, No. 32 at p. 3) Carrier also supported the inclusion of a compressor break-in period for small, large, and very large commercial air conditioners and heat pumps and stated that a 16- to 20-hour compressor break-in period at 95 °F would be sufficient. However, Carrier also commented that to reduce the time equipment is in the test room, the break-in run may sometimes be conducted outside the test room, in which case ambient air temperature may be lower than the 95 °F specified in the test method. When the ambient air temperature is lower than 95 °F, Carrier stated that longer break-in times of up to 50 hours may be necessary. (Carrier, No. 28 at p. 2) AHRI also agreed that a compressor break-in period is necessary for small, large, and very large commercial package air-conditioning and heating equipment, but it recommended, based on AHRI's experience, that the compressor break-in should be at minimum 16 hours. AHRI recommended that DOE allow a compressor break-in period to be the longer of 16 hours or the amount of time it takes for the system to achieve four consecutive 30-minute averages of cooling capacity that do not deviate more than 2 percent between each average and 1 percent from hour to hour. (AHRI, No. 30 at p. 3) Mitsubishi supported the same approach as AHRI. (Mitsubishi, No. 33 at p. 1–2)

DOE believes that setting a minimum compressor break-in period, as suggested by AHRI and Mitsubishi, would unnecessarily increase testing cost to manufacturers whose equipment could stabilize in less than 16 hours. Interested parties did not provide additional data supporting how ambient temperatures may impact compressor break-in time and why a longer break-in time may be warranted. To Carrier's comment regarding the ambient conditions for the break-in period, DOE does not always perform the break-in period in a conditioned space at 95 °F. DOE believes that running the break-in period in a conditioned room adds unnecessary burden on both the industry and on DOE for testing, given the unknown impact on product performance. DOE is reluctant to add an ambient temperature requirement to the break-in period in absence of data suggesting there is a large impact on product performance. DOE's proposal in the NOPR matched the 16-hour maximum period used by AHRI in its Operations Manual for Unitary Large Equipment Certification Program, so DOE is puzzled by AHRI's comment suggesting deviation from this approach. Therefore, DOE is not adopting a minimum length for the break-in period. Rather, DOE is adopting a break-in period that will allow manufacturers to run equipment for any amount of time up to a maximum time limit of up to 20 hours, as suggested by Carrier, because DOE believes that the comments indicate that a break-in period of slightly longer than the 16 hours proposed in the NOPR may be required for certain equipment. DOE recognizes that different compressors will require different amounts of break-in time to achieve optimal performance and appreciates the suggestion by AHRI and Mitsubishi to determine the length of the break-in period based on the stabilization of equipment's cooling capacity. However, DOE notes that determining the break-in period using a method based on stabilizing cooling capacity would require the testing entity

[7] EPCA defines ''small commercial package air conditioning and heating equipment'' as ''commercial package air conditioning and heating equipment that is rated below 135,000 Btu/h (cooling capacity).'' (42 U.S.C. 6311(8)(B)) ASHRAE 90.1–2010 generally divides covered commercial package air conditioners into the following class sizes: (1) <65,000 Btu/h; (2) ≥65,000 and <135,000 Btu/h; (3) ≥135,000 and <240,000 Btu/h; and (4) ≥240,000 Btu/h and <760,000 Btu/h. Thus, ''small'' commercial package air conditioners, as defined by EPCA, are split into two size classes in ASHRAE Standard 90.1–2010: (1) <65,000 Btu/h and (2) ≥65,000 and <135,000 Btu/h.

to continually monitor cooling capacity, which DOE believes may increase the testing burden. Therefore, DOE is not adopting a provision requiring that the break-in period, if used, be determined in any specific manner, but rather is adopting a provision that gives the manufacturer the option of determining the appropriate length of the break-in period using any method deemed appropriate up to a maximum time limit of 20 hours. The lack of a minimum time limit allows the manufacturer to conduct the break-in at its discretion or to allow any break-in period below the maximum time limit that the manufacturer feels is necessary and appropriate, and, thus, minimizes the burden of this addition to the test procedure. The maximum time limit on the optional compressor break-in period prevents an indefinite amount of time being allowed if a unit were to not stabilize and achieve optimal performance. Thus, DOE is adopting an optional compressor break-in allowing manufacturers to conduct a break-in period for any amount of time deemed necessary by the manufacturer, up to a maximum period of 20 hours. Any manufacturer who elects to use this optional compressor break-in period in its certification testing should record this information (including the duration) in the test data underlying the certified ratings that is required to be maintained under 10 CFR 429.71. DOE will use the exact same break-in period for any DOE-initiated testing as the manufacturer used in its certified ratings. In the case an alternate efficiency determination method (AEDM) is used to develop the certified ratings, DOE will use the maximum 20-hour break-in period, which DOE believes will provide the unit sufficient time to stabilize and achieve optimal performance.

B. Commercial Warm-Air Furnaces and Commercial Water Heaters

In the May 2011 NODA and the January 2012 NOPR, DOE examined and proposed to incorporate by reference the three updated test procedures for commercial warm-air furnaces and commercial water heaters referenced in ASHRAE Standard 90.1–2010: UL 727–2006 for commercial oil-fired warm-air furnaces, ANSI Z21.47–2006 for commercial gas-fired warm-air furnaces, and ANSI Z21.10.3–2004 for commercial water heaters. 76 FR 25622, 25636–37 (May 5, 2011); 77 FR 2356, 2374–76 (Jan. 17, 2012). DOE tentatively determined that the changes in the updated test procedures do not substantially impact the measurement of energy efficiency for commercial warm-air furnaces or commercial water heaters. In the March 2012 SNOPR, DOE also explained its position on tolerances and test-set up for conducting the tests for this equipment. 77 FR 16769, 16777–78 (March 22, 2012).

In response to the January 2012 NOPR, AHRI supported DOE's proposal for adopting UL 727–2006 and ANSI Z21.47–2006, but it recommended that DOE should incorporate the latest version of ANSI Z21.10.3 (*i.e.,* the 2011 version of the standard). AHRI added that the thermal efficiency and standby loss tests in that edition of the ANSI standard have not changed from the 2004 edition, which is the version that DOE had proposed to adopt in the NOPR. (AHRI, No. 30 at p. 1 and 3) Rheem also supported the adoption of ANSI Z21.10.3 for commercial water heating equipment but similarly urged DOE to adopt the 2011 version of that standard. (Rheem, No. 32 at p. 3) EEI endorsed DOE's adoption of all the proposed test procedures for commercial warm-air furnaces and commercial water heaters. (EEI, No. 29 at p. 2)

DOE was triggered under EPCA to review and adopt the most recent version of the industry test methods for equipment covered by ASHRAE Standard 90.1, provided that the industry test method meets the requirements of EPCA for test procedures. In response to the comments from AHRI and Rheem, DOE reviewed the 2011 version of ANSI Z21.10.3. DOE agrees with Rheem and AHRI that adopting ANSI Z21.10.3–2011 would not alter the DOE test method or the energy efficiency ratings for commercial water heaters as compared to adopting ANSI Z21.10.3–2004, which was proposed for adoption in the NOPR. However, when reviewing ANSI Z21.10.3–2011, DOE discovered an apparent error in the text of Exhibit G, *Efficiency Test Procedures,* in section G.1, *Thermal Efficiency Test.* The relevant text states that ''[w]ater-tube water heaters shall be installed as shown in Figure 3, Arrangement for Testing Water-tube Type Instantaneous and Circulating Water Heaters.'' DOE notes that Figure 3 in ANSI Z1.10.3–2011 deals with direct vent terminal clearances, and that Figure 2 is titled ''Arrangement for Testing Water-tube Type Instantaneous and Circulating Water Heaters,'' and depicts the test set-up for water-tube water heaters. Therefore, DOE believes this was a drafting error and that the correct figure to reference would be Figure 2. DOE is adopting such correction in today's final rule. In all other regards, DOE has concluded that ANSI Z21.10.3–2011 meets the requirements of EPCA for incorporation into DOE's test procedures, and it is the most up-to-date version of the industry standard that is currently available. Thus, DOE is incorporating by reference ANSI Z21.10.3–2011 for commercial water heaters. DOE is also incorporating by reference UL 727–2006 for commercial oil-fired warm-air furnaces, ANSI Z21.47–2006 for commercial gas-fired warm-air furnaces, as proposed in the January 2012 NOPR.

DOE did not receive any comments specifically related to commercial warm-air furnaces and commercial water heaters on the issues of tolerances, defective units, and test set-up. For the same reasons explained in section IV.A, DOE is not adopting AHRI's tolerances, will determine if a unit is defective on a case-by-case basis according to 10 CFR 429.110(d)(3), and will set up equipment for testing using only the equipment's I&O manual shipped with the unit.

C. Computer Room Air Conditioners

In the January 2012 NOPR, DOE proposed to incorporate by reference ASHRAE 127–2007 as the basis for the Federal test procedure for computer room air conditioners, which was the test procedure referenced in ASHRAE Standard 90.1–2010. 77 FR 2356, 2376 (Jan. 17, 2012). DOE believes that this industry test procedure is best suited to measure the energy efficiency of computer room air conditioners due to its emphasis on the sensible coefficient of performance (SCOP) metric. SCOP emphasizes the computer room air conditioners' sensible cooling [8] ability, which is the predominant type of heating load in computer rooms. Energy efficiency ratio (EER), on the other hand, incorporates latent cooling, which could be detrimental in large quantities for computer rooms, because too much latent cooling could dry out the computer room, potentially causing harmful static discharges. DOE also asked for comment regarding the use of a compressor ''break-in'' period for this equipment, part-load performance and potential shortcomings of the SCOP metric, and how to treat the potential revisions of ASHRAE 127–2007 released as draft for public review on July 14, 2011 . The new ASHRAE 127–2012, officially released on February 24, 2012, introduces a new efficiency metric

[8] ''Sensible cooling'' is the cooling effect that causes an increase in the dry-bulb temperature, which is the actual temperature of the air. ''Latent cooling'' is the cooling effect that causes a decrease in the wet-bulb temperature or the moisture content of the air, which is similar to the temperature one feels.

called net sensible coefficient of performance (NSenCOP) to replace the SCOP metric, which had caused some confusion with another term in ASHRAE Standard 90.1 with the same acronym. Also, NSenCOP now incorporates the electric usage of the heat rejection equipment used by fluid-cooled computer room air conditioners (SCOP omitted this electric power in its equations).

DOE also notes that even though AHRI does not currently have a certification program or operations manual for this equipment, the same DOE guidance that applies to commercial package air-conditioning and heating equipment for determining the appropriate test set-up, enhancement devices, refrigerant charge, rating air flow rates, and whether a test sample is defective (as explained in section IV.A) is applicable for this equipment.

In response to the January 2012 NOPR and the March 2012 SNOPR, EEI endorsed DOE's adoption of the ASHRAE 127 test procedures for computer room air conditioners. (EEI, No. 29 at p. 2) NEEA stated that DOE should review the possibility of adopting ASHRAE 127–2012 as the test procedure for computer room air conditioners because the updated test procedure has now been finalized. (NEEA, No. 31 at p. 1) AHRI and NEEA commented that there are significant improvements in the new draft of ASHRAE 127 (ASHRAE 127–2012) which would provide a more representative efficiency rating and allow for a better selection of models for any specific application and would provide some new efficiency metrics. (AHRI, No. 30 at p. 4 and NEEA, No. 31 at p. 1) AHRI suggested that DOE should delay the rulemaking in order to adopt the revised ASHRAE 127–2012 test procedure and not adopt the current ASHRAE 127–2007 test procedure. AHRI further commented that if DOE adopts the ASHRAE 127–2007 test procedure, it would be an injudicious use of resources and an unnecessary burden on manufacturers, because manufacturers would have to spend significant time and money to comply with the 2007 version of ASHRAE and then more time and money to retest all their models using ASHRAE 127–2012, when it is adopted in the next ASHRAE Standard 90.1 rulemaking. AHRI asserted that delaying the rulemaking in order to adopt the revised ASHRAE Standard 127 would not be a lost opportunity for energy savings but that it would provide a better opportunity for effective energy savings because of improved metrics, additional application classes, and added rating conditions. (AHRI, No. 30 at p. 4) In addition, ASAP commented that the SCOP metric (in ASHRAE 127–2007) does not reflect very well how computer room air conditioners perform in the field and that energy saving technologies such as variable speed fans are not captured in the SCOP metric. Instead, ASAP urged DOE to consider a test procedure with a metric that does capture part-load performance. (ASAP, Public Meeting Transcript, No. 20 at pp. 43–44). Similarly, NEEA urged DOE to value part-load operation efficiency of CRACs more than full-load operation efficiency, because in the field, computer room air conditioners tend to be oversized and operate at part-load most or all of the time. (NEEA, No. 31 at p. 2)

In response, DOE notes that EPCA provides the requirements for adopting amended or new standards for ASHRAE equipment. When the efficiency levels in ASHRAE Standard 90.1 are updated with respect to covered equipment, DOE must either adopt those levels as Federal standards within 18 months of the publication of the most recent version of ASHRAE Standard 90.1, or adopt more stringent Federal levels within 30 months. Once ASHRAE decides to act by amending Standard 90.1, EPCA does not provide DOE with discretion to delay the adoption of minimum standards pending test procedure updates as AHRI suggests. Because DOE must adopt energy conservation standards for computer room air conditioners within the time constraints laid out by EPCA, DOE must also adopt a test method for determining compliance with the minimum standard. DOE has found that ASHRAE Standard 127–2007 meets the statutory requirements for incorporation into DOE's test procedures and is appropriate for rating CRACs using the SCOP metric. In contrast, the new ASHRAE 127–2012 standard is not referenced in ASHRAE Standard 90.1–2010, and, as a result, the efficiency levels that DOE considered were based on ASHRAE 127–2007. In order to justify the adoption of efficiency levels other than those contained in the most recent version of ASHRAE Standard 90.1, DOE notes that it would have to provide clear and convincing evidence that such levels are technologically feasible and economically justified. Due to the fact that ASHRAE 127–2012 has only been recently finalized, DOE was unable to find any test data showing the results of testing to this standard, and how the results compare to those obtained using the previous version of ASHRAE Standard 127. Therefore, there is no basis for DOE to adopt ASHRAE 127–2012 and corresponding standards at this time. DOE believes that pursuing the use of the updated industry test procedure standard would unnecessarily delay the rulemaking for computer room air conditioners, and ultimately, the result would be that not enough information is available to promulgate standards at levels other than those in ASHRAE Standard 90.1–2010. If the ASHRAE 127–2012 test method and corresponding efficiency levels using the new metric are included in the next version of ASHRAE Standard 90.1, DOE will review the amended test procedure and efficiency levels at that time, as required by EPCA.

For the above reasons, in today's rulemaking, DOE is adopting a test procedure for computer room air conditioners by incorporating by reference ASHRAE 127–2007.

Regarding the break-in period for computer room air conditioners, AHRI commented that computer room air conditioners should be allowed the same opportunity for a compressor break-in period as the other commercial package air-conditioning and heating equipment. (AHRI, No. 30 at p. 6) At the February 14, 2012 NOPR public meeting, Emerson stated that for all compressors, the break-in period is essential to stabilize the compressor's performance and efficiency. (Emerson, Public Meeting Transcript, No. 20 at p. 49)

Because computer room air conditioners mainly use scroll compressors like other commercial package air conditioners, DOE agrees that computer room manufacturers should be allowed the same opportunity for an optional compressor ''break-in'' period. Thus, DOE is adopting the same provision for an optional compressor break-in as it is adopting for other commercial air-conditioning equipment. Manufacturers may opt to use a break-in period for computer room air conditioners for any length of time, up to a maximum time of 20 hours. Manufacturers who elect to use this optional compressor break-in period in its certification testing should record this information (including the duration) as part of the test data underlying the certified ratings that is required to be maintained under 10 CFR 429.71.

D. Variable Refrigerant Flow Air-Conditioning and Heating Equipment

In this final rule, DOE is incorporating by reference AHRI 1230–2010 with addendum 1 as the basis for the Federal test procedure for variable refrigerant

flow equipment and is adopting the use of an optional compressor break-in period for variable refrigerant flow equipment. DOE initially discussed its proposals for testing this equipment in the January 2012 NOPR. 77 FR 2356, 2377–78 (Jan. 17, 2012). In the March 2012 SNOPR, DOE asked for comment regarding the need for a compressor break-in period longer than 16 hours for this equipment class. 77 FR 16769, 16776–77 (March 22, 2012). Also in the March 2012 SNOPR, DOE proposed to allow a manufacturer representative to witness assessment and enforcement testing and to adjust the compressor speed during testing, and DOE requested comment on these proposals. *Id.* at 16778–79. In the SNOPR, DOE also stated that manufacturers must document their certification set-up (including the fixed compressor speed) and maintain this documentation as part of their test data underlying certification so that DOE can request the documentation from the manufacturer on an as-needed basis. *Id.* Lastly, DOE proposed in the March 2012 SNOPR to adopt correction factors for the refrigerant line lengths for VRF systems only in instances where the physical constraints of the testing laboratory require a longer than minimum refrigerant line length. *Id.* at 16779. DOE also sought comment from stakeholders about its proposal to include these refrigerant line length correction factors.

Mitsubishi, Carrier, and EEI agreed with DOE's proposed adoption of AHRI 1230–2010 with addenda 1 for VRF systems. (Mitsubishi, No. 33 at p. 2, Carrier, No. 28 at p. 3, and EER, No. 29 at p. 2) There were no comments from stakeholders objecting to this proposal. DOE agrees with the submitted comments and is incorporating by reference AHRI 1230–2010 with addenda 1 into the Federal test procedure for VRF systems as part of today's final rule.

With respect to the break-in period for VRF systems, AHRI commented that VRF systems should be allowed the same compressor break-in period as it recommended for small, large, and very large commercial package air conditioners and heat pumps—the longer of 16 hour or the amount of time it takes for the system to complete 4 consecutive 30-minute cycles where the cooling capacity does not vary by more than 2 percent between each average and 1 percent from hour to hour. (AHRI, No. 30 at p. 4) Carrier stated that the compressor break-in period for VRF systems should be the same as for other commercial package air conditioners and heat pumps, as noted in section IV.A.

DOE agrees with these comments and believes that the break-in period for VRF equipment should be the same as that for other commercial package air conditioners and heat pumps. Thus, DOE is adopting an optional compressor break-in period that allows manufacturers to break in VRF equipment prior to testing for any length of time up to a maximum of 20 hours. Manufacturers who elect to use this optional compressor break-in period during certification testing should record this information (including the duration) as part of the test data underlying the certified ratings that is required to be maintained under 10 CFR 429.71.

DOE also received several comments regarding the limited manufacturer involvement in assessment and enforcement testing proposed in the SNOPR. AHRI agreed with DOE's proposal to allow limited manufacturer involvement in the testing of VRF systems. (AHRI, No. 30 at p. 9) Carrier also supported allowing limited manufacturer involvement during testing of VRF systems in order to ensure that the system has been set up properly and to lock compressor speeds for regulatory testing. However, Carrier extended that logic, arguing that the need for limited manufacturer involvement is not unique to VRF systems and that all commercial equipment is typically commissioned by a factory-trained person and should be allowed limited manufacturer involvement during testing as well. (Carrier, No. 28 at p. 5) Mitsubishi agreed with DOE's proposal to allow limited manufacturer involvement but suggested that the language be revised to allow the manufacturer representative to adjust the ''modulating components'' and not just to fix the compressor speed in order to achieve stabilization. (Mitsubishi, No. 33 at p. 3) More specifically, Mitsubishi commented that permissible manufacturer involvement should be clarified to allow manufacturers to properly interface with the unit control and communication system, to modulate control equipment in response to test room cycles, and to require factory-trained and certified installation technicians. (Mitsubishi, No. 33 at p. 2)

DOE believes that due to the unusually complicated nature of VRF systems, manufacturer involvement is necessary to ensure that the system operates properly during testing; however, DOE does not agree with Carrier's suggestion that the manufacturers also be allowed to assist in testing for other more typical commercial equipment. As noted in the March 2012 SNOPR, DOE believes that, unlike the conventional unitary market, a representative from the VRF manufacturer's company will typically provide on-site expertise when a VRF system is installed in a building in order to help ensure proper operation. 77 FR 16769, 16779 (March 22, 2012). In the conventional unitary market, trained general contractors can set up the commercial unitary equipment in the field without direct involvement from a manufacturer representative, and, thus, it would be reasonable to assume that test laboratories will be able to set up and run the test procedure for commercial unitary equipment without manufacturer involvement. DOE agrees with Mitsubishi's comment that VRF manufacturers might need to adjust more than just the compressor speed and is revising the language to allow manufacturers to adjust only the ''modulating components'' during testing in the presence of a DOE representative in order to achieve steady-state operation. Thus, DOE will allow manufacturer involvement in the testing of VRF systems under the condition that the manufacturer representative adjust only the modulating components in the presence of a DOE representative and that the manufacturer documents the test set-up and fixed compressor speeds as part of the test data underlying the certified ratings.

Lastly, regarding the refrigerant line correction factors proposed in the March 2012 SNOPR, DOE received several comments. AHRI and Mitsubishi agreed with DOE's proposal to incorporate the refrigerant line length correction factors into the DOE test procedure for VRF equipment. (AHRI, No. 30 at p. 9 and Mitsubishi, No. 33 at p. 3) Carrier also commented that all VRF equipment should be tested with the standard line lengths as defined by the appropriate rating standard for which minimum efficiency requirements were developed. (Carrier, No. 28 at p. 5)

DOE agrees that manufacturers should be required to use the minimum refrigerant line lengths in AHRI 1230–2010 but also recognizes that there may be circumstances (*i.e.,* the physical limitations of the laboratory) where this is not possible. Only in such cases, DOE will allow manufacturers to use correction factors in their calculations. Thus, DOE is adopting the minimum refrigerant line length correction factors, which are only to be used in instances where it is not possible to set up the test using the line lengths listed in Table 3 of AHRI 1230–2010.

E. Single Package Vertical Air Conditioners and Heat Pumps

In the January 2012 NOPR, DOE proposed to incorporate by reference AHRI 390–2003 as the basis for the Federal test procedure for single package vertical air conditioners and single package vertical heat pumps and proposed to adopt an optional compressor ''break-in'' period of no more than 16 hours. 77 FR 2356, 2378 (Jan. 17, 2012). In the March 2012 SNOPR DOE asked for comment about the need for a longer break-in period for this equipment class. 77 FR 16769, 16776–77 (March 22, 2012).

Mitsubishi and EEI agreed with DOE's proposed adoption of AHRI 390–2003 for single package vertical air conditioners and single package vertical heat pumps. (Mitsubishi, No. 33 at p. 2 and EEI, No. 29 at p. 2) Carrier commented that single package vertical equipment with a cooling capacity greater than or equal to 65,000 Btu/h should be rated according to AHRI 340/360–2007 with addenda 1 and 2 in order to ensure consistency in testing and rating vertical package and other commercial packaged equipment. (Carrier, No. 28 at p. 3)

In response to stakeholder comment, DOE notes that EPCA directs DOE to review the test procedures as referenced in the most recent version of ASHRAE Standard 90.1. ASHRAE Standard 90.1–2010 references AHRI 390–2003 as the test method for all classes of SPVUs. Upon reviewing AHRI 390–2003, DOE believes that the standard is reasonably designed to produce test results which reflect energy efficiency, energy use, and estimated operating costs of all classes of single package vertical air conditioners and single package vertical heat pumps, as required by EPCA for adoption. Accordingly, DOE is incorporating by reference AHRI 390–2003 as the Federal test procedure for single package vertical air conditioners and single package vertical heat pumps as required by EPCA.

Regarding the break-in period for SPVUs, AHRI commented that SPVUs should be allowed the same compressor break-in period as AHRI recommended for small, large, and very large commercial package air conditioners and heat pumps, as noted in section IV.A (AHRI, No. 30 at p. 4) DOE agrees that the break-in period for SPVUs should be the same as for other air-conditioning and heating equipment, and, thus, DOE is adopting an optional compressor break-in period that allows the manufacturer to break in equipment for up to a maximum time of 20 hours before commencing testing.

Similar to commercial package air conditioners, as discussed in section IV.A, DOE reiterates that DOE will only use information contained in a manufacturer's I&O manual for setting up testing, using enhancement devices, setting refrigerant charges, and setting rating air flow rates.

V. Methodology and Discussion of Comments for Computer Room Air Conditioners

A. Market Assessment

To begin its analysis on computer room air conditioners, DOE researched publicly-available information to provide an overall outlook in terms of the market for this type of equipment. DOE researched information on the structure of the industry, the purpose of the equipment, manufacturers, and market characteristics. This assessment included both quantitative and qualitative information. The topics discussed in this market assessment include definitions, equipment classes, manufacturers, and efficiencies. For more details on any of these subjects, see Chapter 2 of the final rule TSD.

1. Definition of ''Computer Room Air Conditioner''

As discussed in the May 2011 NODA and the January 2012 NOPR, ASHRAE expanded the scope in Standard 90.1–2010 to include air conditioners and condensing units serving computer rooms. 76 FR 25622, 25633–34 (May 5, 2011); 77 FR 2356, 2382–83 (Jan. 17, 2012). Because of this expansion of scope, DOE has determined that it has the authority to consider and adopt standards for this equipment. *Id.* However, because DOE did not previously cover this equipment type and is only now considering standards for this equipment class, DOE does not currently have a definition for ''computer room air conditioner'' and must define this type of equipment. DOE initially proposed a definition of this term in the January 2012 NOPR and asked for comment on ways in which manufacturers differentiate commercial air conditioners used for manufacturing and industrial processes from commercial air conditioners used for comfort cooling. 77 FR 2356, 2383 (Jan. 17, 2012). Then, in light of stakeholder feedback at the NOPR public meeting, DOE published an SNOPR in the **Federal Register** on March 22, 2012, revising its proposed definition to read as follows:

Computer room air conditioner means a basic model of commercial package air-conditioning and heating equipment that is: (1) Used in computer rooms, data processing rooms, or other purpose-specific cooling applications; (2) rated for sensible coefficient of performance (SCOP) and tested in accordance with 10 CFR 431.96; and (3) not a covered, consumer product under 42 U.S.C. 6291(1)–(2) and 6292. A computer room air conditioner may be provided with, or have as available options, an integrated humidifier, temperature, and/or humidity control of the supplied air, and reheating function.

77 FR 16769, 16773.

In response, Carrier commented that it does believe there is a basis to differentiate computer room air conditioners from commercial package air conditioners used for comfort conditioning because computer room units are designed to handle different load characteristics, most notably by focusing on sensible load and not latent cooling. (Carrier, No. 28 at p. 1) Panasonic commented that computer room air conditioners have a different operating range and that the tolerances on the relative humidity and temperature control is tighter. Panasonic stated that the very sophisticated computer rooms and data centers require 50 percent relative humidity, with a 10 percent tolerance, and a specific temperature; however, the commenter also said that 95 percent of data centers are less sensitive with regard to the operating ranges. (Panasonic, No. 20 at pp. 68–69) Mitsubishi commented that the DOE definition for ''computer room air conditioner'' should allow for dual ratings and certification for equipment and allow that products be used for multiple applications if they meet all applicable standards. (Mitsubishi, No. 33 at p. 2) At the NOPR public meeting, Danfoss commented that DOE should not restrict the use of a product and leave it up to competitive pressures to determine where manufacturers rate and market their products and that DOE's vigilance would prevent manufacturers from constantly switching equipment classes. (Danfoss, No. 20 at p. 64–66)

AHRI expressed disagreement with the proposed definition for ''computer room air conditioner,'' because the commenter argued that it is unnecessarily complex and overly broad. AHRI commented that the list of options that may be available with a computer room air conditioner is not necessary to the basic definition of the product and that the term ''purpose-specific cooling application'' is vague and confusing. AHRI recommended the following for a definition of ''computer room air conditioner'': ''Computer room air conditioners means a unit of commercial air conditioning equipment (packaged or split) that's intended by the manufacturer for use in computer

rooms, data processing rooms, or other information technology cooling applications, and is rated for sensible coefficient of performance (SCOP) using ASHRAE Standard 127.'' (AHRI, No. 30 at p. 8)

In response, DOE notes that its authority to cover computer room air conditioners stems from the expansion of ASHRAE Standard 90.1's scope and DOE's obligations pursuant to EPCA with regards to ASHRAE equipment. DOE is not aware of, nor did commenters identify, any distinct physical characteristic(s) that would consistently differentiate computer room air conditioners from other comfort-cooling commercial package air conditioners. DOE agrees with AHRI's assertion that ''purpose-specific cooling application is vague'' and, therefore, is removing that term from the definition. DOE acknowledges that the list of illustrative features of computer room air conditioners is not essential to the definition; however, DOE is retaining that language, because DOE believes that a recitation of such characteristics would provide useful assistance to manufacturers, industry, and DOE in determining which equipment should be considered to meet the definition of ''computer room air conditioner.'' Furthermore, DOE agrees with Mitsubishi's comment that the ''computer room air conditioner'' definition should allow for dual rating and certification for equipment if the basic model meets all applicable Federal standards, and notes that the definition proposed in the SNOPR would not preclude dual rating. Although DOE agrees with several points made by commenters, and is modifying the definition of ''computer room air conditioner'' accordingly, DOE is not adopting AHRI's proposed definition wholesale because it lacks several important clarifications. First, as discussed above, DOE believes that the list of features of computer room air conditioners provides useful assistance to DOE and industry in distinguishing computer room air conditioners from other types of covered commercial air conditioners. Second, DOE believes that the definition must clarify that the unit is tested for SCOP, which must be determined in accordance with DOE's test procedures at 10 CFR 431.96. In addition, DOE believes the clarification that a computer room air conditioner cannot be a covered product under 42 U.S.C. 6291(1)–(2) and 6292 is important to distinguish this equipment from residential products. Thus, DOE is adopting the following definition for ''computer room air conditioner,'':

Computer Room Air Conditioner means a basic model of commercial package air-conditioning and heating equipment (packaged or split) that is: (1) Used in computer rooms, data processing rooms, or other information technology cooling applications; (2) rated for sensible coefficient of performance (SCOP) and tested in accordance with 10 CFR 431.96, and (3) not a covered consumer product under 42 U.S.C. 6291(1)–(2) and 6292. A computer room air conditioner may be provided with, or have as available options, an integrated humidifier, temperature, and/or humidity control of the supplied air, and reheating function.

DOE believes that this definition does not prohibit manufacturers of commercial package air conditioners used for comfort cooling from advertising equipment for use in computer rooms or from making representations using the SCOP rating for computer air conditioners. However, DOE notes that if manufacturers of commercial package air conditioners used for comfort cooling wish to make representations of SCOP ratings, they must do so using only the procedures established by DOE in 10 CFR 431.96 for computer room air conditioners.

In addition, in the March 2012 SNOPR, DOE proposed to clarify that any basic model that meets the definition of ''commercial package air-conditioning and heat equipment'' must be classified as one of the equipment types (*e.g.,* small, large, or very large commercial package air-conditioning and heat equipment, packaged terminal air conditioners or heat pumps, variable refrigerant flow systems, computer room air conditioners, and single package vertical units) for the purposes of determining the primary applicable test procedure and energy conservation standard. 77 FR 16769, 16773–74 (March 22, 2012). DOE proposed adding a new section to the beginning of 10 CFR 431.97 to make it clear that each manufacturer of a basic model that meets this definition does have a regulatory obligation in terms of standards compliance. In the March 2012 SNOPR, DOE proposed a revision to 10 CFR 431.97 to read as follows:

(a) All basic models of commercial package air-conditioning and heating equipment must be tested for performance using the applicable DOE test procedure in § 431.96, be compliant with the applicable standards set forth in paragraphs (b) through (f) of this section, and be certified to the Department under 10 CFR part 429, where required.

Id.

In response to this proposed change, AHRI commented that it does not agree with the proposed amendments to 10 CFR 431.97(a), because AHRI believes it is unnecessary and does not provide added clarity, but rather, it simply repeats the basic concept of DOE's certification, compliance, and enforcement regulations. (AHRI, No. 30 at p. 8)

DOE recognizes that the additional language in 10 CFR 431.97 repeats the basic concepts from DOE's certification compliance and enforcement regulations. However, DOE believes that including this statement in 10 CFR 431.97 will serve as a reminder to manufacturers of commercial air-conditioning and heating equipment that their basic models must be certified to one of the equipment classes according to the requirements set forth in 10 CFR part 429. In addition, the paragraph clarifies that all commercial package air-conditioning and heating equipment must be tested for performance using the applicable test procedure in 10 CFR 431.96. DOE, therefore, believes that this statement will help clarify its requirements, and accordingly, DOE is adopting this change in the final rule.

Finally, with regard to the third part of its definition for computer room air conditioners, specifically, that the equipment cannot be a covered consumer product under 42 U.S.C. 6291(1)–(2) and 6292, manufacturers should compare the characteristics of each basic model to the definition of a ''central air conditioner,'' as specified in 42 U.S.C. 6291(21). If any basic model in question meets the definition of a ''central air conditioner,'' the onus is on the manufacturer to provide justification that the equipment is not a covered consumer product under 42 U.S.C. 6291(1)–(2) and is instead subject to a different definition in DOE's regulatory program. In other words, all equipment meeting the definition of ''central air conditioner'' must be in compliance with the test procedure, standard, and certification provisions applicable to that product type. DOE will review the manufacturer's justification and make its own determination of coverage if questions arise regarding a given basic model.

2. Equipment Classes

ASHRAE Standard 90.1–2010 divides computer room air conditioners into 30 different equipment classes based on the net sensible cooling capacity (*i.e.,* <65,000 Btu/h; ≥65,000 Btu/h and <240,000 Btu/h; or ≥240,000 Btu/h and <760,000 Btu/h), orientation of airflow (*i.e.,* upflow or downflow), heat rejection method (*i.e.,* air-cooled, water-cooled, glycol-cooled), and the presence of a fluid economizer.[9] DOE generally

[9] A ''fluid economizer'' is a system configuration potentially available where an external fluid-cooler

divides equipment and product classes by the type of energy used or by capacity or other performance-related features that affect efficiency. Different energy conservation standards may apply to different equipment classes. (42 U.S.C. 6295(q)) Because DOE believes that net sensible cooling capacity, orientation, heat rejection method, and use of a fluid economizer are all performance-related features that affect computer room air conditioner efficiency (*i.e.,* SCOP), DOE is dividing computer room air conditioners into the 30 equipment classes shown in Table V.1. These are the same equipment classes DOE proposed to adopt in the January 2012 NOPR. 77 FR 2356, 2383–84; 2431 (Jan. 17, 2012).

TABLE V.1—COMPUTER ROOM AIR CONDITIONERS EQUIPMENT CLASSES AND EFFICIENCY LEVELS

Equipment type	Net sensible cooling capacity	Minimum SCOP efficiency	
		Downflow units	Upflow units
Air Conditioners, Air-Cooled	<65,000 Btu/h	2.20	2.09
	≥65,000 Btu/h and <240,000 Btu/h	2.10	1.99
	≥240,000 Btu/h and <760,000 Btu/h	1.90	1.79
Air Conditioners, Water-Cooled	<65,000 Btu/h	2.60	2.49
	≥65,000 Btu/h and <240,000 Btu/h	2.50	2.39
	≥240,000 Btu/h and <760,000 Btu/h	2.40	2.29
Air Conditioners, Water-Cooled with a Fluid Economizer.	<65,000 Btu/h	2.55	2.44
	≥65,000 Btu/h and <240,000 Btu/h	2.45	2.34
	≥240,000 Btu/h and <760,000 Btu/h	2.35	2.24
Air Conditioners, Glycol-Cooled	<65,000 Btu/h	2.50	2.39
	≥65,000 Btu/h and <240,000 Btu/h	2.15	2.04
	≥240,000 Btu/h and <760,000 Btu/h	2.10	1.99
Air Conditioner, Glycol-Cooled with a Fluid Economizer.	<65,000 Btu/h	2.45	2.34
	≥65,000 Btu/h and <240,000 Btu/h	2.10	1.99
	≥240,000 Btu/h and <760,000 Btu/h	2.05	1.94

3. Review of Current Market for Computer Room Air Conditioners

DOE consulted a wide variety of sources, including manufacturer literature, manufacturer Web sites, and the California Energy Commission (CEC) Appliance Efficiency Database to obtain the information needed for the market assessment for computer room air conditioners. The information gathered from these sources serves as a basis for the analyses preformed in this rulemaking. The sections below provide a general overview of the computer room air conditioner market. More detail, including citations to relevant sources, of the computer room air conditioner market can be found in Chapter 2 of the final rule TSD.

a. Trade Association Information

AHRI is the trade association representing most manufacturers of commercial air-conditioning and heating equipment; however, at the time of this final rule, AHRI did not have a certification program for computer room air conditioners, and with one exception, the major manufacturers of computer room air conditioners that DOE identified are not currently AHRI members.[10] However, in its public comments, AHRI indicated that earlier this year, it added a Datacom Cooling Section and certification program which covers manufacturers of computer room air conditioners. (AHRI, No. 30 at p. 1)

b. Manufacturer Information

DOE initially identified manufacturers of computer room air conditioners by conversing with industry experts, by examining the CEC appliance efficiency database,[11] and by examining individual manufacturers' Web sites. Manufacturers that DOE identified include American Power Conversion, Compu-Aire, Data Aire, Liebert, and Stulz. DOE reviewed their manufacturer literature to gain insight into product availability, technologies used to improve efficiency, and product characteristics (*e.g.,* cooling capacities) of the models in each of the 30 equipment classes.

c. Market Data

Using the CEC database and manufacturer literature, DOE compiled a database of 1,364 computer room air conditioner models from the five manufacturers it identified. Because manufacturers are not required to report efficiency information about computer room air conditioners, most manufacturers do not publish this information in their product literature. DOE gathered efficiency data in the form of energy efficiency ratio (EER) from the CEC database (where manufacturers are required to report efficiency information if they sell models in California) and an individual manufacturer's product literature. Of the 1,364 models in DOE's database, DOE was only able to obtain efficiency information for 208 units (from three of the five manufacturers), which accounts for 15.2 percent of the database (see chapter 2 of the final rule TSD for information about how DOE estimated efficiency data in SCOP). As noted above, DOE was only able to obtain efficiency information from three of the five known manufacturers because two of the manufacturers did not provide SCOP or EER information in product literature or in the CEC database. The full breakdown of these 1,364 units into the 30 equipment classes can be found in chapter 2 of the final rule TSD, along with information on the typical performance characteristics (*e.g.,*

is utilized for heat rejection (*i.e.,* for glycol-cooled or water-cooled equipment). The fluid economizer utilizes a separate liquid-to-air cooling coil within the CRAC unit and the cooled water or glycol fluid returning from the external fluid cooler to cool return air directly, much like a chilled water air handling unit (*i.e.,* without the use of compressors). The ''economizer'' cooling can either augment or can take the place of compressor cooling, but only when returning water or glycol fluid temperatures are low enough to provide significant direct cooling from the liquid-to-air cooling coil.

[10] For more information see: *http://www.ahrinet.org/ahri+members.aspx.*

[11] See: *http://www.appliances.energy.ca.gov/.*

average sensible cooling capacity, average SCOP) for each equipment class. DOE used the market data as a foundation for developing price-efficiency curves in the engineering analysis. Additionally, DOE used the market data, along with other sources, to estimate shipments of computer room air conditioners. Further details regarding the development of shipment estimates and forecasts can be found in section V.F.2. of this final rule.

B. Engineering Analysis

The engineering analysis establishes the relationship between higher-efficiency equipment and the cost of achieving that higher efficiency when evaluating energy conservation standards. The results from the engineering analysis serve as the basis for the cost-benefit calculations for the individual consumers and the Nation. As explained in the January 2012 NOPR, DOE used an efficiency-level approach in conjunction with a pricing survey to develop the price-efficiency relationships for the 30 classes of computer room air conditioners. 77 FR 2356, 2385–86 (Jan. 17, 2012). An efficiency-level approach allowed DOE to estimate the cost of achieving different SCOP levels in a timely manner (which was necessary to allow DOE to meet the statutorily-required deadlines for ASHRAE equipment in EPCA). The efficiency-level approach allowed DOE to focus on the price of the computer room air conditioners at different SCOP ratings while capturing a variety of designs available of the market. The efficiency levels that DOE analyzed in the engineering analysis were within the range of efficiencies of computer room air conditioners on the market at the time the engineering analysis was developed. DOE relied on data collected from equipment distributors of three large computer room air conditioner manufacturers to develop its price-efficiency relationship for computer room air conditioners. (See chapter 3 of the final rule TSD for further detail.)

Although there are certain benefits to using an efficiency-level approach with a pricing survey (namely the ability to conduct an analysis in a limited amount of time that spans a variety of equipment and technologies), DOE notes there are also drawbacks to this approach. The most significant drawback of such an approach is that equipment pricing is not always based solely on equipment cost and is often influenced by a variety of other factors. Factors such as whether the unit is a high-volume seller, whether the unit has premium features (such as more sophisticated controls or a longer warranty), and the differences in markup between different manufacturers all have an effect on the prices of computer room air conditioners. In certain instances, this can make it difficult to compare prices across manufacturers because of the number of different ways that manufacturers can decide to set pricing based on features that are not part of the basic equipment costs. As a result, the relationship between price and efficiency could be different from the relationship between manufacturer cost and efficiency that might be revealed through other engineering methods such as a design-option approach or a reverse-engineering approach. However, given the limited analysis time allowed by EPCA, DOE proceeded with an efficiency-level approach for computer room air conditioners in which it gathered the price of equipment at various efficiency levels. Nonetheless, DOE believes this approach provides a reasonable approximation of the cost increases associated with efficiency increases and could be conducted in a timely manner that would allow DOE to meet the deadlines specified in EPCA for ASHRAE products. The approach allowed DOE to provide an estimate of equipment prices at different efficiencies and spanned a range of technologies currently on the market that are used to achieve the increased efficiency levels. However, DOE also notes that there is a high level of uncertainty in the results based on such an approach due to the limited amount of data and information available about this particular type of equipment.

The following provides an overview of the engineering analysis. DOE first determined which equipment classes it would need to analyze. DOE only analyzed the downflow equipment classes because after examining equipment designs, DOE found that that upflow and downflow units have the same interior components and technologies, and that every upflow model could be optionally arranged by the manufacturer in a downflow orientation (but not vice-versa). DOE assumed that the efficiency cost and benefit of a given technology would be the same in both the downflow and upflow orientations, which allowed for an analysis in downflow orientation only (the results of which would be assumed to be true for upflow models as well). This reduced the number of equipment classes that DOE needed to analyze from 30 to 15. Then, DOE chose a representative baseline computer room air conditioner, which is the starting point for analyzing possible benefits of energy efficiency improvements. Next, DOE used efficiency data from the market assessment to identify higher efficiency levels above the baseline. DOE collected contractor pricing information for models at the baseline and those higher efficiency levels, and used that information to estimate the cost increase of achieving those higher efficiency levels. Then, for equipment classes where there was too little data available to directly analyze the cost of increasing efficiency, DOE estimated the cost-efficiency relationship based on the analysis done for the other classes where data were available. Further detail regarding the key inputs to the engineering analysis and the results generated are presented immediately below and in further detail in chapter 3 of the final rule TSD.

1. Representative Input Capacities for Analysis

As explained in the January 2012 NOPR, DOE reviewed the 15 analyzed equipment classes of computer room air conditioners. 77 FR 2356, 2386 (Jan.17, 2012). For each equipment class, DOE chose a representative net sensible input capacity as a starting point for the engineering analysis. In summary, DOE chose a representative capacity at the average sensible capacity for each of the three size categories regardless of heating type, orientation, or the presence of a fluid economizer. For computer room air conditioners with a sensible cooling capacity less than 65,000 Btu/h, DOE chose 36,000 Btu/h; for those with a sensible cooling capacity greater than or equal to 65,000 Btu/h and less than 240,000 Btu/h, DOE chose 132,000 Btu/h; and for those with a sensible cooling capacity greater than or equal to 240,000 Btu/h and less than 760,000 Btu/h, DOE chose 288,000 Btu/h. These representative capacities also corresponded to the net sensible capacity of most the models in the corresponding equipment class. DOE attained pricing information for models with sensible cooling capacities that were generally within 15 percent of these representative sensible capacities for all equipment classes for which adequate efficiency data were available. In response to the January 2012 NOPR, DOE did not receive any comments regarding the representative sensible capacities for analysis. See chapter 3 of the final rule TSD for more information about the representative sensible capacities DOE selected.

2. Baseline Equipment

Next, DOE selected baseline efficiency levels for 15 of the 30 equipment

classes. DOE uses these baseline models as the basis against which it measures changes resulting from potential higher energy conservation standards. The engineering analysis, LCC analysis, and PBP analysis use the baseline efficiency as a reference point to compare the technology, energy savings, and the cost of equipment with higher efficiency levels. A baseline equipment model typically contains the features and technologies that are most common in a certain equipment class currently offered for sale. As explained in the January 2012 NOPR, DOE chose the efficiency levels in ASHRAE Standard 90.1–2010 as baseline efficiency levels for computer room air conditioners, because DOE cannot adopt minimum standards at levels that are less stringent than the ASHRAE Standard 90.1–2010 efficiency levels. 77 FR 2356, 2386 (Jan. 17, 2012). In response to the January 2012 NOPR, DOE did not receive any comments regarding the baseline efficiency levels selected. Table V.2 shows the baseline efficiency level for each computer room air conditioner equipment class in the downflow orientation.

TABLE V.2—BASELINE SCOP EFFICIENCY LEVEL

Equipment class	Size category	Representative sensible cooling capacity	Downflow orientation baseline SCOP
Air-Cooled	<65,000 Btu/h	36,000 Btu/h	2.2
	≥65,000 Btu/h and <240,000 Btu/h	132,000 Btu/h	2.1
	≥240,000 Btu/h and <760,000 Btu/h	288,000 Btu/h	1.9
Water-Cooled	<65,000 Btu/h	36,000 Btu/h	2.6
	≥65,000 Btu/h and <240,000 Btu/h	132,000 Btu/h	2.5
	≥240,000 Btu/h and <760,000 Btu/h	288,000 Btu/h	2.4
Water-Cooled with a Fluid Economizer	<65,000 Btu/h	36,000 Btu/h	2.55
	≥65,000 Btu/h and <240,000 Btu/h	132,000 Btu/h	2.45
	≥240,000 Btu/h and <760,000 Btu/h	288,000 Btu/h	2.35
Glycol-Cooled	<65,000 Btu/h	36,000 Btu/h	2.5
	≥65,000 Btu/h and <240,000 Btu/h	132,000 Btu/h	2.15
	≥240,000 Btu/h and <760,000 Btu/h	288,000 Btu/h	2.1
Glycol-Cooled with a Fluid Economizer	<65,000 Btu/h	36,000 Btu/h	2.45
	≥65,000 Btu/h and <240,000 Btu/h	132,000 Btu/h	2.1
	≥240,000 Btu/h and <760,000 Btu/h	288,000 Btu/h	2.05

3. Identification of Efficiency Information and Efficiency Levels for Analysis

As reported in detail in the January 2012 NOPR, DOE selected multiple efficiency levels for analysis for each of the 15 equipment classes directly analyzed. 77 FR 2356, 2387 (Jan. 17, 2012). In summary, because DOE does not currently regulate computer room air conditioners, manufacturers are not required to report or rate the efficiency of their equipment, and efficiency data are often either not available or only available as an EER value determined through testing with a previous version of the ASHRAE 127 standard. Thus, DOE had to translate the EER information found in manufacturer literature and in the CEC database into SCOP using a ''rule-of-thumb'' equation found in ASHRAE 127–2007. The ''rule-of-thumb'' equation uses the EER as measured by ASHRAE 127–2001 and the sensible heat ratio (SHR) [12] found in manufacturer specification sheets to estimate the SCOP. For more detail about this conversion, see chapter 3 of the final rule TSD.

In order to select efficiency levels for analysis, DOE examined available market data and concluded that enough efficiency information was available in only four equipment classes that would allow DOE to reasonably select SCOP efficiency levels for analysis for that equipment class. For the equipment classes where DOE did not have enough SCOP data to select efficiency levels, DOE translated the efficiency levels from one of the four previously mentioned equipment classes based on the SCOP differences between the different equipment classes as specified by ASHRAE Standard 90.1–2010. The efficiency levels selected for analysis for each equipment class are shown in Table V.3. Chapter 3 of the final rule TSD shows additional details on the efficiency levels selected for analysis. In response to the January 2012 NOPR, DOE did not receive any comments regarding the efficiency levels selected for analysis.

TABLE V.3—EFFICIENCY LEVELS FOR ANALYSIS OF COMPUTER ROOM AIR CONDITIONERS

Equipment	Efficiency levels (SCOP)				
	Baseline level	Level 1	Level 2	Level 3	Level 4
Air-Cooled, <65,000 Btu/h	2.20	2.40	2.60	2.80	3.00
Air-Cooled, ≥65,000 Btu/h and <240,000 Btu/h	2.10	2.35	2.60	2.85	3.10
Air-Cooled, ≥240,000 Btu/h and <760,000 Btu/h	1.90	2.15	2.40	2.65	2.90
Water-Cooled, <65,000 Btu/h	2.60	2.80	3.00	3.20	3.40
Water-Cooled, ≥65,000 Btu/h and <240,000 Btu/h	2.50	2.70	2.90	3.10	3.30
Water-Cooled, ≥240,000 Btu/h and <760,000 Btu/h	2.40	2.60	2.80	3.00	3.20
Water-Cooled with a Fluid Economizer, <65,000 Btu/h	2.55	2.75	2.95	3.15	3.35
Water-Cooled with a Fluid Economizer, ≥65,000 Btu/h and <240,000 Btu/h	2.45	2.65	2.85	3.05	3.25

[12] ''Sensible heat ratio'' is the ratio of a unit's sensible cooling capacity to its total (*i.e.,* sensible and latent) cooling capacity.

TABLE V.3—EFFICIENCY LEVELS FOR ANALYSIS OF COMPUTER ROOM AIR CONDITIONERS—Continued

Equipment	Efficiency levels (SCOP)				
	Baseline level	Level 1	Level 2	Level 3	Level 4
Water-Cooled with a Fluid Economizer, ≥240,000 Btu/h and <760,000 Btu/h	2.35	2.55	2.75	2.95	3.15
Glycol-Cooled, <65,000 Btu/h	2.50	2.70	2.90	3.10	3.30
Glycol-Cooled, ≥65,000 Btu/h and <240,000 Btu/h	2.15	2.35	2.55	2.75	2.95
Glycol-Cooled, ≥240,000 Btu/h and <760,000 Btu/h	2.10	2.30	2.50	2.70	2.90
Glycol-Cooled with a Fluid Economizer, <65,000 Btu/h	2.45	2.65	2.85	3.05	3.25
Glycol-Cooled with a Fluid Economizer, ≥65,000 Btu/h and <240,000 Btu/h	2.10	2.30	2.50	2.70	2.90
Glycol-Cooled with a Fluid Economizer, ≥240,000 Btu/h and <760,000 Btu/h	2.05	2.25	2.45	2.65	2.85

4. Pricing Data

Once DOE identified representative capacities and baseline units, and selected equipment classes and efficiency levels to analyze, DOE contacted three of the manufacturers of computer room air conditioners [13] to obtain pricing information for individual models in quantities of 10 units. DOE used 10 as a standard request that would be typical of a contractor installing the units in an office space. DOE received pricing information for 32 models total. DOE then used the pricing information in conjunction with the SCOP data (estimated from EER data) to build price-efficiency curves. See chapter 3 of the final rule TSD for additional details about the pricing data DOE received. DOE did not receive any comment about its approach of obtaining pricing information. DOE did receive a comment on the results of the pricing analysis which is addressed in section V.B.6. below.

5. Equipment Classes for Analysis and Extrapolation to Unanalyzed Equipment Classes

As explained in section V.B and in detail in the January 2012 NOPR, DOE did not directly analyze all 30 equipment classes of computer room air conditioners. 77 FR 2356, 2387–88 (Jan. 17, 2012). Rather, DOE analyzed the equipment classes with the largest number of models on the market (and as a result the most data available) and used a variety of assumptions to extrapolate the analysis to those equipment classes with less information available. In addition to only directly analyzing the downflow equipment classes (as explained above), DOE also only directly analyzed those equipment classes without a fluid economizer and assumed what the potential cost of adding a fluid economizer and what the potential efficiency effects of the economizer coil would be for those classes with a fluid economizer.

As in the January 2012 NOPR, DOE found that there was only enough efficiency information to directly analyze four equipment classes: (1) Small (*i.e.,* sensible cooling capacity less than 65,000 Btu/h) air-cooled; (2) large (*i.e.,* sensible cooling capacity greater than or equal to 65,000 Btu/h and less than 240,000 Btu/h) air-cooled; (3) small water-cooled; and (4) and large water-cooled. For the other 11 downflow equipment classes, DOE extrapolated the analysis based on these four primary equipment classes because of a lack of efficiency and pricing data for those other equipment classes. DOE did not receive any comments from stakeholders on the methodology of extrapolating the results to the equipment classes with inadequate data. Thus, DOE has not changed the methodology of extrapolating this data in this final rule. For information about how DOE extrapolated to these 11 equipment classes, see the January 2012 NOPR (77 FR 2356, 2387–88 (Jan. 17, 2012)) and chapter 3 of the final rule TSD.

6. Engineering Analysis Results

The results of the engineering analysis are reported in the form of price-efficiency tables that represent the cost to a contractor for equipment at the baseline levels and at more-stringent efficiency levels for each equipment class. The results of the engineering analysis are the basis for the downstream LCC and PBP analyses. Table V.4 and Table V.5 below show the engineering analysis results for the four equipment classes that were directly analyzed. Chapter 3 of the final rule TSD contains the price-efficiency tables for all 15 equipment classes of computer room air conditioners, including those that were not directly analyzed. In summary, when examining the pricing information for each individual manufacturer, DOE found there was no correlation between pricing and efficiency. Only when all the manufacturer data points were aggregated across all manufacturers for each equipment class did a correlation appear. Generally, there were manufacturers who sold lower-priced, lower-SCOP equipment and those who sold higher-priced, higher-SCOP equipment. DOE also notes that the results for the small (<65,000 Btu/h) water-cooled and glycol-cooled equipment classes are counter-intuitive because the correlation between price and efficiency showed an inverse trend. This result can be attributed to the lack of data points, which prevented a statistically significant trend between price and efficiency. In DOE's experience, an inverse correlation between price and efficiency is not typical, and thus, DOE believes additional data and analysis would possibly reveal a different relationship than this pricing analysis.

[13] As noted in section VA.3.c, DOE was able to obtain efficiency data for three of the five manufacturers. DOE obtained pricing from all manufacturers for which it had efficiency data.

TABLE V.4—AIR-COOLED COMPUTER ROOM AIR CONDITIONERS PRICE-EFFICIENCY DATA

<65,000 Btu/h		≥65,000 Btu/h and <240,000 Btu/h	
SCOP	Price	SCOP	Price
2.20	$6,681.09	2.10	$22,621.45
2.40	7,853.51	2.35	24,383.30
2.60	9,231.68	2.60	26,282.38
2.80	10,851.69	2.85	28,329.36
3.00	12,755.99	3.10	30,535.77

TABLE V.5—WATER-COOLED COMPUTER AIR CONDITIONERS PRICE-EFFICIENCY DATA

<65,000 Btu/h		≥65,000 Btu/h and <240,000 Btu/h	
SCOP	Price	SCOP	Price
2.60	$14,232.84	2.50	$12,883.01
2.80	11,527.69	2.70	17,315.28
3.00	9,336.69	2.90	23,272.43
3.20	7,562.12	3.10	31,279.07
3.40	6,124.84	3.30	42,040.32

EEI commented at the February 14, 2012, public meeting that DOE should state that its analyses for computer room air conditioners were limited and would affect the downstream life-cycle analysis. (EEI, Public Meeting Transcript, No. 20 at p. 85) DOE agrees with EEI in that its analysis was limited and contained a lot of uncertainty in its data because computer room air conditioners were not previously regulated and limited efficiency and price information is available. Because of this lack of clear data and other uncertainties in the analyses performed, DOE does not have clear and convincing evidence to adopt higher efficiency levels than ASHRAE Standard 90.1–2010, as discussed in section VI.D.3. of this final rule.

C. Markups To Determine Equipment Price

DOE understands that the price of CRAC equipment depends on the distribution channel the customer uses to purchase the equipment. Typical distribution channels for most commercial HVAC equipment include shipments that may pass through manufacturers' national accounts, or through entities including wholesalers, mechanical contractors, and/or general contractors. However, DOE understands that the typical distribution channel for CRAC equipment for either new construction or replacement involves a mechanical contractor ordering the equipment from a manufacturer representative or distributor who delivers the equipment to the job site at a ''contractor's price.'' The contractor's price includes the distributor's sales commission. The distributor does not take a separate markup. The manufacturer's sales price in both the NOPR and the final rule reflects the contractor's price. The mechanical contractor takes delivery, then adds a markup and provides installation services. Because the equipment is specialized, general contractors are not involved in the transaction, nor did DOE find any evidence of wholesaler involvement or national accounts for distribution of this specialized CRAC equipment. DOE developed equipment costs for mechanical contractors directly in the engineering analysis and estimated the cost to customers using a markup chain beginning with the mechanical contractor cost. Because of the complexity of installation, DOE assumed most sales of CRAC equipment involved mechanical contractors. Consequently, DOE did not develop separate markups for other distribution channels.

DOE developed supply chain markups in the form of multipliers that represent increases above the mechanical contractor cost. DOE applied these markups (or multipliers) to the mechanical contractor costs it developed from the engineering analysis. DOE then added sales taxes and installation costs to arrive at the final installed equipment prices for baseline and higher-efficiency equipment. See chapter 5 of the ASHRAE final rule TSD for additional details on markups. DOE identified two separate distribution channels for CRAC equipment to describe how the equipment passes from the mechanical contractor to the customer (Table V.6).

TABLE V.6—DISTRIBUTION CHANNELS FOR CRAC EQUIPMENT

Channel 1 (Replacements)	Channel 2 (New Construction)
Distributor or Manufacturer Representative (No Separate Markup) Mechanical Contractor Customer	Distributor or Manufacturer Representative (No Separate Markup) Mechanical Contractor Customer

DOE estimated a baseline markup and an incremental markup. DOE defined a ''baseline markup'' as a multiplier that converts the mechanical contractor cost of equipment with baseline efficiency to the customer purchase price for the equipment at the same baseline efficiency level. An ''incremental markup'' is defined as the multiplier used to convert the incremental increase in mechanical contractor cost of higher-efficiency equipment into the customer

purchase price for the same equipment. Both baseline and incremental markups are independent of the CRAC equipment efficiency levels.

DOE developed the markups based on available financial data. DOE based the mechanical contractor markups on data from the 2007 U.S. Census Bureau financial data [14] for the plumbing, heating, and air-conditioning industry.

The overall markup is the product of all the markups (baseline or incremental) for the different steps within a distribution channel plus sales tax. DOE calculated sales taxes based on 2012 State-by-State sales tax data reported by the Sales Tax Clearinghouse.[15] Because both contractor costs and sales tax vary by State, DOE developed distributions of markups within each distribution channel by State. No information was available to develop State-by-State distributions of CRAC equipment by building or business type, so the percentage distributions of sales by business type are assumed to be the same in all States. The National distribution of the markups varies among business types. Chapter 5 of the ASHRAE final rule TSD provides additional detail on markups.

In response to the January 2012 NOPR, DOE received a comment from Panasonic Air Conditioning Group (Panasonic) that at least some distribution channels may include distributors, manufacturer's representatives, or sales representatives, and that, therefore, one link in the distribution channel was missing. (Panasonic, Public Meeting Transcript, pp. 97–98) However, DOE determined that the manufacturer sales prices used in the NOPR were contractor prices that included manufacturer sales representative or distributor charges and, therefore, did not require a separate markup. Chapter 5 of the ASHRAE final rule TSD provides additional detail on markups.

D. Energy Use Characterization

DOE's building energy use characterization assesses the annual energy use for each of the 15 classes of computer room air conditioners at the efficiency levels established in the engineering analysis. Because of the fixed 0.11 SCOP difference between upflow and downflow CRAC units established in ASHRAE Standard 90.1–2010 and presumed in the engineering analysis for all higher efficiency levels, DOE determined that the per-unit energy savings benefits for corresponding upflow computer room air conditioners at higher efficiency levels could be represented using these 15 downflow equipment classes. The energy use characterization assessed the energy use of computer room air conditioners using a purpose-built spreadsheet that estimates the annual energy consumption for each equipment class at each efficiency level. The spreadsheet uses a modified outside temperature bin analysis. For each air-cooled equipment class, the spreadsheet calculates fan energy and condensing unit power consumption at each 5 °F outdoor air dry bulb temperature bin. The condensing unit power in this context includes the compressor(s) and condenser fan(s) and/or pump(s) included as part of the equipment rating. For water-cooled and glycol-cooled equipment, the spreadsheet first estimates the condensing water supply temperature from either an evaporative cooling tower or a dry cooler for water-cooled and for glycol-cooled CRAC equipment, respectively, based on binned weather data. Using these results, DOE then estimates the condensing unit power consumption and adds to this the estimated supply fan power. The sum of the CRAC condensing unit power and the CRAC supply fan power is the estimated average CRAC total power consumption for each temperature bin. Annual estimates of energy use are developed by multiplying the power consumption at each temperature bin by the number of hours in that bin for each climate analyzed.

To implement DOE's analytical methodology, DOE estimated the average heat load on each type and size of CRAC equipment based on an average thermal load set at 65 percent of the nominal sensible capacity based on an estimate provided in an Australian energy performance standards report.[16] As CRAC equipment is used to cool internally-generated thermal loads which are generally not climate dependent, DOE believes that this figure would also apply to CRAC equipment in the United States. DOE did not have manufacturer efficiency or performance data as a function of the outdoor temperature or the fraction of full load. Accordingly, DOE used an example of the variation in full-load performance as a function of ambient air temperature (for air-cooled equipment) or entering fluid temperature (for water-cooled and glycol-cooled equipment) provided in the ASHRAE 127–2007 test procedure and based on computer simulations to adjust full-load performance from the SCOP rating condition. A part-load performance degradation was also included, based on the methodology outlined for unitary direct-expansion air-conditioning equipment presented in the DOE EnergyPlus simulation tool documentation.[17] For water-cooled and glycol-cooled equipment with economizer coils, DOE reduced the thermal load on the condensing unit during hours when the economizer would be expected to meet some or all of the sensible cooling load. Because the primary heat load met with computer room air conditioners is a sensible load and because DOE did not have data to adequately estimate the relative sensible load versus latent load during the year for computer rooms, DOE did not separately examine the latent load on the equipment as a function of conditions, but determined that the total energy use could be based on the SCOP performance.

While the computer room heat load met by CRAC equipment is generally not climate sensitive, the performance of the equipment is climate sensitive. DOE estimated the annual energy consumption for each equipment class at each efficiency level for 239 climate locations using typical meteorological year (TMY3) weather data.[18] DOE relied on population-based climate location weights to map the results for individual TMY locations to State-level annual energy consumption estimates for each U.S. State. DOE used the resulting State-by-State annual energy consumption estimates for each efficiency level in the subsequent life-cycle cost analysis. DOE received no comments on the January 2012 NOPR regarding the energy use analysis for CRAC equipment and retains the approach for this final rule.

[14] The 2007 U.S. Census Bureau financial data for the plumbing, heating, and air-conditioning industry is the latest version data set and was issued in August 2009. (Available by searching for Table EC0723A1 at: *http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t#none*).

[15] The Sales Tax Clearinghouse, Table of state sales tax rates along with combined city and county rates. (Last accessed January 11, 2012) (Available at: *https://thestc.com/STRates.stm*).

[16] EnergyConsult Pty Ltd., *Equipment Energy Efficiency Committee Regulatory Impact Statement Consultation Draft: Minimum Energy Performance Standards and Alternative Strategies for Close Control Air Conditioners,* Report No 2008/11 (2008) (Available at: *www.energyrating.gov.au*).

[17] U.S. Department of Energy-Office of Energy Efficiency and Renewable Energy. EnergyPlus Documentation, *Engineering Reference* (Available at: *http://apps1.eere.energy.gov/buildings/energyplus/pdfs/engineeringreference.pdf*).

[18] S. Wilcox and W. Marion, *Users Manual for TMY3 Data Sets,* National Renewable Energy Laboratory: Golden, CO., Report No. NREL/TP–581–43156 (2008).

E. Life-Cycle Cost and Payback Period Analyses

DOE conducted the life-cycle cost (LCC) and payback period (PBP) analyses to estimate the economic impacts of potential standards on individual customers of CRAC equipment. DOE first analyzed these impacts for CRAC equipment by calculating the change in customer LCCs likely to result from higher efficiency levels compared with the ASHRAE baseline efficiency levels for the 15 downflow CRAC classes discussed in the engineering analysis. DOE determined that the LCC benefits for higher efficiency levels for each downflow class of CRAC equipment would adequately represent LCC benefits for the corresponding upflow class. The LCC calculation considers total installed cost (contractor cost, sales taxes, distribution chain markups, and installation cost), operating expenses (energy, repair, and maintenance costs), equipment lifetime, and discount rate. DOE calculated the LCC for all customers as if each would purchase a new CRAC unit in the year the standard takes effect. Since DOE is considering both the efficiency levels in ASHRAE Standard 90.1–2010 and more-stringent efficiency levels, the compliance date for a new DOE energy conservation standard for any equipment class would depend on the efficiency level adopted. This is because the statutory lead times for DOE adoption of the ASHRAE Standard 90.1–2010 efficiency levels and the adoption of more-stringent efficiency levels are different. (See section V.I.1. for additional explanation regarding compliance dates.) However, the LCC benefits to the customer of standards higher than those in ASHRAE Standard 90.1–2010 can begin to accrue only after the compliance date for such a higher standard is adopted by DOE. To account for this fact and to facilitate comparison, DOE presumed that the purchase year for all CRAC equipment for purposes of the LCC calculation is 2017, the earliest year in which DOE can establish an amended energy conservation level at an efficiency level more stringent than the ASHRAE efficiency level. To compute LCCs, DOE discounted future operating costs to the time of purchase and summed them over the lifetime of the equipment.

Next, DOE analyzed the effect of changes in installed costs and operating expenses by calculating the PBP of potential standards relative to baseline efficiency levels. The PBP is the amount of time it would take the customer to recover the incremental increase in the purchase price of more-efficient equipment through lower operating costs. The PBP is the change in purchase price divided by the change in annual operating cost that results from the energy conservation standard. DOE expresses the PBP in years. Similar to the LCC, the PBP is based on the total installed cost and the operating expenses. However, unlike the LCC, DOE only considers the first year's operating expenses in the PBP calculation. Because the PBP does not account for changes in operating expense over time or the time value of money, it is also referred to as a simple PBP.

DOE conducted the LCC and PBP analyses using a commercially-available spreadsheet tool and a purpose-built spreadsheet model, available online.[19] This spreadsheet model developed by DOE accounts for variability in energy use and prices, installation costs, repair and maintenance costs, and energy costs. It uses weighting factors to account for distributions of shipments to different building types and States to generate national LCC savings by efficiency level. The results of DOE's LCC and PBP analyses are summarized in section VI.B.3. and described in detail in chapter 6 of the ASHRAE final rule TSD. DOE received comments on specific aspects of the LCC and PBP methods and input data. These comments are addressed in the appropriate subsections below.

1. Approach

Recognizing that each business that uses CRAC equipment is unique, DOE analyzed variability and uncertainty by performing the LCC and PBP calculations assuming a correspondence between business types and market segments (characterized as building types) for customers located in three types of commercial buildings (health care, education, and office). DOE developed financial data appropriate for the customers in each building type. Each type of building has typical customers who have different costs of financing because of the nature of the business. DOE derived the financing costs based on data from the Damodaran Online site.[20]

The LCC analysis used the estimated annual energy use for selected size units in each CRAC equipment class described in section V.B. The energy use characterization is described in section V.D and in greater detail in Chapter 4 of the final rule TSD. Because energy use of CRAC equipment is sensitive to climate, energy use varies by State. Aside from energy use, other important factors influencing the LCC and PBP analyses are energy prices, installation costs, equipment distribution markups, and sales tax. All of these are assumed to vary by State. At the national level, the LCC spreadsheets explicitly modeled both the uncertainty and the variability in the model's inputs, using probability distributions based on State population, which serves as a proxy for the shipment of CRAC equipment to different States.

As mentioned above, DOE generated LCC and PBP results by building type and State and used weighting factors to generate national average LCC savings and PBP for each efficiency level. Because there is a unique LCC and PBP for each calculated value at the building type and State level, the outcomes of the analysis can also be expressed as probability distributions with a range of LCC and PBP results. A distinct advantage of this type of approach is that DOE can identify the percentage of customers achieving LCC savings or attaining certain PBP values due to an increased efficiency level, in addition to the average LCC savings or average PBP for that efficiency level. DOE received no comments on its general LCC and PBP approach and has retained it for the final rule.

2. Life-Cycle Cost Inputs

For each efficiency level DOE analyzed, the LCC analysis required input data for the total installed cost of the equipment, its operating cost, and the discount rate. Table V.7 summarizes the inputs and key assumptions DOE used to calculate the customer economic impacts of all energy efficiency levels analyzed in this rulemaking. A more detailed discussion of the inputs follows.

[19] DOE's Life-Cycle Cost spreadsheet model can be found on the DOE's ASHRAE Products Web site at: *www1.eere.energy.gov/buildings/appliance_standards/commercial/ashrae_products_docs_meeting.html.*

[20] Damodaran Online, *The Data Page* (Last Accessed Jan. 2012) (Available at: <*www.stern.nyu.edu/~adamodar/New_Home_Page/data.html*>).

TABLE V.7—SUMMARY OF INPUTS AND KEY ASSUMPTIONS USED IN THE LCC AND PBP ANALYSES

Inputs	NOPR	Changes for the final rule
Affecting Installed Costs		
Equipment Price	Equipment price was derived by multiplying manufacturer sales price or MSP (distributor's or manufacturer's representative's price delivered to a mechanical contractor at the job site, calculated in the engineering analysis) by mechanical contractor markups, as needed, plus sales tax from the markups analysis.	Sales taxes updates to 2012 rates. No other changes.
Installation Cost	Installation cost includes installation labor, installer overhead, and any miscellaneous materials and parts, derived from *RS Means CostWorks 2011.*[21]	Updated installation costs and relative regional cost multipliers from 2011 to 2012 conditions using *RS Means CostWorks 2012.*[22]
Affecting Operating Costs		
Annual Energy Use	Annual unit energy consumption for each class of equipment at each efficiency level estimated on a per-State basis using a spreadsheet model and a population-based mapping of climate locations to States.	No change.
Electricity Prices	DOE developed average electricity prices based on EIA's Form 861 data for 2010.[23] Price projections based on *AEO 2011.*[24]	Updated from 2010 to 2011 using EIA Form 826 data for 2011.[25] Price projections based on *AEO 2011.*
Maintenance Cost	DOE estimated annual maintenance costs based on *RS Means CostWorks 2011* for CRAC equipment. Annual maintenance cost did not vary as a function of efficiency.	Updated maintenance using *RS Means CostWorks 2012* and to reflect more frequent maintenance schedules for all CRAC equipment.
Repair Cost	DOE estimated the annualized repair cost for baseline efficiency CRAC equipment based on cost data from *RS Means CostWorks 2011* (2010 data). DOE assumed that the materials components portion of the repair costs would vary in direct proportion with the MSP at higher efficiency levels because it generally costs more to replace components that are more efficient.	Updated repair costs using *RS Means CostWorks 2012.*
Affecting Present Value of Annual Operating Cost Savings		
Equipment Lifetime	DOE estimated CRAC equipment lifetime ranged between 10 and 25 years, with an average lifespan of 15 years, based on estimates cited in available CRAC literature.	No change.
Discount Rate	Mean real discount rates for business types considered range from 2.68 percent for education to 4.51 percent for offices. Health care was 4.10 percent based on a limited sample.	Updated to early 2012 conditions. Additional business included in office category. Education was 2.98 percent. Office was 4.46 percent. Health care was 4.98 percent, based on an expanded sample.
Analysis Start Year	Start year for LCC is 2017, which is the earliest compliance date that DOE can set for new standards if it adopts any efficiency level for energy conservation standards higher than that shown in ASHRAE Standard 90.1–2010.	No change.
Analyzed Efficiency Levels		
Analyzed Efficiency Levels	DOE analyzed the baseline efficiency levels (ASHRAE Standard 90.1–2010) and four higher efficiency levels for all 15 equipment classes. See the engineering analysis for additional details on selections of efficiency levels and cost.	No change.

a. Equipment Prices

The price of CRAC equipment reflects the application of distribution channel markups (mechanical contractor markups) and sales tax to the manufacturer sales price (distributor's price, delivered to the job site), which is the cost established in the engineering analysis. As described in section V.C, DOE determined mechanical contractor costs and markup for air-conditioning equipment. For each equipment class, the engineering analysis provided contractor costs for the baseline equipment and up to four higher equipment efficiencies.

The markup is the percentage increase in price as the CRAC equipment passes

[21] RS Means Company Inc., *RS Means CostWorks 2011* (2011) (Available at: <*www.meanscostworks.com/*>).

[22] RS Means Company, Inc., *RS Means CostWorks 2012* (2012) (Available at: <*www.meanscostworks.com/*>).

[23] U.S. Energy Information Administration, *Electric Sales, Revenue, and Average Price 2009* (Last accessed May 10, 2011) (Available at: <*www.eia.doe.gov/cneaf/electricity/esr/esr_sum.html*>). Inflator—2009 to 2010 dollars from EIA *AEO 2011* GDP Price Index. (Last accessed April 27, 2011 at <*www.eia.doe.gov/oiaf/aeo/tablebrowser/#release=AEO2011&subject=0-AEO2011&table=18-AEO2011&region=0-0&cases=ref2011-d020911a*>).

[24] U.S. Energy Information Administration, *Annual Energy Outlook 2011* (Available at: <*http://www.eia.gov/forecasts/aeo/data.cfm*>).

[25] U.S. Energy Information Administration, *Sales and Revenue Data by State, Monthly Back to 1990 (Form EIA–826)* (Last accessed Jan. 27, 2012) (Available at: <*http://www.eia.gov/cneaf/electricity/page/sales_revenue.xls*>).

through the distribution channel. As explained in section V.C, all CRAC equipment is assumed to be delivered to the mechanical contractor at the job site for installation without the involvement of a general contractor. This is assumed to happen whether the equipment is being purchased for the new construction market or to replace existing equipment.

To project a price trend for the final rule, DOE initially derived an inflation-adjusted index of the Producer Price Index (PPI) for miscellaneous refrigeration and air-conditioning equipment over 1990–2010.[26] These data show a general price index decline from 1990 to 2004, followed by a sharp increase, primarily due to rising prices of copper and steel products that go into this equipment. Given the slowdown in global economic activity in 2011, DOE believes that the extent to which the trends of the past few years will continue is very uncertain and that the observed data do not provide a firm basis for projecting future costs trends for CRAC equipment. Therefore, DOE used a constant price assumption as the default price factor index to project future computer room air conditioner prices in 2017. Thus, prices projected for the LCC and PBP analysis are equal to the 2011 values for each efficiency level in each equipment class. Appendix 8D of the final rule TSD describes the historical data and the derivation of the price projection.

DOE requested comments on the most appropriate trend to use for real (inflation-adjusted) computer room air conditioner prices. DOE received no comments on this issue and has retained the same approach for the final rule.

b. Installation Costs

For the NOPR, DOE derived national average installation costs for CRAC equipment from data provided in *RS Means CostWorks 2011* (RS Means) specifically for CRAC equipment.[27] RS Means provides estimates for installation costs for CRAC units by equipment capacity, as well as city cost indices that reflect the variation in installation costs. DOE uses the RS Means cost indexes for 288 cities in the United States to determine State-level markups. The RS Means data identify several cities in all 50 States and the District of Columbia. DOE incorporated location-based cost indices into the analysis to capture variation in installation cost, depending on the location of the customer.

For more-stringent efficiency levels, DOE recognized that installation costs could potentially be higher with larger units and higher-efficiency CRAC equipment due to larger sizes and more complex setup requirements. DOE utilized RS Means installation cost data from *RS Means CostWorks 2011* to derive installation cost curves by size of unit for the base-efficiency unit. These cost curves were updated for the final rule using *RS Means CostWorks 2012*.[28] DOE did not have data to calibrate the extent to which installation cost might change as efficiency increased. This was identified as Issue 13 under ''Issues on Which DOE Seeks Comment'' in section X.E of the January 2012 NOPR. 77 FR 2356, 2424 (Jan. 17, 2012).

DOE received two comments on the NOPR concerning its installation costs for the LCC analysis. Danfoss commented that installation costs in replacement and retrofit applications might be higher than for new applications, because higher-efficiency equipment may be larger and harder to adapt to existing spaces. (Danfoss, Public Meeting Transcript at p. 110) Emerson commented that installation costs in situations where much attention is paid to efficiency may be higher because of the intentions of the designer interested in energy efficiency, not the equipment itself. (Emerson, Public Meeting Transcript at pp. 110–111) DOE acknowledges that either of these comments may be correct under certain circumstances, but it does not have quantitative information that would allow computation of an installation cost curve that is sensitive to efficiency level. Accordingly, DOE is using average installation cost data from RS Means that spans a variety of installation circumstances at a range of capacities. These data indicated that installation costs for replacements overall were slightly less costly than new installations. In this final rule, DOE is maintaining the approach used in the NOPR, specifically that installation costs do not vary with efficiency level.

c. Annual Energy Use

DOE estimated the annual electricity consumed by each class of CRAC equipment, by efficiency level, based on the energy use characterization described in section V.D and in chapter 4 of the final rule TSD. DOE received no comments on energy use. Accordingly, DOE is maintaining the same approach in the final rule.

d. Electricity Prices

Electricity prices are used to convert the electric energy savings from higher-efficiency equipment into energy cost savings. Because annual electricity consumption savings and equipment costs vary across the country, it is important to consider regional differences in electricity prices. DOE used average effective commercial electricity prices at the State level from U.S. Energy Information Administration (EIA) data for 2011.[29] This approach captured a wide range of commercial electricity prices across the United States. Furthermore, different kinds of businesses typically use electricity in different amounts at different times of the day, week, and year, and therefore, face different effective prices. To make this adjustment, DOE used EIA's 2003 Commercial Building Energy Consumption Survey (CBECS)[30] data set to identify the average prices the three building types paid and compared them with the average prices paid by all commercial customers.[31] DOE used the ratios of prices paid by the three types of businesses to the national average commercial prices seen in the 2003 CBECS as multipliers to adjust the average commercial 2011 State price data.

DOE estimated the relative prices each building type paid in each State and the estimated relative sales of CRAC equipment to each building type in each State. The relative prices were compared with a weighted-average national electricity price for 2011. The State/building type weights reflect the probabilities that a given unit of CRAC equipment shipped will operate with a given fuel price. The original State-by-State average commercial prices in the NOPR (adjusted to 2011$) range from $0.066 per kWh to approximately $0.216 per kWh. The commercial electricity prices for each State used in the final rule were updated through October 2011 and range from $0.065 per kWh to $0.312 per kWh (See chapter 6 of the ASHRAE final rule TSD for further details.)

The electricity price trends provide the relative change in electricity costs

[26] Series ID PCU3334153334159; <*http://data.bls.gov/cgi-bin/srgate*>

[27] R.S. Means Company, Inc., *RS Means CostWorks 2011* (2011) (Available at: <*www.meanscostworks.com/*>).

[28] RS Means Company, Inc., *RS Means CostWorks 2012* (2012) (Available at: <*www.meanscostworks.com/*>).

[29] Not all of the 2011 data had been posted by EIA by the time calculations for the final rule were required. Consequently, prices for the period November 2010 through October 2011 were used.

[30] U.S. Energy Information Administration, *CBECS Public Use Microdata Files* (Last Accessed April 2012) (Available at: <*www.eia.doe.gov/emeu/cbecs/cbecs2003/public_use_2003/cbecs_pudata2003.html*>).

[31] EIA's 2003 CBECS is the most recent version of the data set.

for future years. DOE applied the *AEO 2011* reference case as the default scenario and extrapolated the trend in values at the Census Division level from 2025 to 2035 of the projection to establish prices in 2036 to 2060. This method of extrapolation is in line with methods EIA uses to project fuel prices for the Federal Energy Management Program (FEMP). DOE provides a sensitivity analysis of the LCC savings and PBP results to different fuel price scenarios using both the *AEO 2011* high-price and low-price projections in the ASHRAE final rule TSD.

DOE received no comments concerning either electricity prices or electricity price trends. Accordingly, DOE updated the data used in the NOPR to reflect the latest available prices and price forecasts and retained the same analytical approach for the final rule.

e. Maintenance Costs

Maintenance costs are the costs to the customer of maintaining equipment operation. Maintenance costs include services such as cleaning heat-exchanger coils and changing air filters. For the NOPR, DOE estimated annual routine maintenance costs for CRAC equipment as $84 per year for capacities up to 288 kBtu per hour and $102 per year for larger capacities, as reported in the *RS Means CostWorks 2011* database. For the final rule, these values were increased to account for recommended CRAC quarterly and semi-annual maintenance schedules and for changes in unit costs reflected in *RS Means CostWorks 2012.* Because data did not indicate how maintenance costs vary with equipment efficiency, DOE used preventive maintenance costs that remain constant as equipment efficiency increases. DOE received no comments on the NOPR concerning the maintenance cost estimates. DOE made no changes to the maintenance cost estimates for this final rule other than those updating the RS Means maintenance schedules and unit costs.

f. Repair Costs

The repair cost is the cost to the customer of replacing or repairing components that have failed in the CRAC equipment. For the NOPR, DOE estimated the one-time repair cost in *RS Means CostWorks 2011* as a percentage of MSP for capacities between 5 tons (T) (60,000 Btu/h) and 15 T (180,000 Btu/h), with the curve flattening at the 15 T percentage thereafter. DOE applied the percentage to the MSP for more-efficient equipment at each capacity for the one-time repair, then annualized the resulting repair costs. For the final rule, DOE updated repair costs using data in *RS Means CostWorks 2012.* DOE determined that annualized repair costs would increase in direct proportion with increases in equipment prices. Because the price of CRAC equipment increases with efficiency, the cost for component repair will also increase as the efficiency of equipment increases. See chapter 6 of the ASHRAE final rule TSD for details on the development of repair costs.

DOE received two comments on the January 2012 NOPR concerning repair cost estimates. The Appliance Standard Awareness Project (ASAP) questioned whether annualizing the present value of a future outlay results in the same value as directly calculating the present value of that outlay. (ASAP, Public Meeting Transcript at pp.114–116) Emerson commented that the time profile of failure rates for compressors, which would represent a significant portion of repair costs, are basically constant over time. Therefore, according to the comment, it makes no difference whether the cost was calculated for a single year or an equivalent annual cost. (Emerson, Public Meeting Transcript at pp. 116–117) For the final rule, DOE calculated annualized repair costs for CRAC equipment by first calculating the present value of a major repair at the mid-point of the average lifetime and then calculating the equivalent annual payment that would yield the same present value.

g. Equipment Lifetime

DOE defines ''equipment lifetime'' as the age at which a unit of CRAC equipment is retired from service. DOE reviewed available literature to establish typical equipment lifetimes. The literature offered a wide range of typical equipment lifetimes, ranging from 10 to 25 years. The data did not distinguish between classes of CRAC equipment. Consequently, DOE used a distribution of lifetimes between 10 and 25 years, with an average of 15 years based on review of a range of CRAC lifetime estimates found in published studies and online documents. DOE applied this distribution to all classes of CRAC equipment analyzed. Chapter 6 of the ASHRAE final rule TSD discusses equipment lifetime. DOE received no comments on the January 2012 NOPR regarding the distribution of equipment lifetimes or the average equipment lifespan used in the LCC analysis. Accordingly, no changes were made to this analysis for the final rule.

h. Discount Rate

The discount rate is the rate at which future expenditures are discounted to establish their present value. DOE determined the discount rate by estimating the cost of capital for purchasers of CRAC equipment. Most purchasers use both debt and equity capital to fund investments. Therefore, for most purchasers, the discount rate is the weighted-average cost of debt and equity financing, or the weighted-average cost of capital (WACC), less the expected inflation.

DOE updated the data sources for the final rule. As was done in the NOPR, to estimate the WACC of computer room air conditioner equipment purchasers that are private firms, DOE used a sample of more than 2,000 companies, grouped to represent operators of each of three commercial building types (health care, education, and office). These companies were drawn from a database of 5,891 U.S. companies presented on the Damodaran Online Web site in January 2012.[32] This database includes most of the publicly-traded companies in the United States. For most educational buildings and a portion of the office buildings occupied by public schools, universities, and State and local government agencies, DOE estimated the cost of capital based on a 40-year geometric mean of the Bond Buyer Go 20–Bond Municipal Bond Index.[33] Federal office space was assumed to use the Federal bond rate, derived as the 40-year geometric mean of long-term (>10 years) U.S. government securities.[34] When one or more of the variables needed to estimate the discount rate in the Damodaran dataset were missing or could not be obtained, DOE discarded the firm from the analysis. DOE further reduced the sample to exclude firms that were unlikely to use the computer rooms served by CRAC equipment. The WACC approach for determining discount rates accounts for the current tax status of individual firms on an overall corporate basis. DOE did not evaluate the marginal effects of increased costs, and, thus, depreciation due to more expensive equipment, on the overall tax status.

DOE received a comment on the January 2012 NOPR concerning the discount rates used in the LCC analysis.

[32] Damodaran financial data used for determining cost of capital is available at *http://pages.stern.nyu.edu/~adamodar/* for commercial businesses (Last accessed Jan. 27, 2012).

[33] Federal Reserve Bank of St. Louis, State and Local Bonds-Bond Buyer Go 20-Bond Municipal Bond Index (Last accessed April 6, 2012) (Available at: *<http://research.stlouisfed.org/fred2/series/MSLB20/downloaddata?cid=32995>).*

[34] Calculated as a 40-year geometric average of long-term (>10 year) U.S. government securities. Rate calculated with 1972–2011 data. Data source: U.S. Federal Reserve (Last accessed Jan. 23, 2012 at *www.federalreserve.gov/releases/h15/data.htm*).

Edison Electric Institute (EEI) requested that major retail and internet service companies be added to the businesses that would use computer rooms having CRAC equipment. (EEI, Public Meeting Transcript at p. 120) For the final rule, DOE added several additional types of businesses into the ''office'' category to broaden that classification. Retail and internet firms were included.

DOE used the final sample of companies to represent purchasers of CRAC equipment. For each company in the sample, DOE derived the cost of equity, cost of debt, percent debt financing, and systematic company risk from information on the Damodaran Online Web site. DOE estimated the cost of debt financing as the ''risk-free'' rate—long-term Federal government bond rate (6.61 percent)—added to a company-specific risk premium based on the standard deviation of its stock price. DOE estimated the cost of equity financing based on the risk-free rate, plus the product of the company-specific risk premium and an expected equity risk premium for firms facing average market risk. DOE then determined WACC for each company and the weighted average WACC for each category of the sample companies. Deducting expected inflation from the cost of capital provided estimates of real discount rate for each company. Based on this database, DOE calculated the weighted average after-tax discount rate for CRAC equipment purchases, adjusted for inflation, in each of the three building types used in the analysis. Chapter 6 of the ASHRAE final rule TSD contains the detailed calculations on the discount rate.

3. Payback Period

DOE also determined the economic impact of potential amended energy conservation standards on customers by calculating the PBP of more-stringent efficiency levels relative to a baseline efficiency level. The PBP measures the amount of time it takes the commercial customer to recover the assumed higher purchase expense of more-efficient equipment through lower operating costs. Similar to the LCC, the PBP is based on the total installed cost and the operating expenses for each building type and State, weighted on the probability of shipment to each market. Because the simple PBP does not take into account changes in operating expense over time or the time value of money, DOE considered only the first year's operating expenses to calculate the PBP, unlike the LCC, which is calculated over the lifetime of the equipment. Chapter 6 of the ASHRAE final rule TSD provides additional details about the PBP. DOE received no comments on the January 2012 NOPR concerning the PBP analysis. Accordingly, no changes were made to this analysis for the final rule.

F. National Impact Analysis

The national impact analysis (NIA) evaluates the effects of a proposed energy conservation standard from a national perspective rather than from the customer perspective represented by the LCC. This analysis assesses the net present value (NPV) (future amounts discounted to the present) and the national energy savings (NES) of total commercial customer costs and savings that are expected to result from amended and new standards at specific efficiency levels. For each efficiency level analyzed, DOE calculated the NPV and NES for adopting more-stringent standards than the efficiency levels specified in ASHRAE Standard 90.1–2010.

The NES refers to cumulative energy savings from 2012 through 2041 or 2013 through 2042, depending on the equipment class. DOE calculated energy savings in each year relative to a base case, which reflects DOE adoption of the efficiency levels specified by ASHRAE Standard 90.1–2010. DOE also calculated energy savings from adopting efficiency levels specified by ASHRAE Standard 90.1–2010 compared to the current market base case. The NPV refers to cumulative monetary savings. DOE calculated net monetary savings in each year relative to the base case (ASHRAE Standard 90.1–2010) as the difference between total operating cost savings and increases in total installed cost. Cumulative savings are the sum of the annual NPV over the specified period. DOE accounted for operating cost savings until 2055 or 2056, when the equipment installed in the 30th year after the compliance date of the amended standards should be retired.

1. Approach

The NES and NPV are a function of the total number of units in use and their efficiencies. Both the NES and NPV depend on annual shipments and equipment lifetime. Both calculations start by using the shipments estimate and the quantity of units in service derived from the shipments model.

With regard to estimating the NES, because more-efficient computer room air conditioners are expected to gradually replace less-efficient ones, the energy per unit of capacity used by the computer room air conditioners in service gradually decreases in the standards case relative to the base case. DOE calculated the NES by subtracting energy use under a standards-case scenario from energy use in the base case.

Unit energy savings for each equipment class are taken from the LCC spreadsheet for each efficiency level and weighted based on market efficiency distributions. To estimate the total energy savings for each efficiency level, DOE first calculated the national site energy consumption (*i.e.,* the energy directly consumed by the units of equipment in operation) for each class of computer room air conditioners for each year of the analysis period. The analysis period begins with the earliest expected compliance date of amended Federal energy conservation standards (*i.e.,* 2012 or 2013), assuming DOE adoption of the ASHRAE Standard 90.1–2010 efficiency levels. For the analysis of DOE's potential adoption of more-stringent efficiency levels, the earliest compliance date would be 2017, four years after DOE would likely issue a final rule requiring such standards. Second, DOE determined the annual site energy savings, consisting of the difference in site energy consumption between the base case and the standards case for each class of computer room air conditioner. Third, DOE converted the annual site energy savings into the annual amount of energy saved at the source of electricity generation (the source energy), using a site-to-source conversion factor. Finally, DOE summed the annual source energy savings over a 30-year period to calculate the total NES. DOE performed these calculations for each efficiency level considered for computer room air conditioners in this rulemaking.

DOE considered whether a rebound effect is applicable in its NES analysis. A rebound effect occurs when an increase in equipment efficiency leads to increased demand for its service. EIA in its National Energy Modeling System (NEMS) model assumes an efficiency rebound to account for an increased demand for service due to the increase in cooling (or heating) efficiency.[35] For the computer room air conditioning equipment market, there are two ways that a rebound effect could occur: (1) Increased use of the air-conditioning equipment within the commercial buildings in which such units are installed; and (2) additional instances of air-conditioning computer rooms that were not being cooled before.

DOE believes that the first instance does not occur often because computer rooms are generally cooled to the level

[35] An overview of the NEMS model and documentation is found at: *http://www.eia.doe.gov/oiaf/aeo/overview/index.html.*

required for safe operation of the servers and other equipment. Persons maintaining the equipment have no reason to deviate from the optimal range of environmental conditions. With regard to the second instance, computer room air conditioners are unlikely to be installed in previously uncooled computer rooms, because servers and other equipment that need to be cooled or otherwise space conditioned to the degree of precision that requires a computer room air conditioner already would be. Given the potential for computer equipment damage or diminished performance, running a computer room without the appropriate environmental controls from the outset is highly unlikely. DOE received no public comments in response to the January 2012 NOPR on the issue of rebound effect. Therefore, DOE did not assume a rebound effect in the analysis.

To estimate NPV, DOE calculated the net impact as the difference between total operating cost savings and increases in total installed costs. DOE calculated the NPV of each considered standard level over the life of the equipment using the following three steps. First, DOE determined the difference between the equipment costs under the standard-level case and the base case in order to obtain the net equipment cost increase resulting from the higher standard level. Second, DOE determined the difference between the base-case operating costs and the standard-level operating costs in order to obtain the net operating cost savings from each higher efficiency level. Third, DOE determined the difference between the net operating cost savings and the net equipment cost increase in order to obtain the net savings (or expense) for each year. DOE then discounted the annual net savings (or expenses) to 2012 for computer room air conditioners bought on or after 2012 or 2013, depending on product class, and summed the discounted values to provide the NPV for an efficiency level. An NPV greater than zero shows net savings (*i.e.,* the efficiency level would reduce customer expenditures relative to the base case in present value terms). An NPV that is less than zero indicates that the efficiency level would result in a net increase in customer expenditures in present value terms.

To make the analysis more transparent to all interested parties, DOE used a commercially-available spreadsheet tool to calculate the energy savings and the national economic costs and savings from potential amended standards. Chapter 8 of the final rule TSD explains the models and how to use them. Interested parties can review DOE's analyses by changing various input quantities within the spreadsheet.

Unlike the LCC analysis, the NES spreadsheet does not use distributions for inputs or outputs, but relies on national average equipment costs and energy costs developed from the LCC spreadsheet. DOE used the NES spreadsheet to perform calculations of energy savings and NPV using the annual energy consumption and total installed cost data from the LCC analysis. DOE forecasted the energy savings, energy cost savings, equipment costs, and NPV of benefits for equipment sold in each computer room air conditioner class from 2012 through 2041 or 2013 through 2042, depending on the product class. The forecast provided annual and cumulative values for all four output parameters described above. DOE received no public comments on these calculations. Accordingly, DOE maintained the same approach in this final rule.

2. Shipments Analysis

DOE developed shipment projections and, in turn, calculated equipment stock by assuming that in each year, each existing computer room air conditioners either age by one year or break down after a 15-year equipment life. DOE used the shipments projection and the equipment stock to determine the NES. The shipments portion of the spreadsheet model forecasts computer room air conditioner shipments from 2012 or 2013 to 2041 or 2042, depending on the product class.

Data on computer room air conditioner shipments in the U.S. were not available. To estimate U.S. shipments, DOE obtained historical and projected (2000–2020) computer room air conditioner shipment data from an Australian energy performance standards report.[36] DOE then used the ratio of business establishments in the U.S. compared to Australia to inflate Australian shipments to reflect the U.S. market. The inflator used was 13.2. Table V.8 exhibits the shipment data provided for a selection of years, while the full data set and the complete discussion of energy use indicators can be found in chapter 7 of the ASHRAE final rule TSD. DOE used these shipments data to extend a shipments trend into the future.

TABLE V.8—TOTAL SHIPMENTS OF COMPUTER ROOM AIR CONDITIONERS

[Units]

Year	Units shipped (Australian data)	Units shipped (U.S. estimate)
2000	850	11,228
2005	985	13,011
2010	1,140	15,058
2015	1,320	17,436
2020	1,526	20,157

DOE allocated overall shipments into product classes using a two-step process. First, DOE used Australian market shares to allocate shipments to six broad product classes. DOE then used the relative fraction of models for each equipment class reflected in DOE's market database to allocate shipments further into the 15 product classes analyzed. The complete discussion of shipment allocation and forecasted shipments for the different equipment classes can be found in chapter 7 of the ASHRAE final rule TSD.

As equipment purchase price and repair costs increase with efficiency, DOE recognizes that higher first costs and repair costs can result in a drop in shipments. However, DOE had no basis for estimating the elasticity of shipments for computer room air conditioners as a function of first costs, repair costs, or operating costs. In addition, because computer room air conditioners are necessary for their application, DOE believes shipments would not change as a result of the

[36] EnergyConsult Pty Ltd., Equipment Energy Efficiency Committee Regulatory Impact Statement Consultation Draft: Minimum Energy Performance Standards and Alternative Strategies for Close Control Air Conditioners, Report No. 2008/11 (Sept. 2008) (Available at: *www.energyrating.gov.au*).

higher first costs and repair costs considered in this rulemaking. Therefore, DOE assumed that the shipments projection does not change with higher standard levels. DOE received no comments on its shipments analysis in response to the January 2012 NOPR. Accordingly, DOE maintained its approach for this final rule.

3. Base-Case and Standards-Case Forecasted Distribution of Efficiencies

DOE reviewed the distribution of efficiency levels for commercially-available models within each equipment class in order to develop base-case efficiency distributions. DOE bundled the efficiency levels into ''efficiency ranges'' and determined the percentage of models within each range. DOE applied the percentages of models within each efficiency range to the total unit shipments for a given equipment class to estimate the distribution of shipments for the base case. Then, from those market shares and projections of shipments by equipment class, DOE extrapolated future equipment efficiency trends both for a base-case scenario and for standards-case scenarios.

For each efficiency level analyzed, DOE used a ''roll-up'' scenario to establish the market shares by efficiency level for the year that compliance would be required with amended standards (*i.e.,* 2017 if DOE adopts more-stringent efficiency levels than those in ASHRAE Standard 90.1–2010). DOE collected information that suggests the efficiencies of equipment in the base case that did not meet the standard level under consideration would roll up to meet the standard level. This information also suggests that equipment efficiencies in the base case that were above the standard level under consideration would not be affected. The base-case efficiency distributions for each equipment class are presented in chapter 7 of the ASHRAE final rule TSD.

For the base case, DOE had no basis to estimate potential change in efficiency market shares. Therefore, DOE assumed that, absent amended standards, forecasted market shares would remain constant until the end of the forecast period (30 years after the compliance date). This prediction could cause DOE to overestimate the savings associated with the higher efficiency levels discussed in this notice because computer room air conditioner efficiencies or relative efficiency class preferences could change over time.

In response to this approach in the January 2012 NOPR, AHRI stated that the analysis of the NES-forecasted base-case distribution of efficiencies and DOE's prediction of how amended energy conservation standards might affect the distribution of efficiencies in the standards case should be redone, with the assumption being that the applicable industry test procedure will be the new edition of ASHRAE Standard 127 (i.e., ASHRAE Standard 127–2012). AHRI stated that the result should be an improved forecast of energy savings. (AHRI, No. 30 at p. 6) In response, DOE notes that as mentioned in section IV.C, it is unable to adopt ASHRAE 127–2012, because there are no test data showing the results of testing to this standard (using the NSenCOP metric) and how they compare to those obtained using ASHRAE 127–2007 (using the SCOP metric, which is also the metric of the standard levels in ASHRAE Standard 90.1–2010), so DOE could not obtain clear and convincing evidence that any new efficiency levels based on ASHRAE 127–2012 would be technologically feasible or economically justified. Therefore, DOE is retaining the approach taken in the NOPR.

NEEA asked whether the national energy savings take into account the energy presumably lost due to reduced energy efficiency standards in the markets regulated by the California Energy Commission (CEC). NEEA provided a table comparing the CEC levels to the ASHRAE levels using the rule-of-thumb with a sensible heat ratio of 0.9, which suggested that in contrast to the CEC's EER requirement for several equipment classes, the corresponding SCOP level in ASHRAE Standard 90.1–2010 may be less stringent. (NEEA, No. at p. 2) In response, DOE notes that the rule-of-thumb method is approximate, and no test data are available to provide an accurate comparison between the EER standards required by the CEC and the SCOP levels in ASHRAE Standard 90.1–2010. Commenters provided no data that would help clarify this matter. In addition, DOE has no information on how the markets regulated by the CEC would react to a national standard and, therefore, how the distribution of efficiencies would be expected to change. As a result, DOE was not able to take this issue into account in its analyses.

G. Emissions Analysis

In the emissions analysis, DOE estimated the reduction in power sector emissions of carbon dioxide (CO_2), nitrogen oxides (NO_X), and mercury (Hg) from amended energy conservation standards for ASHRAE equipment. DOE used the NEMS–BT computer model,[37] which is run similarly to the *AEO* NEMS, except that equipment energy use is reduced by the amount of energy saved (by fuel type) at each efficiency level. The inputs of national energy savings come from the NIA spreadsheet model, while the output is the forecasted physical emissions. The net benefit of each efficiency level in today's final rule is the difference between the forecasted emissions estimated by NEMS–BT at each efficiency level and the *AEO 2011* Reference case, which incorporates projected effects of all emissions regulations promulgated as of January 31, 2011. NEMS–BT tracks CO_2 emissions using a detailed module that provides results with broad coverage of all sectors and inclusion of interactive effects. For today's final rule, DOE used the version of NEMS–BT based on *AEO 2011.*

SO_2 emissions from affected electric generating units (EGUs) are subject to nationwide and regional emissions cap-and-trade programs, and DOE has preliminarily determined that these programs create uncertainty about the impact of energy conservation standards on SO_2 emissions. Title IV of the Clean Air Act sets an annual emissions cap on SO_2 for affected EGUs in the 48 contiguous States and the District of Columbia (D.C.). SO_2 emissions from 28 eastern States and D.C. are also limited under the Clean Air Interstate Rule (CAIR, 70 FR 25162 (May 12, 2005)), which created an allowance-based trading program. Although CAIR was remanded to the Environmental Protection Agency (EPA) by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) (see *North Carolina* v. *EPA,* 550 F.3d 1176 (D.C. Cir. 2008)), it remained in effect temporarily, consistent with the D.C. Circuit's earlier opinion in *North Carolina* v. *EPA,* 531 F.3d 896 (D.C. Cir. 2008). On July 6, 2010, EPA issued the Transport Rule proposal, a replacement for CAIR. 75 FR 45210 (August 2, 2010). On July 6, 2011, EPA issued the final Transport Rule, titled the Cross-State Air Pollution Rule. 76 FR 48208 (August 8, 2011). (See *http://www.epa.gov/crossstaterule/*). On December 30, 2011, however, the D.C. Circuit stayed the new rules while a panel of judges

[37] EIA approves the use of the name ''NEMS'' to describe only an *AEO* version of the model without any modification to code or data. Because the present analysis entails some minor code modifications and runs the model under various policy scenarios that deviate from *AEO* assumptions, the name ''NEMS–BT'' refers to the model as used here. (BT stands for DOE's Building Technologies Program.)

reviews them, and told EPA to continue enforcing CAIR (see *EME Homer City Generation* v. *EPA,* No. 11–1302, Order at *2 (D.C. Cir. Dec. 30, 2011)). The *AEO 2011* NEMS–BT used for today's final rule assumes the implementation of CAIR.[38]

The attainment of emissions caps typically is flexible among EGUs and is enforced through the use of emissions allowances and tradable permits. Under existing EPA regulations, any excess SO_2 emissions allowances resulting from the lower electricity demand caused by the imposition of an energy conservation standard could be used to permit offsetting increases in SO_2 emissions by any regulated EGU. However, if the new and amended standards resulted in a permanent increase in the quantity of unused emissions allowances, there would be an overall reduction in SO_2 emissions from the standards. While there remains some uncertainty about the ultimate effects of energy conservation standards on SO_2 emissions covered by the existing cap-and-trade system, the NEMS–BT modeling system that DOE uses to forecast emissions reductions currently indicates that no physical reductions in power sector emissions would occur for SO_2. DOE acknowledges, however, that even though there is a cap on SO_2 emissions and uncertainty whether efficiency standards would reduce SO_2 emissions, it is possible that standards could reduce the compliance cost by reducing demand for SO_2 allowances.

As discussed above, the *AEO 2011* NEMS used for today's final rule assumes the implementation of CAIR, which established a cap on NO_X emissions in 28 eastern States and the District of Columbia. With CAIR in effect, the energy conservation standards that are the subject of today's final rule are expected to have little or no physical effect on NO_X emissions in those States covered by CAIR, for the same reasons that they may have little effect on SO_2 emissions. However, the final standards would be expected to reduce NO_X emissions in the 22 States not affected by CAIR. For these 22 States, DOE is using the NEMS–BT to estimate NO_X emissions reductions from the standards considered in today's final rule.

On February 16, 2012, EPA published national emissions standards for hazardous air pollutants (NESHAPs) for mercury and certain other pollutants emitted from coal and oil-fired EGUs. 77 FR 9304 (Feb. 16, 2012) (Final Rule). The NESHAPs do not include emissions caps and, as such, DOE's energy conservation standards would likely reduce Hg emissions. For the emissions analysis for this rulemaking, DOE estimated mercury emissions reductions using NEMS–BT based on *AEO 2011,* which does not incorporate the NESHAPs. DOE expects that future versions of the NEMS–BT model will reflect the implementation of the NESHAPs.

H. Monetizing Carbon Dioxide and Other Emissions Impacts

As part of the development of this final rule, DOE considered the estimated monetary benefits likely to result from the reduced emissions of CO_2 and NO_X that are expected to result from each of the considered efficiency levels. In order to make this calculation similar to the calculation of the NPV of customer benefit, DOE considered the reduced emissions expected to result over the lifetime of products shipped in the forecast period for each efficiency level. This section summarizes the basis for the monetary values used for each of these emissions and presents the values considered in this rulemaking.

For today's final rule, DOE is relying on a set of values for the social cost of carbon (SCC) that was developed by an interagency process. A summary of the basis for those values is provided below, and a more detailed description of the methodologies used is provided as an appendix to chapter 10 of the final rule TSD.

1. Social Cost of Carbon

Under section 1(b)(6) of Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993), agencies must, to the extent permitted by law, assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. The purpose of the SCC estimates presented here is to allow agencies to incorporate the monetized social benefits of reducing CO_2 emissions into cost-benefit analyses of regulatory actions that have small, or ''marginal,'' impacts on cumulative global emissions. The estimates are presented with an acknowledgement of the many uncertainties involved and with a clear understanding that they should be updated over time to reflect increasing knowledge of the science and economics of climate impacts.

As part of the interagency process that developed the SCC estimates, technical experts from numerous agencies met on a regular basis to consider public comments, explore the technical literature in relevant fields, and discuss key model inputs and assumptions. The main objective of this process was to develop a range of SCC values using a defensible set of input assumptions grounded in the existing scientific and economic literatures. In this way, key uncertainties and model differences transparently and consistently inform the range of SCC estimates used in the rulemaking process.

a. Monetizing Carbon Dioxide Emissions

The SCC is an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year. It is intended to include (but is not limited to) changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services. Estimates of the SCC are provided in dollars per metric ton of carbon dioxide.

When attempting to assess the incremental economic impacts of carbon dioxide emissions, the analyst faces a number of serious challenges. A recent report from the National Research Council[39] points out that any assessment will suffer from uncertainty, speculation, and lack of information about: (1) Future emissions of greenhouse gases; (2) the effects of past and future emissions on the climate system; (3) the impact of changes in climate on the physical and biological environment; and (4) the translation of these environmental impacts into economic damages. As a result, any effort to quantify and monetize the harms associated with climate change will raise serious questions of science, economics, and ethics and should be viewed as provisional.

Despite the serious limits of both quantification and monetization, SCC estimates can be useful in estimating the social benefits of reducing carbon dioxide emissions. Consistent with the directive in Executive Order 12866 discussed above, the purpose of the SCC estimates presented here is to make it possible for agencies to incorporate the social benefits from reducing carbon dioxide emissions into cost-benefit analyses of regulatory actions that have small, or ''marginal,'' impacts on cumulative global emissions. Most

[38] DOE notes that future iterations of the NEMS–BT model will incorporate any changes necessitated by the Transport Rule, if and when regulatory and judicial review of the rule is complete.

[39] National Research Council, ''Hidden Costs of Energy: Unpriced Consequences of Energy Production and Use,'' National Academies Press: Washington, DC (2009).

Federal regulatory actions can be expected to have marginal impacts on global emissions.

For such policies, the agency can estimate the benefits from reduced (or costs from increased) emissions in any future year by multiplying the change in emissions in that year by the SCC value appropriate for that year. The net present value of the benefits can then be calculated by multiplying each of these future benefits by an appropriate discount factor and summing across all affected years. This approach assumes that the marginal damages from increased emissions are constant for small departures from the baseline emissions path, an approximation that is reasonable for policies that have effects on emissions that are small relative to cumulative global carbon dioxide emissions. For policies that have a large (non-marginal) impact on global cumulative emissions, there is a separate question of whether the SCC is an appropriate tool for calculating the benefits of reduced emissions. This concern is not applicable to this notice, and DOE does not attempt to answer that question here.

At the time of the preparation of this notice, the most recent interagency estimates of the potential global benefits resulting from reduced CO_2 emissions in 2010, expressed in 2010$, were $4.9, $22.3, $36.5, and $67.6 per metric ton avoided. For emissions reductions that occur in later years, these values grow in real terms over time. Additionally, the interagency group determined that a range of values from 7 percent to 23 percent should be used to adjust the global SCC to calculate domestic effects,[40] although preference is given to consideration of the global benefits of reducing CO_2 emissions.

It is important to emphasize that the interagency process is committed to updating these estimates as the science and economic understanding of climate change and its impacts on society improves over time. Specifically, the interagency group has set a preliminary goal of revisiting the SCC values within 2 years or at such time as substantially updated models become available, and to continue to support research in this area. In the meantime, the interagency group will continue to explore the issues raised by this analysis and consider public comments as part of the ongoing interagency process.

[40] It is recognized that this calculation for domestic values is approximate, provisional, and highly speculative. There is no *a priori* reason why domestic benefits should be a constant fraction of net global damages over time.

b. Social Cost of Carbon Values Used in Past Regulatory Analyses

To date, economic analyses for Federal regulations have used a wide range of values to estimate the benefits associated with reducing carbon dioxide emissions. In the model year 2011 CAFE final rule, the Department of Transportation (DOT) used both a ''domestic'' SCC value of $2 per ton of CO_2 and a ''global'' SCC value of $33 per ton of CO_2 for 2007 emission reductions (in 2007$), increasing both values at 2.4 percent per year. It also included a sensitivity analysis at $80 per ton of CO_2. See *Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011,* 74 FR 14196 (March 30, 2009) (Final Rule); Final Environmental Impact Statement Corporate Average Fuel Economy Standards, Passenger Cars and Light Trucks, Model Years 2011–2015 at 3–90 (Oct. 2008) (Available at: *http://www.nhtsa.gov/fuel-economy*). A domestic SCC value is meant to reflect the value of damages in the United States resulting from a unit change in carbon dioxide emissions, while a global SCC value is meant to reflect the value of damages worldwide.

A 2008 regulation proposed by DOT assumed a domestic SCC value of $7 per ton of CO_2 (in 2006$) for 2011 emission reductions (with a range of $0 to $14 for sensitivity analysis), also increasing at 2.4 percent per year. See *Average Fuel Economy Standards, Passenger Cars and Light Trucks, Model Years 2011–2015,* 73 FR 24352 (May 2, 2008) (Proposed Rule); Draft Environmental Impact Statement Corporate Average Fuel Economy Standards, Passenger Cars and Light Trucks, Model Years 2011–2015 at 3–58 (June 2008) (Available at: *http://www.nhtsa.gov/fuel-economy*). A regulation for packaged terminal air conditioners and packaged terminal heat pumps finalized by DOE in October of 2008 used a domestic SCC range of $0 to $20 per ton CO_2 for 2007 emission reductions (in 2007$). 73 FR 58772, 58814 (Oct. 7, 2008). In addition, EPA's 2008 Advance Notice of Proposed Rulemaking on Regulating Greenhouse Gas Emissions Under the Clean Air Act identified what it described as ''very preliminary'' SCC estimates subject to revision. 73 FR 44354 (July 30, 2008). EPA's global mean values were $68 and $40 per ton CO_2 for discount rates of approximately 2 percent and 3 percent, respectively (in 2006$ for 2007 emissions).

In 2009, an interagency process was initiated to offer a preliminary assessment of how best to quantify the benefits from reducing carbon dioxide emissions. To ensure consistency in how benefits are evaluated across agencies, the Administration sought to develop a transparent and defensible method, specifically designed for the rulemaking process, to quantify avoided climate change damages from reduced CO_2 emissions. The interagency group did not undertake any original analysis. Instead, it combined SCC estimates from the existing literature to use as interim values until a more comprehensive analysis could be conducted. The outcome of the preliminary assessment by the interagency group was a set of five interim values: Global SCC estimates for 2007 (in 2006$) of $55, $33, $19, $10, and $5 per ton of CO_2. These interim values represent the first sustained interagency effort within the U.S. government to develop an SCC for use in regulatory analysis. The results of this preliminary effort were presented in several proposed and final rules and were offered for public comment in connection with proposed rules, including the joint EPA–DOT fuel economy and CO_2 tailpipe emission proposed rules.

c. Current Approach and Key Assumptions

Since the release of the interim values, the interagency group reconvened on a regular basis to generate improved SCC estimates, which were considered for this final rule. Specifically, the group considered public comments and further explored the technical literature in relevant fields. The interagency group relied on three integrated assessment models (IAMs) commonly used to estimate the SCC: The FUND, DICE, and PAGE models.[41] These models are frequently cited in the peer-reviewed literature and were used in the last assessment of the Intergovernmental Panel on Climate Change. Each model was given equal weight in the SCC values that were developed.

Each model takes a slightly different approach to model how changes in emissions result in changes in economic damages. A key objective of the interagency process was to enable a consistent exploration of the three models while respecting the different approaches to quantifying damages taken by the key modelers in the field. An extensive review of the literature was conducted to select three sets of input parameters for these models: Climate sensitivity, socio-economic and emissions trajectories, and discount rates. A probability distribution for

[41] The models are described in appendix 15–A of the final rule TSD.

climate sensitivity was specified as an input into all three models. In addition, the interagency group used a range of scenarios for the socio-economic parameters and a range of values for the discount rate. All other model features were left unchanged, relying on the model developers' best estimates and judgments.

The interagency group selected four SCC values for use in regulatory analyses. Three values are based on the average SCC from three integrated assessment models, at discount rates of 2.5 percent, 3 percent, and 5 percent. The fourth value, which represents the 95th-percentile SCC estimate across all three models at a 3-percent discount rate, is included to represent higher-than-expected impacts from temperature change further out in the tails of the SCC distribution. For emissions (or emission reductions) that occur in later years, these values grow in real terms over time, as depicted in Table V.9.

TABLE V.9—SOCIAL COST OF CO_2, 2010–2050

[In 2007 dollars per metric ton]

Year	Discount rate (%)			
	5	3	2.5	3
	Average	Average	Average	95th Percentile
2010	4.7	21.4	35.1	64.9
2015	5.7	23.8	38.4	72.8
2020	6.8	26.3	41.7	80.7
2025	8.2	29.6	45.9	90.4
2030	9.7	32.8	50.0	100.0
2035	11.2	36.0	54.2	109.7
2040	12.7	39.2	58.4	119.3
2045	14.2	42.1	61.7	127.8
2050	15.7	44.9	65.0	136.2

It is important to recognize that a number of key uncertainties remain, and that current SCC estimates should be treated as provisional and revisable since they will evolve with improved scientific and economic understanding. The interagency group also recognizes that the existing models are imperfect and incomplete. The National Research Council report mentioned above points out that there is tension between the goal of producing quantified estimates of the economic damages from an incremental ton of carbon and the limits of existing efforts to model these effects. There are a number of concerns and problems that should be addressed by the research community, including research programs housed in many of the Federal agencies participating in the interagency process to estimate the SCC.

DOE recognizes the uncertainties embedded in the estimates of the SCC used for cost-benefit analyses. As such, DOE and others in the U.S. Government intend to periodically review and reconsider those estimates to reflect increasing knowledge of the science and economics of climate impacts, as well as improvements in modeling. In this context, statements recognizing the limitations of the analysis and calling for further research take on exceptional significance.

In summary, in considering the potential global benefits resulting from reduced CO_2 emissions, DOE used the most recent values identified by the interagency process, adjusted to 2010$ using the GDP price deflator. For each of the four cases specified, the values used for emissions in 2010 were $4.9, $22.3, $36.5, and $67.6 per metric ton avoided (values expressed in 2010$).[42] To monetize the CO_2 emissions reductions expected to result from new or amended standards for the product classes in today's final rule, DOE used the values identified in Table A1 of the ''Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866,'' which is reprinted in appendix 10–A of the final rule TSD, appropriately escalated to 2010$. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the four cases using the specific discount rate that had been used to obtain the SCC values in each case.

2. Valuation of Other Emissions Reductions

DOE investigated the potential monetary benefit of reduced NO_X emissions from the efficiency levels it considered. As noted above, DOE has taken into account how new or amended energy conservation standards would reduce NO_X emissions in those 22 States not affected by the CAIR. DOE estimated the monetized value of NO_X emissions reductions resulting from each of the efficiency levels considered for today's final rule based on environmental damage estimates found in the relevant scientific literature. Available estimates suggest a very wide range of monetary values, ranging from $370 per ton to $3,800 per ton of NO_X from stationary sources, measured in 2001$ (equivalent to a range of $450 to $4,623 per ton in 2010$).[43] In accordance with OMB guidance, DOE conducted two calculations of the monetary benefits derived using each of the economic values used for NO_X, one using a real discount rate of 3 percent and the other using a real discount rate of 7 percent.[44]

DOE is aware of multiple agency efforts to determine the appropriate range of values used in evaluating the potential economic benefits of reduced Hg emissions. DOE has decided to await further guidance regarding consistent valuation and reporting of Hg emissions before it monetizes Hg in its rulemakings.

I. Other Issues

1. Compliance Dates of the Amended and New Energy Conservation Standards

Generally, covered equipment to which a new or amended energy conservation standard applies must comply with the standard if such

[42] Table A1 presents SCC values through 2050. For DOE's calculation, it derived values after 2050 using the 3-percent per year escalation rate used by the interagency group.

[43] For additional information, refer to U.S. Office of Management and Budget, Office of Information and Regulatory Affairs, *2006 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities,* Washington, DC.

[44] OMB, Circular A–4: Regulatory Analysis (Sept. 17, 2003).

equipment is manufactured or imported on or after a specified date. In today's final rule, DOE is evaluating whether more-stringent efficiency levels than those in ASHRAE Standard 90.1–2010 would be technologically feasible, economically justified, and result in a significant amount of energy savings. If DOE were to adopt a rule prescribing energy conservation standards at the efficiency levels contained in ASHRAE Standard 90.1–2010, EPCA states that compliance with any such standards shall be required on or after a date which is two or three years (depending on equipment size) after the compliance date of the applicable minimum energy efficiency requirement in the amended ASHRAE/IES standard. (42 U.S.C. 6313(a)(6)(D)) DOE has applied this two-year or three-year implementation period to determine the compliance date of any energy conservation standard equal to the efficiency levels specified by ASHRAE Standard 90.1–2010 proposed by this rulemaking. Thus, if DOE decides to adopt the efficiency levels in ASHRAE Standard 90.1–2010, the compliance date of the rulemaking would be dependent upon the date specified in ASHRAE Standard 90.1–2010 or its publication date, if none is specified.

The rule would apply to equipment <65,000 Btu/h (10 product classes [45]) manufactured on and after October 29, 2012, which is two years after the publication date of ASHRAE Standard 90.1–2010, and to equipment ≥65,000 Btu/h (20 product classes [46]) manufactured on and after October 29, 2013, which is three years after the publication date of ASHRAE Standard 90.1–2010. Typically, equipment equal to or greater than 65,000 Btu/h and less than 135,000 Btu/h would have a compliance date two years after the publication of ASHRAE Standard 90.1. However, because ASHRAE Standard 90.1–2010 established a product class for computer room air conditioners that combines traditional small and large categories, DOE has decided to assign the later compliance date of three years after the publication of ASHRAE 90.1–2010 to all computer room air conditioner product classes that cover products between 65,000 Btu/h and 240,000 Btu/h.

If DOE were to adopt a rule prescribing energy conservation standards higher than the efficiency levels contained in ASHRAE Standard 90.1–2010, EPCA states that compliance with any such standards is required for products manufactured on and after a date which is four years after the date the rule is published in the **Federal Register.** (42 U.S.C. 6313(a)(6)(D)) DOE has applied this 4-year implementation period to determine the compliance date for any energy conservation standard higher than the efficiency levels specified by ASHRAE Standard 90.1–2010 that might be prescribed. Thus, for products for which DOE might adopt a level more stringent than the ASHRAE efficiency levels, the rule would apply to products manufactured on and after a date four years from the date of publication of the final rule, which the statute requires to be completed by April 29, 2013 (thereby resulting in a compliance date no later than April 29, 2017).[47]

Table V.10 presents the anticipated compliance dates of a new energy conservation standard for each equipment class of computer room air conditioners.

TABLE V.10—COMPLIANCE DATES FOR AN ENERGY CONSERVATION STANDARD FOR EACH EQUIPMENT CLASS OF COMPUTER ROOM AIR CONDITIONERS

Equipment class	Compliance date for adopting the efficiency levels in ASHRAE Standard 90.1–2010	Compliance date for adopting more-stringent efficiency levels than those in ASHRAE Standard 90.1–2010 (no later than * * *)
Air conditioners, air-cooled, <65,000 Btu/h	October 29, 2012	April 29, 2017.
Air conditioners, air-cooled, ≥65,000 and <240,000 Btu/h	October 29, 2013	April 29, 2017.
Air conditioners, air-cooled, ≥240,000 Btu/h and <760,000 Btu/h	October 29, 2013	April 29, 2017.
Air conditioners, water-cooled, <65,000 Btu/h	October 29, 2012	April 29, 2017.
Air conditioners, water-cooled, ≥65,000 and <240,000 Btu/h	October 29, 2013	April 29, 2017.
Air conditioners, water-cooled, ≥240,000 Btu/h and <760,000 Btu/h	October 29, 2013	April 29, 2017.
Air conditioners, water-cooled with fluid economizers, <65,000 Btu/h	October 29, 2012	April 29, 2017.
Air conditioners, water-cooled with fluid economizers, ≥65,000 and <240,000 Btu/h	October 29, 2013	April 29, 2017.
Air conditioners, water-cooled with fluid economizers, ≥240,000 Btu/h and <760,000 Btu/h	October 29, 2013	April 29, 2017.
Air conditioners, glycol-cooled, <65,000 Btu/h	October 29, 2012	April 29, 2017.
Air conditioners, glycol-cooled, ≥65,000 and <240,000 Btu/h	October 29, 2013	April 29, 2017.
Air conditioners, glycol-cooled, ≥240,000 Btu/h and <760,000 Btu/h	October 29, 2013	April 29, 2017.
Air conditioners, glycol-cooled with fluid economizers, <65,000 Btu/h	October 29, 2012	April 29, 2017.
Air conditioners, glycol-cooled with fluid economizers, ≥65,000 and <240,000 Btu/h	October 29, 2013	April 29, 2017.
Air conditioners, glycol-cooled with fluid economizers, ≥240,000 Btu/h and <760,000 Btu/h	October 29, 2013	April 29, 2017.

[45] The analysis only shows five product classes for this equipment size because DOE was able to analyze downflow and upflow units in combination. These units are nearly identical, but ASHRAE Standard 90.1–2010 identifies a 0.11 SCOP reduction in efficiency levels for upflow units as compared to downflow units (likely as a result of the additional static pressure that the blower fan must overcome in the upflow orientation). By adjusting the upflow units by 0.11 SCOP, DOE could analyze upflow and downflow units in combination.

[46] The analysis only shows ten product classes for this equipment size for the same reasons mentioned for equipment <65,000 Btu/h.

[47] Since ASHRAE published ASHRAE Standard 90.1–2010 on October 29, 2010, EPCA requires that DOE publish a final rule adopting more-stringent standards than those in ASHRAE Standard 90.1–2010, if warranted, within 30 months of ASHRAE action (*i.e.,* by April 2013). Thus, four years from April 2013 would be April 2017, which would be the anticipated compliance date for DOE adoption of more-stringent standards.

VI. Analytical Results

A. Efficiency Levels Analyzed

1. Water-Cooled and Evaporatively-Cooled Commercial Package Air-Conditioning and Heating Equipment

The methodology for water-cooled and evaporatively-cooled products was presented in the May 2011 NODA. 76 FR 25622, 25637–40 (May 5, 2011). Table VI.1 presents the baseline efficiency level and the higher efficiency levels analyzed for each equipment class of water-cooled and evaporatively-cooled products subject to today's final rule. The baseline efficiency levels correspond to the lowest efficiency levels currently available on the market. The efficiency levels above the baseline represent efficiency levels specified in ASHRAE Standard 90.1–2010 and higher efficiency levels where equipment is currently available on the market.

TABLE VI.1—EFFICIENCY LEVELS ANALYZED FOR WATER-COOLED AND EVAPORATIVELY-COOLED PRODUCTS

Equipment class	Representative capacity *(tons)*	Efficiency levels analyzed (EER)
Small Water-Cooled Air Conditioners, Electric or No Heat, ≥65,000 Btu/h and <135,000 Btu/h	8	Baseline—11.5 ASHRAE—12.1 13.0 14.0 15.0 Max-Tech—16.4
Small Water-Cooled Air Conditioners, Other Heat, ≥65,000 Btu/h and <135,000 Btu/h	8	Baseline—11.3 ASHRAE—11.9 13.0 14.0 15.0 Max-Tech—16.4
Large Water-Cooled Air Conditioners, Electric or No Heat, ≥135,000 Btu/h and <240,000 Btu/h	15	Baseline—11.0 ASHRAE—12.5 13.0 14.0 15.0 Max-Tech—16.1
Large Water-Cooled Air Conditioners, Other Heat, ≥135,000 Btu/h and <240,000 Btu/h	15	Baseline—11.0 ASHRAE—12.3 13.0 14.0 15.0 Max-Tech—16.1
Very Large Water-Cooled Air Conditioners, Electric or No Heat, ≥240,000 Btu/h and <760,000 Btu/h.	35	Baseline—11.0 ASHRAE—12.4 13.0 14.0 Max-Tech—14.8
Very Large Water-Cooled Air Conditioners, Other Heat, ≥240,000 Btu/h and <760,000 Btu/h	35	Baseline—10.8 ASHRAE—12.2 13.0 14.0 Max-Tech—14.8
Very Large Evaporatively-Cooled Air Conditioner, Electric or No Heat, ≥240,000 Btu/h and <760,000 Btu/h.	40	Baseline—11.0 ASHRAE—11.9 12.5 Max-Tech—13.1
Very Large Evaporatively-Cooled Air Conditioner, Other Heat, ≥240,000 and <760,000 Btu/h	40	Baseline—10.8 ASHRAE—11.7 12.5 Max-Tech—13.1

2. VRF Water-Source Heat Pumps

The methodology for VRF water-source heat pumps was presented in the January 2012 NOPR. 77 FR 2356, 2379–82 (Jan. 17, 2012). Table VI.2 presents the baseline efficiency level and the higher efficiency levels analyzed for each equipment class of VRF water-source heat pumps subject to today's final rule and with equipment on the market. The baseline efficiency levels correspond to the lowest efficiency levels currently available on the market. The efficiency levels above the baseline represent efficiency levels specified in ASHRAE Standard 90.1–2010 and higher efficiency levels where equipment is currently available on the market.

TABLE VI.2—EFFICIENCY LEVELS ANALYZED FOR VRF WATER-SOURCE HEAT PUMPS

Equipment class	Representative capacity *kBtu/h*	Efficiency levels analyzed (EER)
VRF Water-Source Heat Pumps, ≥135,000 Btu/h and <760,000 Btu/h, without heat recovery	242	Baseline—9.5 ASHRAE—10 11 12 13 Max-Tech—14.5
VRF Water-Source Heat Pumps, ≥135,000 Btu/h and <760,000 Btu/h, with heat recovery	215	Baseline—9.5 ASHRAE—9.8 11 12 13 Max-Tech—14.5

3. Computer Room Air Conditioners

The methodology for computer room air conditioners was presented in section V of today's final rule. Table VI.3 presents the market baseline efficiency level and the higher efficiency levels analyzed for each equipment class of computer room air conditioners subject to today's final rule. The market baseline efficiency levels correspond to the lowest efficiency levels currently available on the market. The efficiency levels above the baseline represent efficiency levels specified by ASHRAE Standard 90.1–2010 and efficiency levels above those specified in ASHRAE Standard 90.1–2010 where equipment is currently available on the market. Note that for the economic analysis, efficiency levels above those specified in ASHRAE Standard 90.1–2010 are compared to ASHRAE Standard 90.1–2010 as the baseline rather than the market baseline.

TABLE VI.3—EFFICIENCY LEVELS ANALYZED FOR COMPUTER ROOM AIR CONDITIONERS

Equipment class	Representative capacity *kBtu/h*	Efficiency levels analyzed (SCOP)
Air conditioners, air-cooled, <65,000 Btu/h	36	Market Baseline—2.00 ASHRAE—2.20 2.40 2.60 2.80 Max-Tech—3.00
Air conditioners, air-cooled, ≥65,000 Btu/h and <240,000 Btu/h	132	Market Baseline—2.10 ASHRAE—2.10 2.35 2.60 2.85 Max-Tech—3.10
Air conditioners, air-cooled, ≥240,000 Btu/h and <760,000 Btu/h	288	Market Baseline—1.90 ASHRAE—1.90 2.15 2.40 2.65 Max-Tech—2.90
Air conditioners, water-cooled, <65,000 Btu/h	36	Market Baseline—2.40 ASHRAE—2.60 2.80 3.00 3.20 Max-Tech—3.40
Air conditioners, water-cooled, ≥65,000 Btu/h and <240,000 Btu/h	132	Market Baseline—2.30 ASHRAE—2.50 2.70 2.90 3.10

TABLE VI.3—EFFICIENCY LEVELS ANALYZED FOR COMPUTER ROOM AIR CONDITIONERS—Continued

Equipment class	Representative capacity *kBtu/h*	Efficiency levels analyzed (SCOP)
		Max-Tech—3.30
Air conditioners, water-cooled, ≥240,000 Btu/h and <760,000 Btu/h	288	Market Baseline—2.20 ASHRAE—2.40 2.60 2.80 3.00 Max-Tech—3.20
Air conditioners, water-cooled with fluid economizers, <65,000 Btu/h	36	Market Baseline—2.35 ASHRAE—2.55 2.75 2.95 3.15 Max-Tech—3.35
Air conditioners, water-cooled with fluid economizers, ≥65,000 Btu/h and <240,000 Btu/h	132	Market Baseline—2.25 ASHRAE—2.45 2.65 2.85 3.05 Max-Tech—3.25
Air conditioners, water-cooled with fluid economizers, ≥240,000 Btu/h and <760,000 Btu/h	288	Market Baseline—2.15 ASHRAE—2.35 2.55 2.75 2.95 Max-Tech—3.15
Air conditioners, glycol-cooled, <65,000 Btu/h	36	Market Baseline—2.30 ASHRAE—2.50 2.70 2.90 3.10 Max-Tech—3.30
Air conditioners, glycol-cooled, ≥65,000 and <240,000 Btu/h	132	Market Baseline—1.95 ASHRAE—2.15 2.35 2.55 2.75 Max-Tech—2.95
Air conditioners, glycol-cooled, ≥240,000 Btu/h and <760,000 Btu/h	288	Market Baseline—1.90 ASHRAE—2.10 2.30 2.50 2.70 Max-Tech—2.90
Air conditioners, glycol-cooled with fluid economizers, <65,000 Btu/h	36	Market Baseline—2.25 ASHRAE—2.45 2.65 2.85 3.05 Max-Tech—3.25

TABLE VI.3—EFFICIENCY LEVELS ANALYZED FOR COMPUTER ROOM AIR CONDITIONERS—Continued

Equipment class	Representative capacity *kBtu/h*	Efficiency levels analyzed (SCOP)
Air conditioners, glycol-cooled with fluid economizers, ≥65,000 Btu/h and <240,000 Btu/h	132	Market Baseline—1.90 ASHRAE—2.10 2.30 2.50 2.70 Max-Tech—2.90
Air conditioners, glycol-cooled with fluid economizers, ≥240,000 Btu/h and <760,000 Btu/h	288	Market Baseline—1.85 ASHRAE—2.05 2.25 2.45 2.65 Max-Tech—2.85

B. Energy Savings and Economic Justification

1. Water-Cooled and Evaporatively-Cooled Commercial Package Air-Conditioning and Heating Equipment

DOE estimated the potential primary energy savings in quads (*i.e.,* 10^{15} Btu) for each efficiency level considered within each equipment class analyzed. Table VI.4 to Table VI.11 show the potential energy savings resulting from the analyses conducted as part of the May 2011 NODA. 76 FR 25622, 25637 (May 5, 2011). As discussed in the January 2012 NOPR, DOE did not conduct an economic analysis for this equipment category, because of the minimal energy savings. 77 FR 2356, 2405 (Jan. 17, 2012).

TABLE VI.4—POTENTIAL ENERGY SAVINGS FOR SMALL WATER-COOLED EQUIPMENT WITH ELECTRIC RESISTANCE OR NO HEAT

[2013–2042]

Efficiency level	Primary energy savings* (quads)	
	Historical shipment trend	Shipments fixed to 2009
Level 1—ASHRAE—12.1 EER	0.000005	0.000011
Level 2—13 EER	0.000018	0.000060
Level 3—14 EER	0.000044	0.000144
Level 4—15 EER	0.000074	0.000238
Level 5—"Max-Tech"—16.4 EER	0.000121	0.000388

*The potential energy savings for efficiency levels more stringent than those specified by ASHRAE Standard 90.1–2010 were calculated relative to the efficiency levels that would result if ASHRAE Standard 90.1–2010 standards were adopted.

TABLE VI.5—POTENTIAL ENERGY SAVINGS FOR SMALL WATER-COOLED EQUIPMENT WITH OTHER HEAT

[2013–2042]

Efficiency level	Primary energy savings* (quads)	
	Historical shipment trend	Shipments fixed to 2009
Level 1—ASHRAE—11.9 EER	0.0000005	0.0000013
Level 2—13 EER	0.0000024	0.0000082
Level 3—14 EER	0.0000053	0.0000174
Level 4—15 EER	0.0000085	0.0000276
Level 5—"Max-Tech"—16.4 EER	0.0000137	0.0000441

*The potential energy savings for efficiency levels more stringent than those specified by ASHRAE Standard 90.1–2010 were calculated relative to the efficiency levels that would result if ASHRAE Standard 90.1–2010 standards were adopted.

TABLE VI.6—POTENTIAL ENERGY SAVINGS FOR LARGE WATER-COOLED EQUIPMENT WITH ELECTRIC RESISTANCE OR NO HEAT

[2014–2043]

Efficiency level	Primary energy savings* (quads)	
	Historical shipment trend	Shipments fixed to 2009
Level 1—ASHRAE—12.5 EER	0.00014	0.00027

TABLE VI.6—POTENTIAL ENERGY SAVINGS FOR LARGE WATER-COOLED EQUIPMENT WITH ELECTRIC RESISTANCE OR NO HEAT—Continued

[2014–2043]

Efficiency level	Primary energy savings * (quads)	
	Historical shipment trend	Shipments fixed to 2009
Level 2—13 EER	0.00002	0.00008
Level 3—14 EER	0.00013	0.00032
Level 4—15 EER	0.00024	0.00056
Level 5—"Max-Tech"—16.1 EER	0.00039	0.00089

* The potential energy savings for efficiency levels more stringent than those specified by ASHRAE Standard 90.1–2010 were calculated relative to the efficiency levels that would result if ASHRAE Standard 90.1–2010 standards were adopted.

TABLE VI.7—POTENTIAL ENERGY SAVINGS FOR LARGE WATER-COOLED EQUIPMENT WITH OTHER HEAT

[2014–2043]

Efficiency level	Primary energy savings * (quads)	
	Historical shipment trend	Shipments fixed to 2009
Level 1—ASHRAE—12.3 EER	0.00001	0.00003
Level 2—13 EER	0.00001	0.00001
Level 3—14 EER	0.00002	0.00004
Level 4—15 EER	0.00003	0.00007
Level 5—"Max-Tech"—16.1 EER	0.00005	0.00010

* The potential energy savings for efficiency levels more stringent than those specified by ASHRAE Standard 90.1–2010 were calculated relative to the efficiency levels that would result if ASHRAE Standard 90.1–2010 standards were adopted.

TABLE VI.8—POTENTIAL ENERGY SAVINGS FOR VERY LARGE WATER-COOLED EQUIPMENT WITH ELECTRIC RESISTANCE OR NO HEAT

[2014–2043]

Efficiency level	Primary energy savings * (quads)	
	Historical shipment trend	Shipments fixed to 2009
Level 1—ASHRAE—12.4 EER	0.0002	0.0001
Level 2—13 EER	0.0001	0.0001
Level 3—14 EER	0.0005	0.0003
Level 4—"Max-Tech"—14.8 EER	0.0008	0.0005

* The potential energy savings for efficiency levels more stringent than those specified by ASHRAE Standard 90.1–2010 were calculated relative to the efficiency levels that would result if ASHRAE Standard 90.1–2010 standards were adopted.

TABLE VI.9—POTENTIAL ENERGY SAVINGS FOR VERY LARGE WATER-COOLED EQUIPMENT WITH OTHER HEAT

[2014–2043]

Efficiency level	Primary energy savings * (quads)	
	Historical shipment trend	Shipments fixed to 2009
Level 1—ASHRAE—12.2 EER	0.002	0.001
Level 2—13 EER	0.001	0.001
Level 3—14 EER	0.005	0.003
Level 4—"Max-Tech"—14.8 EER	0.008	0.005

* The potential energy savings for efficiency levels more stringent than those specified by ASHRAE Standard 90.1–2010 were calculated relative to the efficiency levels that would result if ASHRAE Standard 90.1–2010 standards were adopted.

TABLE VI.10—POTENTIAL ENERGY SAVINGS FOR VERY LARGE EVAPORATIVELY-COOLED EQUIPMENT WITH ELECTRIC RESISTANCE OR NO HEAT

[2014–2043]

Efficiency level	Primary energy savings * (quads)	
	Historical shipment trend	Shipments fixed to 2009
Level 1—ASHRAE—11.9 EER	0.00013	0.00009
Level 2—12.5 EER	0.00008	0.00005

TABLE VI.10—POTENTIAL ENERGY SAVINGS FOR VERY LARGE EVAPORATIVELY-COOLED EQUIPMENT WITH ELECTRIC RESISTANCE OR NO HEAT—Continued

[2014–2043]

Efficiency level	Primary energy savings* (quads)	
	Historical shipment trend	Shipments fixed to 2009
Level 3—"Max-Tech"—13.1 EER	0.00017	0.00011

* The potential energy savings for efficiency levels more stringent than those specified by ASHRAE Standard 90.1–2010 were calculated relative to the efficiency levels that would result if ASHRAE Standard 90.1–2010 standards were adopted.

TABLE VI.11—POTENTIAL ENERGY SAVINGS FOR VERY LARGE EVAPORATIVELY-COOLED EQUIPMENT WITH OTHER HEAT

[2014–2043]

Efficiency level	Primary energy savings* (quads)	
	Historical shipment trend	Shipments fixed to 2009
Level 1—ASHRAE—11.7 EER	0.0011	0.0007
Level 2—12.5 EER	0.0010	0.0007
Level 3—"Max-Tech"—13.1 EER	0.0019	0.0012

* The potential energy savings for efficiency levels more stringent than those specified by ASHRAE Standard 90.1–2010 were calculated relative to the efficiency levels that would result if ASHRAE Standard 90.1–2010 standards were adopted.

2. VRF Water-Source Heat Pumps

DOE estimated the potential primary energy savings in quads (*i.e.,* 10^{15} Btu) for each efficiency level considered within the two equipment classes of VRF water-source heat pumps at or greater than 135,000 Btu/h. Table VI.12 and Table VI.13 show the potential energy savings resulting from the analyses conducted as part of the January 2012 NOPR. 77 FR 2356, 2379–82 (Jan. 17, 2012). Because there appear to be no models on the market below ASHRAE Standard 90.1–2010 levels, there are no energy savings from adopting ASHRAE. However, there are also extremely minimal energy savings from adopting a higher standard. As discussed in the January 2012 NOPR, DOE did not conduct an economic analysis for this equipment category. *Id.* at 2368–70. In addition, DOE did not identify any models on the market less than 17,000 Btu/h, and, therefore, did not conduct any analyses for this equipment category. *Id.* at 2368.

TABLE VI.12—POTENTIAL ENERGY SAVINGS FOR VRF WATER-SOURCE HEAT PUMPS, ≥135,000 BTU/H AND <760,000 BTU/H, WITHOUT HEAT RECOVERY

[2013–2042]

Efficiency level	Primary energy savings* (quads)
Level 1—ASHRAE—10.0 EER	.....
Level 2—11 EER	0.0009
Level 3—12 EER	0.0174
Level 4—13 EER	0.0416

TABLE VI.12—POTENTIAL ENERGY SAVINGS FOR VRF WATER-SOURCE HEAT PUMPS, ≥135,000 BTU/H AND <760,000 BTU/H, WITHOUT HEAT RECOVERY—Continued

[2013–2042]

Efficiency level	Primary energy savings* (quads)
Level 5—"Max-Tech"—14.5 EER	0.0761

* The potential energy savings for efficiency levels more stringent than those specified by ASHRAE Standard 90.1–2010 were calculated relative to the efficiency levels that would result if ASHRAE Standard 90.1–2010 standards were adopted.

TABLE VI.13—POTENTIAL ENERGY SAVINGS FOR VRF WATER-SOURCE HEAT PUMPS, ≥135,000 BTU/H AND <760,000 BTU/H WITH HEAT RECOVERY

[2013–2042]

Efficiency level	Primary energy savings* (quads)
Level 1—ASHRAE—9.8 EER	.....
Level 2—11 EER	0.0008
Level 3—12 EER	0.0083
Level 4—13 EER	0.0195
Level 5—"Max-Tech"—14.5 EER	0.0358

* The potential energy savings for efficiency levels more stringent than those specified by ASHRAE Standard 90.1–2010 were calculated relative to the efficiency levels that would result if ASHRAE Standard 90.1–2010 standards were adopted.

3. Computer Room Air Conditioners

a. Economic Impacts on Commercial Customers

i. Life-Cycle Cost and Payback Period

To evaluate the economic impact of the efficiency levels on commercial customers, DOE conducted an LCC analysis for each efficiency level. More-efficient computer room air conditioners would affect these customers in two ways: (1) Annual operating expense would decrease; and (2) purchase price would increase. Inputs used for calculating the LCC include total installed costs (*i.e.,* equipment price plus installation costs), operating expenses (*i.e.,* annual energy savings, energy prices, energy price trends, repair costs, and maintenance costs), equipment lifetime, and discount rates.

The output of the LCC model is a mean LCC savings (or cost [48]) for each equipment class, relative to the baseline CRAC efficiency level. The LCC analysis also provides information on the percentage of customers that are negatively affected by an increase in the minimum efficiency standard.

DOE also performed a PBP analysis as part of the LCC analysis. The PBP is the number of years it would take for the customer to recover the increased costs of higher-efficiency equipment as a result of energy savings based on the operating cost savings. The PBP is an economic benefit-cost measure that uses benefits and costs without discounting. Chapter 5 of the final rule TSD provides

[48] An LCC cost is shown as a negative savings in the results presented.

detailed information on the LCC and PBP analyses.

DOE's LCC and PBP analyses provided five key outputs for each efficiency level above the baseline (*i.e.,* efficiency levels more stringent than those in ASHRAE Standard 90.1–2010), as reported in Table VI.14 through Table VI.28 These outputs include the proportion of CRAC purchases in which the purchase of a computer room air conditioner that is compliant with the new energy conservation standard creates a net LCC increase, no impact, or a net LCC savings for the customer. Another output is the average net LCC savings from standard-compliant equipment, as well as the average PBP for the customer investment in standard-compliant equipment.

TABLE VI.14—SUMMARY LCC AND PBP RESULTS FOR COMPUTER ROOM AIR CONDITIONERS, AIR-COOLED, <65,000 BTU/H

Efficiency level	Life-cycle cost (*2011$*)			Life-cycle cost savings				Payback period (*years*)
	Installed cost	Discounted operating cost	LCC	Average savings (*2011$ **)	% of Consumers that experience			
					Net cost	No impact	Net benefit	Median
Baseline	12,003	33,563	45,566	.....	.....	.....	.....	.....
1	13,491	31,554	45,045	584	2	89	9	8.6
2	15,239	29,905	45,144	122	18	68	14	10.3
3	17,295	28,548	45,842	(648)	67	23	10	12.2
4	19,711	27,436	47,147	(1,828)	91	5	4	14.6

* Numbers in parentheses indicate negative LCC savings.

TABLE VI.15—SUMMARY LCC AND PBP RESULTS FOR COMPUTER ROOM AIR CONDITIONERS, AIR-COOLED, ≥65,000 AND <240,000 BTU/H

Efficiency level	Life-cycle cost (*2011$*)			Life-cycle cost savings				Payback period (*years*)
	Installed cost	Discounted operating cost	LCC	Average savings (*2011$*)	% of Consumers that experience			
					Net cost	No impact	Net benefit	Median
Baseline	38,943	118,114	157,057	.....	.....	.....	.....	.....
1	41,179	108,190	149,369	8,535	0	98	2	2.6
2	43,588	100,283	143,871	6,378	0	78	22	3.0
3	46,185	93,872	140,057	5,894	0	33	67	3.5
4	48,984	88,606	137,590	6,474	0	2	98	3.9

TABLE VI.16—SUMMARY LCC AND PBP RESULTS FOR COMPUTER ROOM AIR CONDITIONERS, AIR-COOLED, ≥240,000 AND <760,000 BTU/H

Efficiency level	Life-cycle cost (*2011$*)			Life-cycle cost savings				Payback period (*years*)
	Installed cost	Discounted operating cost	LCC	Average savings (*2011$*)	% of Consumers that experience			
					Net cost	No impact	Net benefit	Median
Baseline	56,633	288,343	344,977	.....	.....	.....	.....	.....
1	59,852	262,649	322,501	24,709	0	98	2	1.4
2	63,322	242,741	306,063	18,947	0	78	22	1.7
3	67,061	227,026	294,087	18,146	0	33	67	2.0
4	71,092	214,460	285,553	20,871	0	2	98	2.3

TABLE VI.17—SUMMARY LCC AND PBP RESULTS FOR COMPUTER ROOM AIR CONDITIONERS, WATER-COOLED, <65,000 BTU/H

Efficiency level	Life-cycle cost (*2011$*)			Life-cycle cost savings				Payback period (*years **)
	Installed cost	Discounted operating cost	LCC	Average savings (*2011$*)	% of Consumers that experience			
					Net cost	No impact	Net benefit	Median
Baseline	23,716	30,844	54,560	.....	.....	.....	.....	.....
1	20,284	29,008	49,292	5,286	0	72	28	(21.7)
2	17,504	27,426	44,930	7,264	0	49	51	(21.1)
3	15,253	26,051	41,303	7,896	0	13	87	(20.5)
4	13,429	24,845	38,274	10,089	0	3	97	(19.9)

* Numbers in parentheses indicate negative payback period due to a declining installed cost at higher efficiency levels.

TABLE VI.18—SUMMARY LCC AND PBP RESULTS FOR COMPUTER ROOM AIR CONDITIONERS, WATER-COOLED, ≥65,000 BTU/H AND <240,000 BTU/H

Efficiency level	Life-cycle cost (2011$)			Life-cycle cost savings				Payback period (years)
	Installed cost	Discounted operating cost	LCC	Average savings (2011$ *)	% of Consumers that experience			
					Net cost	No impact	Net benefit	Median
Baseline	22,767	106,535	129,302	.....	.....	.....	.....	.....
1	28,390	101,751	130,141	(774)	21	72	7	14.2
2	35,948	98,421	134,370	(4,582)	56	42	2	19.9
3	46,106	96,571	142,677	(11,622)	80	20	0	29.3
4	59,759	96,331	156,090	(23,097)	96	4	0	47.0

* Numbers in parentheses indicate negative LCC savings.

TABLE VI.19—SUMMARY LCC AND PBP RESULTS FOR COMPUTER ROOM AIR CONDITIONERS, WATER-COOLED, ≥240,000 AND <760,000 BTU/H

Efficiency level	Life-cycle cost (2011$)			Life-cycle cost savings				Payback period (years)
	Installed cost	Discounted operating cost	LCC	Average savings (2011$ *)	% of Consumers that experience			
					Net cost	No impact	Net benefit	Median
Baseline	42,240	240,877	283,117	.....	.....	.....	.....	.....
1	52,910	230,552	283,462	(196)	17	72	11	12.6
2	67,250	224,068	291,318	(7,906)	54	42	4	18.6
3	86,522	221,566	308,088	(22,491)	79	20	1	29.7
4	112,423	223,494	335,917	(46,570)	96	4	0	54.6

* Numbers in parentheses indicate negative LCC savings.

TABLE VI.20—SUMMARY LCC AND PBP RESULTS FOR AIR CONDITIONERS, WATER-COOLED WITH FLUID ECONOMIZERS, <65,000 BTU/H

Efficiency level	Life-cycle cost (2011$)			Life-cycle cost savings				Payback period (years *)
	Installed cost	Discounted operating cost	LCC	Average savings (2011$)	% of Consumers that experience			
					Net cost	No impact	Net benefit	Median
Baseline	25,025	21,485	46,510	.....	.....	.....	.....	.....
1	21,393	20,449	41,842	4,686	0	72	28	(40.7)
2	18,451	19,563	38,015	6,400	0	49	51	(39.7)
3	16,069	18,798	34,867	6,908	0	13	87	(38.7)
4	14,139	18,132	32,272	8,772	0	3	97	(37.7)

* Numbers in parentheses indicate negative payback period due to a declining installed cost at higher efficiency levels.

TABLE VI.21—SUMMARY LCC AND PBP RESULTS FOR COMPUTER ROOM AIR CONDITIONERS, WATER-COOLED WITH FLUID ECONOMIZERS, ≥65,000 BTU/H AND <240,000 BTU/H

Efficiency level	Life-cycle cost (2011$)			Life-cycle cost savings				Payback period (years *)
	Installed cost	Discounted operating cost	LCC	Average savings (2011$*)	% of Consumers that experience			
					Net cost	No impact	Net benefit	Median
Baseline	23,952	71,670	95,622	.....	.....	.....	.....	.....
1	29,903	69,964	99,867	(4,179)	28	72	0	36.8
2	37,901	69,297	107,198	(9,336)	58	42	0	48.1
3	48,651	69,771	118,421	(17,987)	80	20	0	35.8
4	63,099	71,578	134,677	(31,244)	96	4	0	(73.0)

* Numbers in parentheses indicate either negative LCC savings or show a negative payback due to increased annual operating costs.

TABLE VI.22—SUMMARY LCC AND PBP RESULTS FOR COMPUTER ROOM AIR CONDITIONERS, WATER-COOLED WITH FLUID ECONOMIZERS, ≥240,000 AND <760,000 BTU/H

Efficiency level	Life-cycle cost (*2011$*)			Life-cycle cost savings				Payback period (*years**)
	Installed cost	Discounted operating cost	LCC	Average savings (*2011$**)	% of Consumers that experience			
					Net cost	No impact	Net benefit	Median
Baseline	44,489	161,303	205,792	.....	.....	.....	.....	.....
1	55,781	158,228	214,009	(8,064)	28	72	0	32.3
2	70,956	157,979	228,935	(18,795)	58	42	0	22.6
3	91,351	160,896	252,247	(36,931)	80	20	0	(43.7)
4	118,760	167,577	286,337	(64,864)	96	4	0	(57.2)

* Numbers in parentheses indicate either negative LCC savings or show a negative payback due to increased annual operating costs.

TABLE VI.23—SUMMARY LCC AND PBP RESULTS FOR COMPUTER ROOM AIR CONDITIONERS, GLYCOL-COOLED, <65,000 BTU/H

Efficiency level	Life-cycle cost (*2011$*)			Life-cycle cost savings				Payback period (*years**)
	Installed cost	Discounted operating cost	LCC	Average savings (*2011$**)	% of Consumers that experience			
					Net cost	No impact	Net benefit	Median
Baseline	23,764	31,335	55,099	.....	.....	.....	.....	.....
1	20,332	29,414	49,746	5,372	0	72	28	(20.5)
2	17,552	27,768	45,321	7,375	0	49	51	(20.0)
3	15,301	26,345	41,646	8,009	0	13	87	(19.5)
4	13,477	25,104	38,581	10,226	0	3	97	(19.0)

* Numbers in parentheses indicate negative payback period due to a declining installed cost at higher efficiency levels.

TABLE VI.24—SUMMARY LCC AND PBP RESULTS FOR COMPUTER ROOM AIR CONDITIONERS, GLYCOL-COOLED, ≥65,000 BTU/H AND <240,000 BTU/H

Efficiency level	Life-cycle cost (*2011$*)			Life-cycle cost savings				Payback period (*years**)
	Installed cost	Discounted operating cost	LCC	Average savings (*2011$**)	% of Consumers that experience			
					Net cost	No impact	Net benefit	Median
Baseline	22,857	118,862	141,719	.....	.....	.....	.....	.....
1	28,473	112,743	141,215	588	14	72	14	10.9
2	36,020	108,621	144,642	(3,117)	51	42	7	15.5
3	46,164	106,463	152,626	(10,236)	79	20	1	23.0
4	59,795	106,392	166,188	(22,091)	96	4	0	37.5

* Numbers in parentheses indicate negative LCC savings.

TABLE VI.25—SUMMARY LCC AND PBP RESULTS FOR COMPUTER ROOM AIR CONDITIONERS, GLYCOL-COOLED, ≥240,000 AND <760,000 BTU/H

Efficiency level	Life-cycle cost (*2011$*)			Life-cycle cost savings				Payback period (*years*)
	Installed cost	Discounted operating cost	LCC	Average savings (*2011$**)	% of Consumers that experience			
					Net cost	No impact	Net benefit	Median
Baseline	42,419	268,376	310,795	.....	.....	.....	.....	.....
1	53,089	256,260	309,349	1,633	13	72	15	10.6
2	67,430	249,398	316,828	(6,637)	51	42	7	16.3
3	86,702	247,905	334,607	(22,582)	79	20	1	28.0
4	112,602	252,346	364,948	(49,159)	96	4	0	48.4

* Numbers in parentheses indicate negative LCC savings.

TABLE VI.26—SUMMARY LCC AND PBP RESULTS FOR AIR CONDITIONERS, GLYCOL-COOLED WITH FLUID ECONOMIZERS, <65,000 BTU/H

Efficiency level	Life-cycle cost (*2011$*)			Life-cycle cost savings				Payback period (*years**)
	Installed cost	Discounted operating cost	LCC	Average savings (*2011$*)	% of Consumers that experience			
					Net cost	No impact	Net benefit	Median
Baseline	25,073	26,615	51,689	.....	.....	.....	.....	.....
1	21,441	25,108	46,550	5,162	0	72	28	(28.4)
2	18,500	23,823	42,323	7,064	0	49	51	(27.8)
3	16,117	22,716	38,833	7,640	0	13	87	(27.1)
4	14,187	21,755	35,942	9,722	0	3	97	(26.4)

* Numbers in parentheses indicate negative payback period due to a declining installed cost at higher efficiency levels.

TABLE VI.27—SUMMARY LCC AND PBP RESULTS FOR COMPUTER ROOM AIR CONDITIONERS, GLYCOL-COOLED WITH FLUID ECONOMIZERS, ≥65,000 BTU/H AND <240,000 BTU/H

Efficiency level	Life-cycle cost (*2011$*)			Life-cycle cost savings				Payback period (*years*)
	Installed cost	Discounted operating cost	LCC	Average savings (*2011$**)	% of Consumers that experience			
					Net cost	No impact	Net benefit	Median
Baseline	24,041	99,288	123,328	.....	.....	.....	.....	.....
1	29,984	95,100	125,083	(1,652)	23	72	5	18.0
2	37,971	92,626	130,597	(6,282)	55	42	3	27.3
3	48,705	91,890	140,595	(14,548)	79	20	1	45.3
4	63,131	93,060	156,191	(27,719)	96	4	0	49.5

* Numbers in parentheses indicate negative LCC savings.

TABLE VI.28—SUMMARY LCC AND PBP RESULTS FOR COMPUTER ROOM AIR CONDITIONERS, GLYCOL-COOLED WITH FLUID ECONOMIZERS, ≥240,000 AND <760,000 BTU/H

Efficiency level	Life-cycle cost (*2011$*)			Life-cycle cost savings				Payback Period (*years**)
	Installed cost	Discounted operating cost	LCC	Average savings (*2011$**)	% of Consumers that experience			
					Net cost	No impact	Net benefit	Median
Baseline	44,668	224,664	269,332	.....	.....	.....	.....	.....
1	55,960	216,938	272,898	(3,338)	22	72	6	19.4
2	71,136	213,811	284,947	(13,598)	55	42	3	26.8
3	91,530	215,533	307,063	(31,974)	79	20	1	17.6
4	118,939	222,769	341,709	(61,294)	96	4	0	(45.0)

* Numbers in parentheses indicate negative LCC savings or show a negative payback due to increased annual operating costs.

b. National Impact Analysis

i. Amount and Significance of Energy Savings

To estimate the energy savings through 2041 or 2042 due to amended or new energy conservation standards, DOE compared the energy consumption of computer room air conditioners under the ASHRAE Standard 90.1–2010 efficiency levels to energy consumption of computer room air conditioners under higher efficiency standards. DOE also compared the energy consumption of computer room air conditioners under the ASHRAE Standard 90.1–2010 efficiency levels to energy consumption of computer room air conditioners under the current market base case. DOE examined up to four efficiency levels higher than those of ASHRAE Standard 90.1–2010. Table VI.29 shows the forecasted national energy savings at each of the considered standard levels. (See chapter 8 of the final rule TSD.) As mentioned in section V.B, DOE adjusted the efficiency rating (SCOP) upward for all upflow units in order to analyze the energy savings from only 15 classes of computer room air conditioners, with upflow and downflow units combined.

TABLE VI.29—SUMMARY OF CUMULATIVE NATIONAL ENERGY SAVINGS FOR COMPUTER ROOM AIR CONDITIONERS

[2012–2041 or 2013–2042]

Equipment class	National energy savings (quads)*				
	ASHRAE level	Efficiency level 1	Efficiency level 2	Efficiency level 3	Efficiency level 4
Air conditioners, air-cooled, <65,000 Btu/h	0.00018	0.0006	0.0021	0.0052	0.0086
Air conditioners, air-cooled, ≥65,000 and <240,000 Btu/h	**	0.006	0.059	0.196	0.364
Air conditioners, air-cooled, ≥240,000 and <760,000 Btu/h	**	0.004	0.034	0.112	0.206

TABLE VI.29—SUMMARY OF CUMULATIVE NATIONAL ENERGY SAVINGS FOR COMPUTER ROOM AIR CONDITIONERS—Continued

[2012–2041 or 2013–2042]

Equipment class	National energy savings (quads) *				
	ASHRAE level	Efficiency level 1	Efficiency level 2	Efficiency level 3	Efficiency level 4
Air conditioners, water-cooled, <65,000 Btu/h	0.00003	0.0001	0.0003	0.0007	0.0010
Air conditioners, water-cooled, ≥65,000 and <240,000 Btu/h	0.0009	0.0088	0.0246	0.0435	0.0634
Air conditioners, water-cooled, ≥240,000 and <760,000 Btu/h	0.0008	0.0079	0.0220	0.0388	0.0565
Air conditioners, water-cooled with fluid economizers, <65,000 Btu/h	0.00001	0.00004	0.00011	0.00021	0.00031
Air conditioners, water-cooled with fluid economizers, ≥65,000 and <240,000 Btu/h	0.0004	0.0038	0.0106	0.0188	0.0273
Air conditioners, water-cooled with fluid economizers, ≥240,000 and <760,000 Btu/h	0.0002	0.0016	0.0043	0.0076	0.0111
Air conditioners, glycol-cooled, <65,000 Btu/h	0.00003	0.00013	0.00033	0.00063	0.00092
Air conditioners, glycol-cooled, ≥65,000 and <240,000 Btu/h	0.001	0.011	0.031	0.054	0.078
Air conditioners, glycol-cooled, ≥240,000 and <760,000 Btu/h	0.0008	0.0080	0.0220	0.0384	0.0554
Air conditioners, glycol-cooled with fluid economizers, <65,000 Btu/h	0.00002	0.0001	0.0002	0.0005	0.0007
Air conditioners, glycol-cooled with fluid economizers, ≥65,000 and <240,000 Btu/h	0.001	0.010	0.027	0.047	0.067
Air conditioners, glycol-cooled with fluid economizers, ≥240,000 and <760,000 Btu/h	0.0005	0.0054	0.0147	0.0257	0.0370

* All energy savings from efficiency levels above ASHRAE Standard 90.1–2010 are calculated with those ASHRAE levels as a baseline.
** For these equipment classes, no models were identified below the efficiency levels shown in ASHRAE Standard 90.1–2010, so there are no energy savings for the ASHRAE Standard 90.1–2010 efficiency levels.

ii. Net Present Value

The NPV analysis measures the cumulative benefit or cost of standards to equipment customers from a national perspective. In accordance with OMB's guidelines on regulatory analysis (OMB Circular A–4, section E (Sept. 17, 2003)), DOE calculated NPV using both a 7-percent and a 3-percent real discount rate. The 7-percent rate is an estimate of the average before-tax rate of return on private capital in the U.S. economy, and reflects the returns to real estate and small business capital, as well as corporate capital. It approximates the opportunity cost of capital in the private sector. The 3-percent rate represents the rate at which society discounts future consumption flows to their present value. This rate can be approximated by the real rate of return on long-term government debt (*e.g.,* yield on Treasury notes minus annual rate of change in the Consumer Price Index), which has averaged about 3 percent on a pre-tax basis for the last 30 years. Table VI.30 and Table VI.31 provide an overview of the NPV results. (See chapter 7 of the final rule TSD for further detail.)

TABLE VI.30—CUMULATIVE NET PRESENT VALUE FOR POTENTIAL STANDARDS FOR COMPUTER ROOM AIR CONDITIONERS

[Discounted at seven percent]

Equipment class	Net present value (billion 2011$ *)			
	Efficiency level 1	Efficiency level 2	Efficiency level 3	Efficiency level 4
Air conditioners, air-cooled, <65,000 Btu/h	$0.0004	$(0.0000)	$(0.0048)	$(0.0154)
Air conditioners, air-cooled, ≥65,000 and <240,000 Btu/h	0.01	0.12	0.34	0.54
Air conditioners, air-cooled, ≥240,000 and <760,000 Btu/h	0.01	0.08	0.24	0.40
Air conditioners, water-cooled, <65,000 Btu/h	0.001	0.003	0.006	0.009
Air conditioners, water-cooled, ≥65,000 and <240,000 Btu/h	(0.004)	(0.041)	(0.140)	(0.332)
Air conditioners, water-cooled, ≥240,000 and <760,000 Btu/h	(0.001)	(0.026)	(0.102)	(0.251)
Air conditioners, water-cooled with fluid economizers, <65,000 Btu/h	0.001	0.002	0.003	0.005
Air conditioners, water-cooled with fluid economizers, ≥65,000 and <240,000 Btu/h	(0.02)	(0.07)	(0.18)	(0.38)
Air conditioners, water-cooled with fluid economizers, ≥240,000 and <760,000 Btu/h	(0.005)	(0.024)	(0.064)	(0.134)
Air conditioners, glycol-cooled, <65,000 Btu/h	0.001	0.003	0.006	0.008
Air conditioners, glycol-cooled, ≥65,000 and <240,000 Btu/h	0.002	(0.028)	(0.123)	(0.316)
Air conditioners, glycol-cooled, ≥240,000 and <760,000 Btu/h	0.002	(0.018)	(0.083)	(0.215)
Air conditioners, glycol-cooled with fluid economizers, <65,000 Btu/h	0.001	0.003	0.006	0.008
Air conditioners, glycol-cooled with fluid economizers, ≥65,000 and <240,000 Btu/h	(0.01)	(0.07)	(0.20)	(0.46)

TABLE VI.30—CUMULATIVE NET PRESENT VALUE FOR POTENTIAL STANDARDS FOR COMPUTER ROOM AIR CONDITIONERS—Continued

[Discounted at seven percent]

Equipment class	Net present value (billion 2011$ *)			
	Efficiency level 1	Efficiency level 2	Efficiency level 3	Efficiency level 4
Air conditioners, glycol-cooled with fluid economizers, ≥240,000 and <760,000 Btu/h	(0.004)	(0.033)	(0.106)	(0.242)

* Numbers in parentheses indicate negative NPV.

TABLE VI.31—CUMULATIVE NET PRESENT VALUE FOR POTENTIAL STANDARDS FOR COMPUTER ROOM AIR CONDITIONERS

[Discounted at three percent]

Equipment class	Net present value (billion 2011$ *)			
	Efficiency level 1	Efficiency level 2	Efficiency level 3	Efficiency level 4
Air conditioners, air-cooled, <65,000 Btu/h	$0.002	$0.003	$(0.002)	$(0.017)
Air conditioners, air-cooled, ≥65,000 and <240,000 Btu/h	0.03	0.29	0.88	1.48
Air conditioners, air-cooled, ≥240,000 and <760,000 Btu/h	0.02	0.19	0.58	1.00
Air conditioners, water-cooled, <65,000 Btu/h	0.003	0.007	0.012	0.018
Air conditioners, water-cooled, ≥65,000 and <240,000 Btu/h	0.003	(0.051)	(0.220)	(0.566)
Air conditioners, water-cooled, ≥240,000 and <760,000 Btu/h	0.007	(0.029)	(0.160)	(0.435)
Air conditioners, water-cooled with fluid economizers, <65,000 Btu/h	0.001	0.004	0.006	0.009
Air conditioners, water-cooled with fluid economizers, ≥65,000 and <240,000 Btu/h	(0.02)	(0.12)	(0.33)	(0.69)
Air conditioners, water-cooled with fluid economizers, ≥240,000 and <760,000 Btu/h	(0.008)	(0.042)	(0.117)	(0.251)
Air conditioners, glycol-cooled, <65,000 Btu/h	0.003	0.006	0.012	0.017
Air conditioners, glycol-cooled, ≥65,000 and <240,000 Btu/h	0.02	(0.02)	(0.18)	(0.53)
Air conditioners, glycol-cooled, ≥240,000 and <760,000 Btu/h	0.01	(0.02)	(0.13)	(0.38)
Air conditioners, glycol-cooled with fluid economizers, <65,000 Btu/h	0.002	0.006	0.011	0.015
Air conditioners, glycol-cooled with fluid economizers, ≥65,000 and <240,000 Btu/h	(0.01)	(0.10)	(0.34)	(0.82)
Air conditioners, glycol-cooled with fluid economizers, ≥240,000 and <760,000 Btu/h	(0.004)	(0.052)	(0.187)	(0.447)

* Numbers in parentheses indicate negative NPV.

C. Need of the Nation To Conserve Energy

Enhanced energy efficiency, where economically justified, improves the Nation's energy security, strengthens the economy, and reduces the environmental impacts or costs of energy production. Reduced electricity demand from energy conservation standards is also likely to reduce the cost of maintaining the reliability of the electricity system, particularly during peak-load periods. As a measure of this reduced demand, Table VI.32 presents the estimated reduction in generating capacity in 2042 – relative to the *AEO* Reference case – attributable to the efficiency levels that DOE considered in this rulemaking.

TABLE VI.32—REDUCTION IN NATIONAL ELECTRIC GENERATING CAPACITY IN 2042 UNDER CONSIDERED EFFICIENCY LEVELS (GIGAWATTS)

	Efficiency level				
	ASHRAE (baseline)	1	2	3	4
Water-Cooled and Evaporatively-Cooled Products	0.00	0.01	0.01	0.02	0.02
VRF Water-Source Heat Pumps	0.00	0.00	0.05	0.12	0.23
Computer Room Air Conditioners	0.01	0.12	0.47	1.09	1.81

Energy savings from standards for the equipment classes covered in today's final rule could also produce environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases associated with electricity production. Table VI.33 provides DOE's estimate of cumulative CO_2, NO_X, and Hg emissions reductions projected to result from the efficiency levels considered in this rulemaking. DOE reports annual CO_2, NO_X, and Hg emissions reductions for each efficiency level in chapter 9 of the final rule TSD.

As discussed in section V.G, DOE did not report SO_2 emissions reductions from power plants because there is uncertainty about the effect of energy conservation standards on the overall level of SO_2 emissions in the United States due to SO_2 emissions caps. DOE

also did not include NO_X emissions reduction from power plants in States subject to CAIR, because an energy conservation standard would not affect the overall level of NO_X emissions in those States due to the emissions caps mandated by CAIR.

TABLE VI.33—SUMMARY OF EMISSIONS REDUCTION ESTIMATED FOR CONSIDERED EFFICIENCY LEVELS

[Cumulative in 2012–2041 or 2013–2042]

	Efficiency level				
	ASHRAE (baseline)	1	2	3	4
Water-Cooled and Evaporatively-Cooled Products					
CO_2 (*million metric tons*)	0.10	0.10	0.25	0.36	0.37
NO_X (*thousand tons*)	0.08	0.08	0.21	0.30	0.31
Hg (*tons*)	0.001	0.001	0.003	0.004	0.004
VRF Water-Source Heat Pumps					
CO_2 (*million metric tons*)	0.00	0.05	0.82	1.96	3.58
NO_X (*thousand tons*)	0.00	0.04	0.68	1.60	2.93
Hg (*tons*)	0.000	0.001	0.009	0.022	0.040
Computer Room Air Conditioners					
CO_2 (*million metric tons*)	0.18	2.14	8.06	18.7	31.1
NO_X (*thousand tons*)	0.14	1.76	6.62	15.4	25.6
Hg (*tons*)	0.001	0.023	0.087	0.203	0.337

As part of the analysis for this final rule, DOE estimated monetary benefits likely to result from the reduced emissions of CO_2 and NO_X that DOE estimated for each of the efficiency levels considered. As discussed in section V.H, DOE used values for the SCC developed by an interagency process. The four values for CO_2 emissions reductions resulting from that process (expressed in 2010$) are $4.9/ton (the average value from a distribution that uses a 5-percent discount rate), $22.3/ton (the average value from a distribution that uses a 3-percent discount rate), $36.5/ton (the average value from a distribution that uses a 2.5-percent discount rate), and $67.6/ton (the 95th-percentile value from a distribution that uses a 3-percent discount rate). These values correspond to the value of emission reductions in 2010; the values for later years are higher due to increasing damages as the magnitude of climate change increases.

Table VI.34 presents the global value of CO_2 emissions reductions at each efficiency level. For each of the four cases, DOE calculated a present value of the stream of annual values using the same discount rate as was used in the studies upon which the dollar-per-ton values are based. DOE calculated domestic values as a range from 7 percent to 23 percent of the global values, and these results are presented in chapter 10 of the final rule TSD.

TABLE VI.34—ESTIMATES OF GLOBAL PRESENT VALUE OF CO_2 EMISSIONS REDUCTION UNDER CONSIDERED EFFICIENCY LEVELS

Efficiency level	5% discount rate, average	3% discount rate, average	2.5% discount rate, average	3% discount rate, 95th percentile
	Million 2011$			
Water-Cooled and Evaporatively-Cooled Products				
ASHRAE (baseline)	0.5	2.4	4.1	7.4
1	0.5	2.5	4.3	7.7
2	1.2	6.3	10.6	19.1
3	1.8	9.0	15.2	27.4
4	1.8	9.2	15.6	28.1
VRF Water-Source Heat Pumps				
ASHRAE (baseline)	0.0	0.0	0.0	0.0
1	0.3	1.4	2.3	4.2
2	4.3	22.5	38.1	68.4
3	10.3	53.7	91.1	163.4
4	18.9	98.1	166.5	298.5
Computer Room Air Conditioners				
ASHRAE (baseline)	0.9	4.7	7.9	14.4
1	11.2	57.5	97.4	175.2
2	48.2	246.7	417.5	751.4

TABLE VI.34—ESTIMATES OF GLOBAL PRESENT VALUE OF CO_2 EMISSIONS REDUCTION UNDER CONSIDERED EFFICIENCY LEVELS—Continued

Efficiency level	5% discount rate, average	3% discount rate, average	2.5% discount rate, average	3% discount rate, 95th percentile
3	119.9	613.9	1038.7	1869.3
4	214.6	1099.0	1859.6	3346.6

DOE is well aware that scientific and economic knowledge about the contribution of CO_2 and other greenhouse gas (GHG) emissions to changes in the future global climate and the potential resulting damages to the world economy continues to evolve rapidly. Thus, any value placed in this rulemaking on reducing CO_2 emissions is subject to change. DOE, together with other Federal agencies, will continue to review various methodologies for estimating the monetary value of reductions in CO_2 and other GHG emissions. This ongoing review will consider the comments on this subject that are part of the public record for this and other rulemakings, as well as other methodological assumptions and issues. However, consistent with DOE's legal obligations, and taking into account the uncertainty involved with this particular issue, DOE has included in this final rule the most recent values and analyses resulting from the ongoing interagency review process.

DOE also estimated a range for the cumulative monetary value of the economic benefits associated with NO_X emissions reductions anticipated to result from amended standards for the equipment that is the subject of today's final rule. The low and high dollar-per-ton values that DOE used are discussed in section V.H. Table VI.35 presents the cumulative present values of NO_X emissions reductions for each efficiency level calculated using seven-percent and three-percent discount rates.

TABLE VI.35—ESTIMATES OF PRESENT VALUE OF NO_X EMISSIONS REDUCTION UNDER CONSIDERED EFFICIENCY LEVELS

Efficiency level	*Million 2011$*	
	3% Discount rate	7% Discount rate
Water-Cooled and Evaporatively-Cooled Products		
ASHRAE (baseline)	0.02 to 0.25	0.01 to 0.12.
1	0.02 to 0.24	0.01 to 0.10.
2	0.06 to 0.64	0.03 to 0.28.
3	0.09 to 0.92	0.04 to 0.40.
4	0.09 to 0.95	0.04 to 0.42.
VRF Water-Source Heat Pumps		
ASHRAE (baseline)	0.0 to 0.0	0.0 to 0.0.
1	0.01 to 0.13	0.01 to 0.05.
2	0.2 to 2.2	0.1 to 0.9.
3	0.5 to 5.2	0.2 to 2.2.
4	0.9 to 9.5	0.4 to 4.0.
Computer Room Air Conditioners		
ASHRAE (baseline)	0.04 to 0.46	0.02 to 0.22.
1	0.6 to 6.1	0.3 to 2.7.
2	2.4 to 24.6	1.0 to 10.7.
3	6.0 to 61.4	2.6 to 26.6.
4	10.7 to 109.8	4.6 to 47.6.

D. Amended and New Energy Conservation Standards

1. Water-Cooled and Evaporatively-Cooled Commercial Package Air-Conditioning and Heating Equipment

EPCA specifies that, for any commercial and industrial equipment addressed under 42 U.S.C. 6313(a)(6)(A)(i), DOE may prescribe an energy conservation standard more stringent than the level for such equipment in ASHRAE Standard 90.1, as amended, only if ''clear and convincing evidence'' shows that a more-stringent standard would result in significant additional conservation of energy and is technologically feasible and economically justified. (42 U.S.C. 6313(a)(6)(A)(ii)(II))

In evaluating more-stringent efficiency levels for water-cooled and evaporatively-cooled equipment than those specified by ASHRAE Standard 90.1–2010, DOE reviewed the results in terms of the significance of their energy savings. As noted in the January 2012 NOPR, DOE does not have ''clear and convincing evidence'' that significant additional conservation of energy would result from adoption of more-stringent standard levels. 77 FR 2356, 2415 (Jan. 17, 2012). Commenters on the NOPR did not provide any additional information to alter this conclusion. Therefore, DOE did not examine whether the levels are economically justified, and DOE is adopting the energy efficiency levels for these products as set forth in ASHRAE Standard 90.1–2010. Table VI.36 presents the energy conservation standards and compliance dates for water-cooled and evaporatively-cooled equipment.

TABLE VI.36—ENERGY CONSERVATION STANDARDS FOR WATER-COOLED AND EVAPORATIVELY-COOLED EQUIPMENT

Equipment type	Subcategory	Size category (Input)	Efficiency level (EER)	Compliance date
Small Water-Cooled Air Conditioners	Electric or No Heat	≥65,000 Btu/h and <135,000 Btu/h	12.1	June 1, 2013.
Small Water-Cooled Air Conditioners	Other Heat	≥65,000 Btu/h and <135,000 Btu/h	11.9	June 1, 2013.
Large Water-Cooled Air Conditioners	Electric or No Heat	≥135,000 Btu/h and <240,000 Btu/h	12.5	June 1, 2014.
Large Water-Cooled Air Conditioners	Other Heat	≥135,000 Btu/h and <240,000 Btu/h	12.3	June 1, 2014.
Very Large Water-Cooled Air Conditioners.	Electric or No Heat	≥240,000 Btu/h and <760,000 Btu/h	12.4	June 1, 2014.
Very Large Water-Cooled Air Conditioners.	Other Heat	≥240,000 Btu/h and <760,000 Btu/h	12.2	June 1, 2014.
Small Evaporatively-Cooled Air Conditioners.	Electric or No Heat	≥65,000 Btu/h and <135,000 Btu/h	12.1	June 1, 2013.
Small Evaporatively-Cooled Air Conditioners.	Other Heat	≥65,000 Btu/h and <135,000 Btu/h	11.9	June 1, 2013.
Large Evaporatively-Cooled Air Conditioners.	Electric or No Heat	≥135,000 Btu/h and <240,000 Btu/h	12.0	June 1, 2014.
Large Evaporatively-Cooled Air Conditioners.	Other Heat	≥135,000 Btu/h and <240,000 Btu/h	11.8	June 1, 2014.
Very Large Evaporatively-Cooled Air Conditioners.	Electric or No Heat	≥240,000 Btu/h and <760,000 Btu/h	11.9	June 1, 2014.
Very Large Evaporatively-Cooled Air Conditioners.	Other Heat	≥240,000 Btu/h and <760,000 Btu/h	† 11.7	June 1, 2014.

† ASHRAE Standard 90.1–2010 specifies this efficiency level as 12.2 EER. However, DOE has determined and AHRI has concurred that this level was mistakenly reported and that the correct level is 11.7 EER. (AHRI, No. 1 at p. 1).

2. VRF Water-Source Heat Pumps

As noted previously, EPCA specifies that, for any commercial and industrial equipment addressed under 42 U.S.C. 6313(a)(6)(A)(i), DOE may prescribe an energy conservation standard more stringent than the level for such equipment in ASHRAE Standard 90.1, as amended, only if ''clear and convincing evidence'' shows that a more-stringent standard would result in significant additional conservation of energy and is technologically feasible and economically justified. (42 U.S.C. 6313(a)(6)(A)(ii)(II))

In evaluating more-stringent efficiency levels for VRF water-source heat pumps than those specified by ASHRAE Standard 90.1–2010, DOE reviewed the results in terms of the significance of their energy savings. As discussed in the January 2012 NOPR, the energy savings for more-stringent efficiency levels for VRF water-source heat pumps equal to or greater than 135,000 Btu/h would be minimal. 77 FR 2356, 2416 (Jan. 17, 2012). In addition, there are no models on the market of VRF water-source heat pumps less than 17,000 Btu/h, so there are no energy savings predicted for this product class. As such, DOE does not have ''clear and convincing evidence'' that significant additional conservation of energy would result from adoption of more-stringent efficiency levels than those specified in ASHRAE Standard 90.1–2010. Therefore, DOE did not examine whether the levels are economically justified, and DOE is adopting the energy efficiency levels for these products as set forth in ASHRAE Standard 90.1–2010.[49] Table VI.37 presents the amended energy conservation standards and compliance dates for VRF water-source heat pumps.

TABLE VI.37—ENERGY CONSERVATION STANDARDS FOR VRF WATER-SOURCE HEAT PUMPS

Equipment type	Subcategory	Size category (Input)	Efficiency level	Compliance date **
VRF Water-Source Heat Pumps.	Without Heat Recovery	<17,000 Btu/h	12.0 EER 4.2 COP *	October 29, 2012.
VRF Water-Source Heat Pumps.	With Heat Recovery	<17,000 Btu/h	11.8 EER 4.2 COP *	October 29, 2012.
VRF Water-Source Heat Pumps.	Without Heat Recovery	≥135,000 Btu/h and <760,000 Btu/h.	10.0 EER 3.9 COP	October 29, 2013.
VRF Water-Source Heat Pumps.	With Heat Recovery	≥135,000 Btu/h and <760,000 Btu/h.	9.8 EER 3.9 COP	October 29, 2013.

* 4.2 COP is the existing Federal minimum energy conservation standard for water-source heat pumps <17,000 Btu/h. Although ASHRAE did not increase the COP level in Standard 90.1, it did increase the corresponding EER level for this equipment.

** ASHRAE Standard 90.1–2010 did not provide an effective date for these products, so it is assumed to be publication of ASHRAE Standard 90.1–2010, or October 29, 2010. Compliance dates for Federal standards are two or three years after the effective date in ASHRAE Standard 90.1, depending on product size.

[49] For other classes of VRF systems introduced by ASHRAE Standard 90.1–2010, DOE is not adopting new standards but is clarifying that existing standards for air-cooled or water-source heat pumps continue to apply. In addition, DOE is adopting a new test procedure for all classes of VRF equipment. The changes to the Code of Federal Regulations are found at the end of this final rule.

3. Computer Room Air Conditioners

As noted previously, EPCA specifies that, for any commercial and industrial equipment addressed under 42 U.S.C. 6313(a)(6)(A)(i), DOE may prescribe an energy conservation standard more stringent than the level for such equipment in ASHRAE Standard 90.1, as amended, only if ''clear and convincing evidence'' shows that a more-stringent standard would result in significant additional conservation of energy and is technologically feasible and economically justified. (42 U.S.C. 6313(a)(6)(A)(ii)(II))

In evaluating more-stringent efficiency levels for computer room air conditioners than those specified by ASHRAE Standard 90.1–2010, DOE reviewed the results in terms of their technological feasibility, significance of energy savings, and economic justification.

DOE has concluded that all of the SCOP levels considered by DOE are technologically feasible, as units with equivalent efficiency appeared to be available in the current market at all levels examined. As noted in section V.B.3., manufacturers are currently not reporting CRAC equipment efficiencies in terms of SCOP as defined and tested for in ASHRAE 127–2007. As a result, the efficiency data used to determine the SCOP levels for analysis were obtained using a rule-of-thumb method to convert EER (as determined using ASHRAE Standard 127–2001) to an estimate of the SCOP (as determined by ASHRAE Standard 127–2007), which lends some uncertainty to the SCOP ratings of computer room air conditioners. However, based on this mapping between EER and SCOP, DOE believes that all SCOP levels analyzed are technically feasible.

DOE examined the potential energy savings that would result from the efficiency levels specified in ASHRAE Standard 90.1–2010 and compared these to the potential energy savings that would result from efficiency levels more stringent than those in ASHRAE Standard 90.1–2010. DOE estimates that 0.01 quad of energy would be saved if DOE adopts the efficiency levels set in ASHRAE Standard 90.1–2010 for each computer room air conditioner equipment class specified in that standard. If DOE were to adopt efficiency levels more stringent than those specified by ASHRAE Standard 90.1–2010, the potential additional energy savings range from 0.07 quad to 0.98 quad. Associated with proposing more-stringent efficiency levels is a three-and-a-half to four-and-a-half-year delay in implementation (depending on equipment size) compared to the adoption of energy conservation standards at the levels specified in ASHRAE Standard 90.1–2010 (see section V.I.1.). This delay in implementation of amended energy conservation standards would result in a small amount of energy savings being lost in the first years (2012 through 2016) compared to the savings from adopting the levels in ASHRAE Standard 90.1–2010 (approximately 0.0001 quad); however, this loss may be compensated for by increased savings in later years. Taken in isolation, the energy savings associated with more-stringent standards might be considered significant enough to warrant adoption of such standards. However, as noted above, energy savings are not the only factor which DOE must consider.

In considering whether potential standards are economically justified, DOE also examined the NPV that would result from adopting efficiency levels more stringent than those set forth in ASHRAE Standard 90.1–2010. With a 7-percent discount rate, all of the efficiency levels examined by DOE resulted in negative NPV. With a 3-percent discount rate, Levels 1 and 2 create positive NPV, while Levels 3 and 4 create negative NPV. These results indicate that adoption of efficiency levels more stringent than those in ASHRAE Standard 90.1–2010 as Federal energy conservation standards would likely lead to negative economic outcomes for the Nation. Consequently, this criterion for adoption of more-stringent standard levels does not appear to have been met.

Furthermore, although DOE based it analyses on the best available data when examining the potential energy savings and the economic justification of efficiency levels more stringent than those specified in ASHRAE Standard 90.1–2010, DOE believes there are several limitations regarding that data which should be assessed when considering amended energy conservation standards for computer room air conditioners. As explained below, none of these concerns are likely to run in the direction of more-stringent standards.

First, DOE reexamined the uncertainty in its analysis of computer room air conditioners. As noted in section V.B.3, due to the lack of current coverage and certification requirements, no manufacturers currently test for the SCOP of their computer room air conditioner models, nor do they all report such information in their literature. DOE's efficiency information used in the analysis was the result of a ''rule-of-thumb'' method that provides an approximation of SCOP, but DOE did not obtain any actual SCOP efficiency information that resulted from testing, leading to uncertainty over whether the levels considered (particularly at the max-tech level) are technologically feasible and also adding uncertainty in the energy savings estimates. In addition, for certain equipment classes, DOE was unable to obtain enough information even to estimate SCOP for a useful portion of the models on the market. For those equipment classes, DOE had to analyze various efficiency levels above the ASHRAE Standard 90.1–2010 levels using SCOP levels that were estimated based on the SCOP differences established by ASHRAE Standard 90.1 between the different equipment classes. The combination of these factors leads to concerns about the viability of using the estimated SCOP data for the basis of this analysis. Such concerns are heightened the further one moves away from the efficiency levels in ASHRAE Standard 90.1–2010 in the context of this rulemaking.

Second, to assess the cost of increasing efficiency, DOE conducted a pricing survey in which DOE collected contractor price data across a range of efficiency levels, and examined the trend in price as efficiency increased. As noted in section V.B, the primary drawback to this approach is that contractor pricing can be based on a variety of factors, some of which have little or nothing to do with changes in equipment efficiency (*e.g.,* differences in manufacturer markups). This leads to unexpected results for certain equipment classes, including an observed trend of decreasing price with increasing efficiency for small water-cooled equipment based on the data collected, which reduces the certainty of the analysis in terms of economic justification. Therefore, the trends developed through such analyses may not be representative of the actual relationship between manufacturer cost and efficiency, or of what DOE would find if it used a design option approach with reverse engineering analysis (which is more time-intensive). Further, although there was generally a trend of increasing price with increased efficiency across all manufacturers for most product classes, there was little discernable trend between price and efficiency for each individual manufacturer, leading to additional doubts about the role of equipment efficiency in determining pricing. As a result, DOE believes the results of this analysis are highly uncertain, and that a more in-depth analysis of the relationship between cost of

manufacturing and efficiency could lead to different results.

Third, due to the limited data on the existing distribution of shipments by efficiency level or historical efficiency trends, DOE was not able to assess possible future changes in either the available efficiencies of equipment in the computer room air conditioner market or the sales distribution of shipments by efficiency level in the absence of setting more-stringent standards. DOE recognizes that manufacturers may continue to make future improvements in the computer room air conditioner efficiencies even in the absence of mandated energy conservation standards. This possibility increases the uncertainty of the energy savings estimates. To the extent that manufacturers improve product efficiency and customers choose to purchase improved products in the absence of standards, the energy savings estimates would likely be reduced.

Fourth, as a result of a lack of shipment information for the United States, DOE's shipment analysis rests primarily on a single market report from Australia. While DOE attempted to use an appropriate inflator to adjust Australian shipments to the United States market, DOE recognizes the uncertainty inherent in this approach. DOE also based its equipment class allocations on market share for a few classes from the Australian report, as well as model availability in the United States. It is unknown whether the United States market mirrors the Australian market or whether model availability approximates shipment distributions. Any inaccuracy in the shipment forecast in total or by product class contributes to the uncertainty of the energy savings results and thus makes it difficult for DOE to determine that any energy savings are significant.

To repeat, to adopt energy conservation standards more stringent than the levels in ASHRAE Standard 90.1, DOE must have ''clear and convincing'' evidence in order to adopt efficiency levels more stringent than those specified in ASHRAE Standard 90.1–2010. For the reasons explained in the preceding paragraphs, the totality of information does not meet the level necessary to support more-stringent efficiency levels for computer room air conditioners. Consequently, although certain stakeholders have recommended that DOE adopt higher efficiency levels for some CRAC classes (as discussed in section III.D), DOE has decided to adopt the efficiency levels in ASHRAE Standard 90.1–2010 as amended energy conservation standards for all 30 computer room air conditioner equipment classes. Table VI.38 presents the energy conservation standards for computer room air conditioners.

By adopting the efficiency levels in ASHRAE Standard 90.1–2010 as energy conservation standards, DOE is setting a minimum floor for these previously unregulated products. This allows the industry time to transition to coverage of these products, requires manufacturers to begin submitting efficiency data, and will spur the tracking of shipments. These data will improve DOE's future analysis of computer room air conditioners. DOE notes that it will be able to undertake such an analysis without waiting for the trigger of a subsequent amendment of ASHRAE Standard 90.1, because of the six-year look back provision in the relevant EISA 2007 amendments to EPCA. (42 U.S.C. 6313(a)(6)(C))

TABLE VI.38—ENERGY CONSERVATION STANDARDS FOR COMPUTER ROOM AIR CONDITIONERS

Equipment type	Subcategory	Size category (input)	Efficiency level (SCOP–127)	Compliance date
Air conditioners, air-cooled	Downflow	<65,000 Btu/h	2.20	October 29, 2012.
Air conditioners, air-cooled	Upflow	<65,000 Btu/h	2.09	October 29, 2012.
Air conditioners, air-cooled	Downflow	≥65,000 Btu/h and <240,000 Btu/h	2.10	October 29, 2013.
Air conditioners, air-cooled	Upflow	≥65,000 Btu/h and <240,000 Btu/h	1.99	October 29, 2013.
Air conditioners, air-cooled	Downflow	≥240,000 Btu/h and <760,000 Btu/h	1.90	October 29, 2013.
Air conditioners, air-cooled	Upflow	≥240,000 Btu/h and <760,000 Btu/h	1.79	October 29, 2013.
Air conditioners, water-cooled	Downflow	<65,000 Btu/h	2.60	October 29, 2012.
Air conditioners, water-cooled	Upflow	<65,000 Btu/h	2.49	October 29, 2012.
Air conditioners, water-cooled	Downflow	≥65,000 Btu/h and <240,000 Btu/h	2.50	October 29, 2013.
Air conditioners, water-cooled	Upflow	≥65,000 Btu/h and <240,000 Btu/h	2.39	October 29, 2013.
Air conditioners, water-cooled	Downflow	≥240,000 Btu/h and <760,000 Btu/h	2.40	October 29, 2013.
Air conditioners, water-cooled	Upflow	≥240,000 Btu/h and <760,000 Btu/h	2.29	October 29, 2013.
Air conditioners, water-cooled with fluid economizer.	Downflow	<65,000 Btu/h	2.55	October 29, 2012.
Air conditioners, water-cooled with fluid economizer.	Upflow	<65,000 Btu/h	2.44	October 29, 2012.
Air conditioners, water-cooled with fluid economizer.	Downflow	≥65,000 Btu/h and <240,000 Btu/h	2.45	October 29, 2013.
Air conditioners, water-cooled with fluid economizer.	Upflow	≥65,000 Btu/h and <240,000 Btu/h	2.34	October 29, 2013.
Air conditioners, water-cooled with fluid economizer.	Downflow	≥240,000 Btu/h and <760,000 Btu/h	2.35	October 29, 2013.
Air conditioners, water-cooled with fluid economizer.	Upflow	≥240,000 Btu/h and <760,000 Btu/h	2.24	October 29, 2013.
Air conditioners, glycol-cooled	Downflow	<65,000 Btu/h	2.50	October 29, 2012.
Air conditioners, glycol-cooled	Upflow	<65,000 Btu/h	2.39	October 29, 2012.
Air conditioners, glycol-cooled	Downflow	≥65,000 Btu/h and <240,000 Btu/h	2.15	October 29, 2013.
Air conditioners, glycol-cooled	Upflow	≥65,000 Btu/h and <240,000 Btu/h	2.04	October 29, 2013.
Air conditioners, glycol-cooled	Downflow	≥240,000 Btu/h and <760,000 Btu/h	2.10	October 29, 2013.
Air conditioners, glycol-cooled	Upflow	≥240,000 Btu/h and <760,000 Btu/h	1.99	October 29, 2013.
Air conditioners, glycol-cooled with fluid economizer.	Downflow	<65,000 Btu/h	2.45	October 29, 2012.
Air conditioners, glycol-cooled with fluid economizer.	Upflow	<65,000 Btu/h	2.34	October 29, 2012.
Air conditioners, glycol-cooled with fluid economizer.	Downflow	≥65,000 Btu/h and <240,000 Btu/h	2.10	October 29, 2013.

TABLE VI.38—ENERGY CONSERVATION STANDARDS FOR COMPUTER ROOM AIR CONDITIONERS—Continued

Equipment type	Subcategory	Size category (input)	Efficiency level (SCOP–127)	Compliance date
Air conditioners, glycol-cooled with fluid economizer.	Upflow	≥65,000 Btu/h and <240,000 Btu/h	1.99	October 29, 2013.
Air conditioners, glycol-cooled with fluid economizer.	Downflow	≥240,000 Btu/h and <760,000 Btu/h	2.05	October 29, 2013.
Air conditioners, glycol-cooled with fluid economizer.	Upflow	≥240,000 Btu/h and <760,000 Btu/h	1.94	October 29, 2013.

VII. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866 and 13563

Section 1(b)(1) of Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993), requires each agency to identify the problem that it intends to address, including, where applicable, the failures of private markets or public institutions that warrant new agency action, as well as to assess the significance of that problem. The problems that today's standards address are as follows:

(1) There is a lack of consumer information and/or information processing capability about energy efficiency opportunities in the commercial equipment market.

(2) There is asymmetric information (one party to a transaction has more and better information than the other) and/or high transactions costs (costs of gathering information and effecting exchanges of goods and services).

(3) There are external benefits resulting from improved energy efficiency of water-cooled and evaporatively-cooled commercial package air conditioners, variable refrigerant flow air conditioners, and computer room air conditioners that are not captured by the users of such equipment. These benefits include externalities related to environmental protection and energy security that are not reflected in energy prices, such as reduced emissions of greenhouse gases.

In addition, DOE has determined that today's regulatory action is not an ''economically significant regulatory action'' under section 3(f)(1) of Executive Order 12866. Accordingly, DOE has not prepared a regulatory impact analysis (RIA) for today's rule, and the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) has not reviewed this rule.

DOE has also reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281 (Jan. 21, 2011)). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, DOE believes that today's final rule is consistent with these principles, including the requirement that, to the extent permitted by law, agencies adopt a regulation only upon a reasoned determination that its benefits justify its costs and select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits.

Consistent with Executive Order 13563, and the range of impacts analyzed in this rulemaking, the energy conservation standards adopted in this final rule maximize net benefits to the extent permitted by EPCA.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment, and a final regulatory flexibility analysis (FRFA) for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site (*www.gc.doe.gov*). DOE reviewed the January 2012 NOPR and today's final rule under the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003.

For manufacturers of small, large, and very large air-conditioning and heating equipment (including water-cooled and evaporatively-cooled equipment, CRACs, VRF systems, and SPVUs), commercial warm-air furnaces, and commercial water heaters, the Small Business Administration (SBA) has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. 65 FR 30836, 30848 (May 15, 2000), as amended at 65 FR 53533, 53544 (Sept. 5, 2000) and codified at 13 CFR part 121. The size standards are listed by North American

Industry Classification System (NAICS) code and industry description and are available at *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.* The ASHRAE equipment covered by this rule, with the exception of commercial water heaters, are classified under NAICS 333415, ''Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing.'' The SBA sets a threshold of 750 employees or fewer for an entity to be considered as a small business for this category. Commercial water heaters are classified under NAICS 333319, ''Other Commercial and Service Industry Machinery Manufacturing,'' for which SBA sets a size threshold of 500 employees or fewer for being considered a small business.

DOE examined each of the manufacturers it found during its market assessment and used publicly-available information to determine if any manufacturers identified qualify as a small business under the SBA guidelines discussed above. (For a list of all manufacturers of ASHRAE equipment covered by this rule, see Chapter 2 of the TSD.) DOE's research involved individual company Web sites, marketing research tools (*e.g.,* Hoovers reports [50]), and contacting individual companies to create a list of companies that manufacture the types of ASHRAE equipment affected by this rule. DOE screened out companies that do not have domestic manufacturing operations for ASHRAE equipment (*i.e.,* manufacturers that produce all of their ASHRAE equipment internationally). DOE also did not consider manufacturers which are subsidiaries of parent companies that exceed the employee threshold set by the SBA to be small businesses. DOE identified 46 total manufacturers impacted by the proposed amendments related to energy conservation standards and test procedures, including 14 that qualify as a small business.

DOE has reviewed today's final rule under the provisions of the Regulatory Flexibility Act and the policies and procedures published on February 19, 2003. 68 FR 7990. As part of this rulemaking, DOE examined not only the impacts on manufacturers of revised standard levels, but also the existing compliance costs manufacturers already bear as compared to the revised compliance costs, based on the revisions to the test procedures. Since DOE is adopting the efficiency levels in ASHRAE Standard 90.1–2010, which are part of the prevailing industry standard, DOE believes that manufacturers of water-cooled and evaporatively-cooled commercial package air conditioners and heating equipment, computer room air conditioners, and VRF water-source heat pumps with a cooling capacity equal to or greater than 135,000 Btu/h and less than 760,000 Btu/h are already producing equipment at these efficiency levels. For VRF water-source heat pumps with a cooling capacity below 17,000 Btu/h, DOE believes the efficiency levels being adopted in today's final rule are also part of the prevailing industry standard and that manufacturers would experience no impacts, because no such equipment is currently manufactured. Furthermore, DOE believes the industry standard was developed through a process which would attempt to mitigate the impacts on manufacturers, including any impacted small business manufacturers, while increasing the efficiency of this equipment.

In addition, DOE does not find that the costs associated with the adoption of updated test procedures for commercial package air-conditioning and heating equipment, commercial water-heating equipment, or commercial warm-air furnaces in this document would result in any significant increase in testing or compliance costs. For these types of equipment, DOE already has testing requirements, which have only minor differences from those being adopted in this notice. Furthermore, the provisions that DOE is adopting from AHRI operations manuals, are already general practice within the industry when conducting testing, and DOE does not expect these changes to have an impact on how the DOE test procedure is conducted. DOE notes that this document also adopts new test procedures for VRF systems and computer room air conditioners. However, VRF systems currently must be tested using the DOE test procedures for commercial package air conditioners and heating equipment. The procedure being adopted in this final rule is tailored to VRF systems, and DOE does not believe this procedure is more burdensome than the currently applicable test procedures. For computer room air conditioners, this notice adopts the use of a new test procedure where none was previously required. However, for all equipment types (including computer room air conditioners) the test procedures are part of the prevailing industry standard to test and rate equipment. DOE believes that manufacturers generally already use the accepted industry test procedures when testing their equipment, and that given its inclusion in ASHRAE Standard 90.1–2010, they would continue to use it in the future. Therefore, DOE has concluded that the additional burden imposed by today's rule will not have a significant adverse impact on a substantial number of small manufacturers.

DOE reached similar conclusions to those discussed above in the January 2012 NOPR and requested comment on the impacts of this rulemaking on small manufacturers. 77 FR 2356, 2420 (Jan. 17, 2012). In responding to this request for comment, Carrier stated generally that significant energy efficiency increases and consequently higher pricing can lead to decreased sales, especially in an economic downturn. (Carrier, No. 28 at p. 4) Engineered Air commented that their company is a small business and stated that the cost for complying with DOE standards was not at issue since DOE and ASHRAE 90.1–2010 were going to be closely aligned. Engineered Air stated that once October 18, 2013 passes, the building codes will require compliance to ASHRAE 90.1–2010, which would essentially force compliance with DOE regulations. (Engineered Air, No. 36 at pp. 3–4) DOE believes that Carrier's concerns about decreased sales are mitigated because the levels being adopted are part of the prevailing industry standard, which indicates that industry believes that these levels are both technologically achievable and economically justified, and that the impacts on manufacturers of complying with such standard levels would not be significant enough to warrant lower levels. Additionally, Engineered Air supports DOE's position that the impacts on small businesses will be minimal from the adoption of the ASHRAE Standard 90.1–2010 efficiency levels.

For the reasons stated above, DOE reaffirms its certification that this rule will not have a significant economic impact on a substantial number of small entities. Therefore, DOE did not prepare an initial regulatory flexibility analysis for the proposed rule or a final regulatory flexibility analysis for the final rule. DOE has transmitted its certification and a supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review pursuant to 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of ASHRAE equipment addressed in today's final rule must

[50] For more information, see *http://www.hoovers.com/.*

certify to DOE that their equipment complies with any applicable energy conservation standards. In certifying compliance, manufacturers must test their equipment according to the DOE test procedures for ASHRAE equipment, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including ASHRAE equipment. 76 FR 12422 (March 7, 2011). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

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.

D. Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), DOE has determined that this rule fits within the category of actions included in Categorical Exclusion (CX) B5.1 and otherwise meets the requirements for application of a CX. See 10 CFR Part 1021, App. B, B5.1(b); 1021.410(b), and Appendix B, B(1)–(5). The rule fits within the category of actions because it is a rulemaking that establishes energy conservation standards for consumer products or industrial equipment, and for which none of the exceptions identified in CX B5.1(b) apply. Therefore, DOE has made a CX determination for this rulemaking, and DOE does not need to prepare an Environmental Assessment or Environmental Impact Statement for this rule. DOE's CX determination for this rule is available at *http://cxnepa.energy.gov/.*

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism.'' 64 FR 43255 (Aug. 10, 1999) imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this final rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the equipment that is the subject of today's final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297 and 6316(b)(2)(D)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729 (Feb. 7, 1996)), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at *www.gc.doe.gov.*

DOE has concluded that this final rule contains neither an intergovernmental mandate nor a mandate that would likely require expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any year. Accordingly, no assessment or analysis is required under the UMRA.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule

that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for Federal agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must provide a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that today's regulatory action, which sets forth energy conservation standards for certain types of ASHRAE equipment, is not a significant energy action because the new and amended standards are not a significant regulatory action under Executive Order 12866 and are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on the final rule.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101 *et seq.*), DOE must comply with all laws applicable to the former Federal Energy Administration, including section 32 of the Federal Energy Administration Act of 1974 (Pub. L. 93–275), as amended by the Federal Energy Administration Authorization Act of 1977 (Pub. L. 95–70). (15 U.S.C. 788; FEAA) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

The modifications to the test procedures addressed by this action incorporate testing methods contained in certain sections of the following commercial standards: (1) AHRI 210–240–2008; (2) AHRI 340–360–2007; (3) AHRI 390–2003; (4) AHRI 1230–2010; (5) UL 727–2006; (6) ANSI Z21.47–2006; (7) ANSI Z21.10.3–2011; (8) ASHRAE 127–2007. DOE has evaluated these standards and is unable to conclude whether they fully comply with the requirements of section 32(b) of the FEAA (*i.e.,* whether each was developed in a manner that fully provides for public participation, comment, and review). DOE has consulted with both the Attorney General and the Chairman of the FTC concerning the impact on competition of requiring use of the methods contained in these standards, and neither recommended against incorporation of these standards.

M. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions. *Id.* at 2667.

In response to OMB's Bulletin, DOE conducted formal in-progress peer reviews of the energy conservation standards development process and analyses and has prepared a Peer Review Report pertaining to the energy conservation standards rulemaking analyses. Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. The ''Energy Conservation Standards Rulemaking Peer Review Report'' dated February 2007 has been disseminated and is available at the following Web site: *www1.eere.energy.gov/buildings/appliance_standards/peer_review.html.*

N. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

VIII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's final rule.

List of Subjects in 10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation, Incorporation by reference, Reporting and recordkeeping requirements.

Issued in Washington, DC, on April 27, 2012.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

For the reasons set forth in the preamble, DOE amends part 431 of Chapter II, Subchapter D, of Title 10 of the Code of Federal Regulations as set forth below:

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

■ 2. Section 431.2 is amended by revising the definition of ''Commercial HVAC & WH product'' to read as follows:

§ 431.2 Definitions.

* * * * *

Commercial HVAC & WH product means any small, large, or very large commercial package air-conditioning and heating equipment, packaged terminal air conditioner, packaged terminal heat pump, single package vertical air conditioner, single package vertical heat pump, computer room air conditioner, variable refrigerant flow multi-split air conditioner, variable refrigerant flow multi-split heat pump, commercial packaged boiler, hot water supply boiler, commercial warm air furnace, instantaneous water heater, storage water heater, or unfired hot water storage tank.

* * * * *

■ 3. Section 431.75 is revised to read as follows:

§ 431.75 Materials incorporated by reference.

(a) *General.* DOE incorporates by reference the following test procedures into subpart D of part 431. The materials listed have been approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Any subsequent amendment to the listed materials by the standard-setting organization will not affect the DOE regulations unless and until such regulations are amended by DOE. Materials are incorporated as they exist on the date of the approval, and a notice of any changes in the materials will be published in the **Federal Register**. All approved materials are available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030 or go to: *http://www.archives.gov/federal_register/code_of_federal regulations/ibr_locations.html.* Also, these materials are available for inspection at U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, 6th Floor, 950 L'Enfant Plaza SW., Washington, DC 20024, (202) 586–2945, or go to: *http://www1.eere.energy.gov/buildings/appliance_standards/.* The referenced test procedure standards are listed below by relevant standard-setting organization, along with information on how to obtain copies from those sources.

(b) *ANSI.* American National Standards Institute. 25 W. 43rd Street, 4th Floor, New York, NY 10036, (212) 642–4900, or go to: *http://www.ansi.org.*

(1) ANSI Z21.47–1998, (''ANSI Z21.47–1998''), ''*Gas-Fired Central Furnaces,*'' approved by ANSI on June 9, 1998, IBR approved for § 431.76.

(2) ANSI Z21.47–2006, (''ANSI Z21.47–2006''), ''*Gas-Fired Central Furnaces,*'' approved on July 27, 2006, IBR approved for § 431.76.

(3) Reserved.

(c) *ASHRAE.* American Society of Heating, Refrigerating and Air-Conditioning Engineers Inc., 1791 Tullie Circle, NE., Atlanta, Georgia 30329, (404) 636–8400, or go to: *http://www.ashrae.org.*

(1) ASHRAE Standard 103–1993, sections 7.2.2.4, 7.8, 9.2, and 11.3.7, ''*Method of Testing for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers,*'' approved on June 26, 1993, IBR approved for § 431.76.

(2) [Reserved].

(d) *HI.* Hydronics Institute Division of AHRI, 35 Russo Place, P.O. Box 218, Berkeley Heights, NJ 07922, (703) 600–0350, or go to: *http://www.ahrinet.org/hydronics+institute+section.aspx.*

(1) HI BTS–2000, sections 8.2.2, 11.1.4, 11.1.5, and 11.1.6.2, ''*Method to Determine Efficiency of Commercial Space Heating Boilers,*'' published January 2001, IBR approved for § 431.76.

(2) [Reserved].

(e) *UL.* Underwriters Laboratories, Inc., 333 Pfingsten Road, Northbrook, IL 60062, (847) 272–8800, or go to: *http://www.ul.com.*

(1) UL 727 (UL 727–1994), ''*Standard for Safety Oil-Fired Central Furnaces,''* published on August 1, 1994, IBR approved for § 431.76.

(2) UL 727 (UL 727–2006), ''*Standard for Safety Oil-Fired Central Furnaces,''* approved April 7, 2006, IBR approved for § 431.76.

(3) [Reserved].

■ 4. Section 431.76 is revised to read as follows:

§ 431.76 Uniform test method for the measurement of energy efficiency of commercial warm air furnaces.

(a) This section covers the test procedures you must follow if, pursuant to EPCA, you are measuring the steady-state thermal efficiency of a gas-fired or oil-fired commercial warm air furnace with a rated maximum input of 225,000 Btu per hour or more. Where this section prescribes use of ANSI Z21.47 or UL 727, (incorporated by reference, see § 431.75), perform only the procedures pertinent to the measurement of the steady-state efficiency. Before May 13, 2013, where you see instructions to use ANSI Z21.47–2006 or UL 727–2006 in this section, you may use the relevant procedures in ANSI Z21.47–1998 or UL 727–1994. On or after May 13, 2013, you must use the relevant procedures in ANSI Z21.47–2006 or UL 727–2006.

(b) *Test setup*—(1) *Test setup for gas-fired commercial warm air furnaces.* The test setup, including flue requirement, instrumentation, test conditions, and measurements for determining thermal efficiency is as specified in sections 1.1 (Scope), 2.1 (General), 2.2 (Basic Test Arrangements), 2.3 (Test Ducts and Plenums), 2.4 (Test Gases), 2.5 (Test Pressures and Burner Adjustments), 2.6 (Static Pressure and Air Flow Adjustments), 2.39 (Thermal Efficiency) (note, this is 2.38 in ANSI Z21.47–1998 (incorporated by reference, see § 431.75)), and 4.2.1 (Basic Test Arrangements for Direct Vent Control Furnaces) of ANSI Z21.47–2006 (incorporated by reference, see § 431.75). The thermal efficiency test must be conducted only at the normal inlet test pressure, as specified in section 2.5.1 of ANSI Z21.47–2006, and at the maximum hourly Btu input rating specified by the manufacturer for the product being tested.

(2) *Test setup for oil-fired commercial warm air furnaces.* The test setup, including flue requirement, instrumentation, test conditions, and measurement for measuring thermal efficiency is as specified in sections 1 (Scope), 2 (Units of Measurement), 3 (Glossary), 37 (General), 38 and 39 (Test Installation), 40 (Instrumentation, except 40.4 and 40.6.2 through 40.6.7, which are not required for the thermal efficiency test), 41 (Initial Test Conditions), 42 (Combustion Test—Burner and Furnace), 43.2 (Operation Tests), 44 (Limit Control Cutout Test),

45 (Continuity of Operation Test), and 46 (Air Flow, Downflow or Horizontal Furnace Test), of UL 727–2006 (incorporated by reference, see § 431.75). You must conduct a fuel oil analysis for heating value, hydrogen content, carbon content, pounds per gallon, and American Petroleum Institute (API) gravity as specified in section 8.2.2 of HI BTS–2000 (incorporated by reference, see § 431.75). The steady-state combustion conditions, specified in Section 42.1 of UL 727–2006, are attained when variations of not more than 5 °F in the measured flue gas temperature occur for three consecutive readings taken 15 minutes apart.

(c) *Additional test measurements*—(1) *Measurement of flue CO_2 (carbon dioxide) for oil-fired commercial warm air furnaces.* In addition to the flue temperature measurement specified in section 40.6.8 of UL 727–2006, (incorporated by reference, see § 431.75) you must locate one or two sampling tubes within six inches downstream from the flue temperature probe (as indicated on Figure 40.3 of UL 727–2006). If you use an open end tube, it must project into the flue one-third of the chimney connector diameter. If you use other methods of sampling CO_2, you must place the sampling tube so as to obtain an average sample. There must be no air leak between the temperature probe and the sampling tube location. You must collect the flue gas sample at the same time the flue gas temperature is recorded. The CO_2 concentration of the flue gas must be as specified by the manufacturer for the product being tested, with a tolerance of ±0.1 percent. You must determine the flue CO_2 using an instrument with a reading error no greater than ±0.1 percent.

(2) *Procedure for the measurement of condensate for a gas-fired condensing commercial warm air furnace.* The test procedure for the measurement of the condensate from the flue gas under steady state operation must be conducted as specified in sections 7.2.2.4, 7.8, and 9.2 of ASHRAE Standard 103–1993 (incorporated by reference, see § 431.75) under the maximum rated input conditions. You must conduct this condensate measurement for an additional 30 minutes of steady state operation after completion of the steady state thermal efficiency test specified in paragraph (b) of this section.

(d) *Calculation of thermal efficiency*—(1) *Gas-fired commercial warm air furnaces.* You must use the calculation procedure specified in section 2.39, Thermal Efficiency, of ANSI Z21.47–2006 (incorporated by reference, see § 431.75). (Note, this is section 2.38 in ANSI Z21.47–1998 (incorporated by reference, see § 431.75))

(2) *Oil-fired commercial warm air furnaces.* You must calculate the percent flue loss (in percent of heat input rate) by following the procedure specified in sections 11.1.4, 11.1.5, and 11.1.6.2 of the HI BTS–2000 (incorporated by reference, see § 431.75). The thermal efficiency must be calculated as:

Thermal Efficiency (percent) = 100 percent − flue loss (in percent).

(e) *Procedure for the calculation of the additional heat gain and heat loss, and adjustment to the thermal efficiency, for a condensing commercial warm air furnace.* (1) You must calculate the latent heat gain from the condensation of the water vapor in the flue gas, and calculate heat loss due to the flue condensate down the drain, as specified in sections 11.3.7.1 and 11.3.7.2 of ASHRAE Standard 103–1993, (incorporated by reference, see § 431.75), with the exception that in the equation for the heat loss due to hot condensate flowing down the drain in section 11.3.7.2, the assumed indoor temperature of 70 °F and the temperature term T_{OA} must be replaced by the measured room temperature as specified in section 2.2.8 of ANSI Z21.47–2006 (incorporated by reference, see § 431.75).

(2) *Adjustment to the Thermal Efficiency for Condensing Furnace.* You must adjust the thermal efficiency as calculated in paragraph (d)(1) of this section by adding the latent gain, expressed in percent, from the condensation of the water vapor in the flue gas, and subtracting the heat loss (due to the flue condensate down the drain), also expressed in percent, both as calculated in paragraph (e)(1) of this section, to obtain the thermal efficiency of a condensing furnace.

■ 5. Section 431.92, is amended by adding the definitions ''Computer Room Air Conditioner,'' ''Heat Recovery,'' ''Sensible Coefficient of Performance, or SCOP,'' ''Variable Refrigerant Flow Multi-Split Air Conditioner'' and ''Variable Refrigerant Flow Multi-Split Heat Pump,'' in alphabetical order to read as follows:

§ 431.92 Definitions concerning commercial air conditioners and heat pumps.

* * * * *

Computer Room Air Conditioner means a basic model of commercial package air-conditioning and heating equipment (packaged or split) that is: Used in computer rooms, data processing rooms, or other information technology cooling applications; rated for sensible coefficient of performance (SCOP) and tested in accordance with 10 CFR 431.96, and is not a covered consumer product under 42 U.S.C. 6291(1)–(2) and 6292. A computer room air conditioner may be provided with, or have as available options, an integrated humidifier, temperature, and/or humidity control of the supplied air, and reheating function.

* * * * *

Heat Recovery (in the context of variable refrigerant flow multi-split air conditioners or variable refrigerant flow multi-split heat pumps) means that the air conditioner or heat pump is also capable of providing simultaneous heating and cooling operation, where recovered energy from the indoor units operating in one mode can be transferred to one or more other indoor units operating in the other mode. A variable refrigerant flow multi-split heat recovery heat pump is a variable refrigerant flow multi-split heat pump with the addition of heat recovery capability.

* * * * *

Sensible Coefficient of Performance, or SCOP means the net sensible cooling capacity in watts divided by the total power input in watts (excluding reheaters and humidifiers).

* * * * *

Variable Refrigerant Flow Multi-Split Air Conditioner means a unit of commercial package air-conditioning and heating equipment that is configured as a split system air conditioner incorporating a single refrigerant circuit, with one or more outdoor units, at least one variable-speed compressor or an alternate compressor combination for varying the capacity of the system by three or more steps, and multiple indoor fan coil units, each of which is individually metered and individually controlled by an integral control device and common communications network and which can operate independently in response to multiple indoor thermostats. Variable refrigerant flow implies three or more steps of capacity control on common, inter-connecting piping.

Variable Refrigerant Flow Multi-Split Heat Pump means a unit of commercial package air-conditioning and heating equipment that is configured as a split system heat pump that uses reverse cycle refrigeration as its primary heating source and which may include secondary supplemental heating by means of electrical resistance, steam, hot water, or gas. The equipment incorporates a single refrigerant circuit,

with one or more outdoor units, at least one variable-speed compressor or an alternate compressor combination for varying the capacity of the system by three or more steps, and multiple indoor fan coil units, each of which is individually metered and individually controlled by a control device and common communications network and which can operate independently in response to multiple indoor thermostats. Variable refrigerant flow implies three or more steps of capacity control on common, inter-connecting piping.

* * * * *

■ 6. Section 431.95 is revised to read as follows:

§ 431.95 Materials incorporated by reference.

(a) *General.* DOE incorporates by reference the following test procedures into subpart F of part 431. The materials listed have been approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Any subsequent amendment to the listed materials by the standard-setting organization will not affect the DOE regulations unless and until such regulations are amended by DOE. Materials are incorporated as they exist on the date of the approval, and a notice of any changes in the materials will be published in the **Federal Register**. All approved materials are available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federalregulations/ibr_locations.html*. Also, this material is available for inspection at U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, 6th Floor, 950 L'Enfant Plaza SW., Washington, DC 20024, (202) 586–2945, or go to: *http://www1.eere.energy.gov/buildings/appliance_standards/*. The referenced test procedure standards are listed below by relevant standard-setting organization, along with information on how to obtain copies from those sources.

(b) *AHRI.* Air-Conditioning, Heating, and Refrigeration Institute, 2111 Wilson Blvd., Suite 500, Arlington, VA 22201, (703) 524–8800, or go to: *http://www.ahrinet.org*.

(1) ARI Standard 210/240–2003, ''2003 Standard for *Unitary Air-Conditioning & Air-Source Heat Pump Equipment,*'' published in 2003 (AHRI 210/240–2003), IBR approved for § 431.96.

(2) ANSI/AHRI Standard 210/240–2008, ''2008 Standard for *Performance Rating of Unitary Air-Conditioning & Air-Source Heat Pump Equipment,*'' approved by ANSI on October 27, 2011 and updated by addendum 1 in June 2011 and addendum 2 in March 2012 (AHRI 210/240–2008), IBR approved for § 431.96.

(3) ARI Standard 310/380–2004, ''*Standard for Packaged Terminal Air-Conditioners and Heat Pumps,*'' published September 2004 (AHRI 310/380–2004), IBR approved for § 431.96.

(4) ARI Standard 340/360–2004, ''2004 Standard for *Performance Rating of Commercial and Industrial Unitary Air-Conditioning and Heat Pump Equipment,*'' published in 2004 (AHRI 340/360–2004), IBR approved for § 431.96.

(5) ANSI/AHRI Standard 340/360–2007, ''2007 Standard for *Performance Rating of Commercial and Industrial Unitary Air-Conditioning and Heat Pump Equipment,*'' approved by ANSI on October 27, 2011 and updated by addendum 1 in December 2010 and addendum 2 in June 2011 (AHRI 340/360–2007), IBR approved for § 431.96.

(6) ANSI/AHRI Standard 390–2003, ''2003 Standard for *Performance Rating of Single Package Vertical Air-Conditioners and Heat Pumps,*'' dated 2003, (AHRI 390–2003), IBR approved for § 431.96.

(7) ANSI/AHRI Standard 1230–2010, ''2010 Standard for *Performance Rating of Variable Refrigerant Flow (VRF) Multi-Split Air-Conditioning and Heat Pump Equipment,*'' approved August 2, 2010 and updated by addendum 1 in March 2011 (AHRI 1230–2010), IBR approved for § 431.96.

(8) [Reserved].

(c) *ASHRAE.* American Society of Heating, Refrigerating and Air-Conditioning Engineers, 1791 Tullie Circle, NE., Atlanta, Georgia 30329, (404) 636–8400, or go to: *http://www.ashrae.org*.

(1) ASHRAE Standard 127–2007, ''*Method of Testing for Rating Computer and Data Processing Room Unitary Air Conditioners,*'' approved on June 28, 2007, (ASHRAE 127–2007), IBR approved for § 431.96.

(2) [Reserved].

(d) *ISO.* International Organization for Standardization, 1, ch. De la Voie-Creuse, Case Postale 56, CH–1211 Geneva 20, Switzerland, +41 22 749 01 11 or go to: *http://www.iso.ch/*.

(1) ISO Standard 13256–1, ''*Water-source heat pumps—Testing and rating for performance—Part 1: Water-to-air and brine-to-air heat pumps,*'' approved 1998, IBR approved for § 431.96.

(2) [Reserved].

■ 7. Section 431.96 is revised to read as follows:

§ 431.96 Uniform test method for the measurement of energy efficiency of commercial air conditioners and heat pumps.

(a) *Scope.* This section contains test procedures for measuring, pursuant to EPCA, the energy efficiency of any small, large, or very large commercial package air-conditioning and heating equipment, packaged terminal air conditioners and packaged terminal heat pumps, computer room air conditioners, variable refrigerant flow systems, and single package vertical air conditioners and single package vertical heat pumps.

(b) *Testing and calculations.* (1) Determine the energy efficiency of each covered product by conducting the test procedure(s) listed in the rightmost column of Table 1 of this section, that apply to the energy efficiency descriptor for that product, category, and cooling capacity, until compliance with this test procedure version is no longer required per the date shown in the 5th most column from the left of Table 1 of this section.

TABLE 1 TO § 431.96—TEST PROCEDURES FOR COMMERCIAL AIR CONDITIONERS AND HEAT PUMPS

Equipment type	Category	Cooling capacity	Energy efficiency descriptor	Test procedure required for compliance until	Use tests, conditions, and procedures [1] in
Small Commercial Packaged Air-Conditioning and Heating Equipment.	Air-Cooled, 3-Phase, AC and HP	<65,000 Btu/h	SEER and HSPF	May 13, 2013	ARI 210/240–2003.
	Air-Cooled AC and HP	≥65,000 Btu/h and <135,000 Btu/h.	EER and COP	May 13, 2013	ARI 340/360–2004.

TABLE 1 TO § 431.96—TEST PROCEDURES FOR COMMERCIAL AIR CONDITIONERS AND HEAT PUMPS—Continued

Equipment type	Category	Cooling capacity	Energy efficiency descriptor	Test procedure required for compliance until	Use tests, conditions, and procedures [1] in
	Water-Cooled and Evaporatively-Cooled AC	<65,000 Btu/h	EER	May 13, 2013	ARI 210/240–2003.
		≥65,000 Btu/h and <135,000 Btu/h.	EER	May 13, 2013	ARI 340/360–2004.
	Water-Source HP	<135,000 Btu/h	EER and COP	May 13, 2013	ISO Standard 13256–1 (1998).
Large Commercial Packaged Air-Conditioning and Heating Equipment.	Air-Cooled AC and HP	≥135,000 Btu/h and <240,000 Btu/h.	EER and COP	May 13, 2013	ARI 340/360–2004.
	Water-Cooled and Evaporatively-Cooled AC	≥135,000 Btu/h and <240,000 Btu/h.	EER	May 13, 2013	ARI 340/360–2004.
Very Large Commercial Packaged Air-Conditioning and Heating Equipment.	Air-Cooled AC and HP	≥240,000 Btu/h and <760,000 Btu/h.	EER and COP	May 13, 2013	ARI 340/360–2004.
	Water-Cooled and Evaporatively-Cooled AC	≥240,000 Btu/h and <760,000 Btu/h.	EER	May 13, 2013	ARI 340/360–2004.
Packaged Terminal Air Conditioners and Heat Pumps.	AC and HP	<760,000 Btu/h	EER and COP	May 13, 2013	AHRI 310/380–2004.

[1] Incorporated by reference, see § 431.95.

(2) On or after the compliance dates listed in Table 2 of this section, determine the energy efficiency of each type of covered equipment by conducting the test procedure(s) listed in the rightmost column of Table 2 of this section along with any additional testing provisions set forth in paragraphs (c), (d), and (e) of this section, that apply to the energy efficiency descriptor for that equipment, category, and cooling capacity. Note, the omitted sections of the test procedures listed in the rightmost column of Table 1 of this section shall not be used.

TABLE 2 TO § 431.96—TEST PROCEDURES FOR COMMERCIAL AIR CONDITIONERS AND HEAT PUMPS

Equipment type	Category	Cooling capacity	Energy efficiency descriptor	Compliance with test procedure required on or after	Use tests, conditions, and procedures [1] in
Small Commercial Packaged Air-Conditioning and Heating Equipment.	Air-Cooled, 3-Phase, AC and HP	<65,000 Btu/h	SEER and HSPF	May 13, 2013	AHRI 210/240–2008 (omit section 6.5).
	Air-Cooled AC and HP	≥65,000 Btu/h and <135,000 Btu/h.	EER and COP	May 13, 2013	AHRI 340/360–2007 (omit section 6.3).
	Water-Cooled and Evaporatively-Cooled AC	<65,000 Btu/h	EER	May 13, 2013	AHRI 210/240–2008 (omit section 6.5).
		≥65,000 Btu/h and <135,000 Btu/h.	EER	May 13, 2013	AHRI 340/360–2007 (omit section 6.3).
	Water-Source HP	<135,000 Btu/h	EER and COP	May 13, 2013	ISO Standard 13256–1 (1998).
Large Commercial Packaged Air-Conditioning and Heating Equipment.	Air-Cooled AC and HP	≥135,000 Btu/h and <240,000 Btu/h.	EER and COP	May 13, 2013	AHRI 340/360–2007 (omit section 6.3).
	Water-Cooled and Evaporatively-Cooled AC	≥135,000 Btu/h and <240,000 Btu/h.	EER	May 13, 2013	AHRI 340/360–2007 (omit section 6.3).
Very Large Commercial Packaged Air-Conditioning and Heating Equipment.	Air-Cooled AC and HP	≥240,000 Btu/h and <760,000 Btu/h.	EER and COP	May 13, 2013	AHRI 340/360–2007 (omit section 6.3).
	Water-Cooled and Evaporatively-Cooled AC	≥240,000 Btu/h and <760,000 Btu/h.	EER	May 13, 2013	AHRI 340/360–2007 (omit section 6.3).
Packaged Terminal Air Conditioners and Heat Pumps.	AC and HP	<760,000 Btu/h	EER and COP	May 13, 2013	AHRI 310/380–2004 (omit section 5.6).
Computer Room Air Conditioners.	AC	<65,000 Btu/h	SCOP	October 29, 2012	ASHRAE 127–2007 (omit section 5.11).
		<65,000 Btu/h and <760,000 Btu/h.	SCOP	May 13, 2013	ASHRAE 127–2007 (omit section 5.11).
Variable Refrigerant Flow Multi-split Systems.	AC	<760,000 Btu/h	EER and COP	May 13, 2013	AHRI 1230–2010 (omit sections 5.1.2 and 6.6).
Variable Refrigerant Flow Multi-split Systems, Air-cooled.	HP	<760,000 Btu/h	EER and COP	May 13, 2013	AHRI 1230–2010 (omit sections 5.1.2 and 6.6).

TABLE 2 TO § 431.96—TEST PROCEDURES FOR COMMERCIAL AIR CONDITIONERS AND HEAT PUMPS—Continued

Equipment type	Category	Cooling capacity	Energy efficiency descriptor	Compliance with test procedure required on or after	Use tests, conditions, and procedures [1] in
Variable Refrigerant Flow Multi-split Systems, Water-source.	HP	<17,000 Btu/h	EER and COP	October 29, 2012	AHRI 1230–2010 (omit sections 5.1.2 and 6.6).
Variable Refrigerant Flow Multi-split Systems, Water-source.	HP	≥17,000 Btu/h and <760,000 Btu/h.	EER and COP	May 13, 2013	AHRI 1230–2010 (omit sections 5.1.2 and 6.6).
Single Package Vertical Air Conditioners and Single Package Vertical Heat Pumps.	AC and HP	<760,000 Btu/h	EER and COP	July 16, 2012	AHRI 390–2003 (omit section 6.4).

[1] Incorporated by reference, see § 431.95.

(c) *Optional break-in period for tests conducted using AHRI 210/240–2008, AHRI 340/360–2007, AHRI 390–2003, AHRI 1230–2010, and ASHRAE 127–2007.* Manufacturers may optionally specify a ''break-in'' period, not to exceed 20 hours, to operate the equipment under test prior to conducting the test method specified by AHRI 210/240–2008, AHRI 340/360–2007, AHRI 390–2003, AHRI 1230–2010, or ASHRAE 127–2007 (incorporated by reference, see § 431.95). A manufacturer who elects to use an optional compressor break-in period in its certification testing should record this information (including the duration) in the test data underlying the certified ratings that is required to be maintained under 10 CFR 429.71.

(d) *Refrigerant line length corrections for tests conducted using AHRI 1230–2010.* For test setups where it is physically impossible for the laboratory to use the required line length listed in Table 3 of the AHRI 1230–2010 (incorporated by reference, see § 431.95), then the actual refrigerant line length used by the laboratory may exceed the required length and the following correction factors are applied:

Piping length beyond minimum, X (ft)	Piping length beyond minimum, Y (m)	Cooling capacity correction %
0> X ≤20	0> Y ≤6.1	1
20> X ≤40	6.1> Y ≤12.2	2
40> X ≤60	12.2> Y ≤18.3	3
60> X ≤80	18.3> Y ≤24.4	4
80> X ≤100	24.4> Y ≤30.5	5
100 > X ≤120	30.5> Y ≤36.6	6

(e) *Additional provisions for equipment set-up.* The only additional specifications that may be used in setting up the basic model for test are those set forth in the installation and operation manual shipped with the unit. Each unit should be set up for test in accordance with the manufacturer installation and operation manuals. Paragraphs (e)(1) through (3) of this section provide specifications for addressing key information typically found in the installation and operation manuals.

(1) If a manufacturer specifies a range of superheat, sub-cooling, and/or refrigerant pressure in its installation and operation manual for a given basic model, any value(s) within that range may be used to determine refrigerant charge or mass of refrigerant, unless the manufacturer clearly specifies a rating value in its installation and operation manual, in which case the specified rating value shall be used.

(2) The air flow rate used for testing must be that set forth in the installation and operation manuals being shipped to the commercial customer with the basic model and clearly identified as that used to generate the DOE performance ratings. If a rated air flow value for testing is not clearly identified, a value of 400 standard cubic feet per minute (scfm) per ton shall be used.

(3) For VRF systems, the test set-up and the fixed compressor speeds (*i.e.,* the maximum, minimum, and any intermediate speeds used for testing) should be recorded and maintained as part of the test data underlying the certified ratings that is required to be maintained under 10 CFR 429.71.

(f) *Manufacturer involvement in assessment or enforcement testing for variable refrigerant flow systems.* A manufacturer's representative will be allowed to witness assessment and/or enforcement testing for VRF systems. The manufacturer's representative will be allowed to inspect and discuss set-up only with a DOE representative and adjust only the modulating components during testing in the presence of a DOE representative that are necessary to achieve steady-state operation. Only previously documented specifications for set-up as specified under paragraphs (d) and (e) of this section will be used.

■ 8. Section 431.97 is revised to read as follows:

§ 431.97 Energy efficiency standards and their compliance dates.

(a) All basic models of commercial package air-conditioning and heating equipment must be tested for performance using the applicable DOE test procedure in § 431.96, be compliant

with the applicable standards set forth in paragraphs (b) through (f) of this section, and be certified to the Department under 10 CFR part 429.

(b) Each commercial air conditioner or heat pump (not including single package vertical air conditioners and single package vertical heat pumps, packaged terminal air conditioners and packaged terminal heat pumps, computer room air conditioners, and variable refrigerant flow systems) manufactured on and after the compliance date listed in the corresponding table must meet the applicable minimum energy efficiency standard level(s) set forth in Tables 1, 2, and 3 of this section.

TABLE 1 TO § 431.97—MINIMUM COOLING EFFICIENCY STANDARDS FOR AIR-CONDITIONING AND HEATING EQUIPMENT

[Not including single package vertical air conditioners and single package vertical heat pumps, packaged terminal air conditioners and packaged terminal heat pumps, computer room air conditioners, and variable refrigerant flow multi-split air conditioners and heat pumps]

Equipment type	Cooling capacity	Sub-category	Heating type	Efficiency level	Compliance date: products manufactured on and after . . .
Small Commercial Packaged Air-Conditioning and Heating Equipment (Air-Cooled, 3 Phase)	<65,000 Btu/h	AC	All	SEER = 13	June 16, 2008.
		HP	All	SEER = 13	June 16, 2008.
Small Commercial Packaged Air-Conditioning and Heating Equipment (Air-Cooled)	≥65,000 Btu/h and <135,000 Btu/h	AC	No Heating or Electric Resistance Heating	EER = 11.2	January 1, 2010.
			All Other Types of Heating	EER = 11.0	January 1, 2010.
		HP	No Heating or Electric Resistance Heating	EER = 11.0	January 1, 2010.
			All Other Types of Heating	EER = 10.8	January 1, 2010.
Large Commercial Packaged Air-Conditioning and Heating Equipment (Air-Cooled)	≥135,000 Btu/h and <240,000 Btu/h	AC	No Heating or Electric Resistance Heating	EER = 11.0	January 1, 2010.
			All Other Types of Heating	EER = 10.8	January 1, 2010.
Heating Equipment (Air-Cooled).	>240,000 Btu/h	HP	No Heating or Electric Resistance heating	EER = 10.6	January 1, 2010.
			All Other Types of Heating	EER = 10.4	January 1, 2010.
Very Large Commercial Packaged Air-Conditioning and Heating Equipment (Air-Cooled)	≥240,000 Btu/h and <760,000 Btu/h	AC	No Heating or Electric Resistance Heating	EER = 10.0	January 1, 2010.
			All Other Types of Heating	EER = 9.8	January 1, 2010.
		HP	No Heating or Electric Resistance Heating	EER = 9.5	January 1, 2010.
			All Other Types of Heating	EER = 9.3	January 1, 2010.
Small Commercial Packaged Air-Conditioning and Heating Equipment (Water-Cooled, Evaporatively-Cooled, and Water-Source).	<17,000 Btu/h	AC	All	EER = 12.1	October 29, 2003.
	≥17,000 Btu/h and <65,000 Btu/h	HP	All	EER = 11.2	October 29, 2003.
		AC	All	EER = 12.1	October 29, 2003.
		HP	All	EER = 12.0	October 29, 2003.
	≥65,000 Btu/h and <135,000 Btu/h	AC	No Heating or Electric Resistance Heating	EER = 11.5	October 29, 2003.[1]
			All Other Types of Heating	EER = 11.3	October 29, 2003.[1]
		HP	All	EER = 12.0	October 29, 2003.[1]
Large Commercial Packaged Air-Conditioning and Heating Equipment (Water-Cooled, Evaporatively-Cooled, and Water-Source).	≥135,000 Btu/h and <240,000 Btu/h	AC	All	EER = 11.0	October 29, 2004.[2]
		HP	All	EER = 11.0	October 29, 2004.[2]
Very Large Commercial Packaged Air-Conditioning and Heating Equipment (Water-Cooled, Evaporatively-Cooled, and Water-Source).	≥240,000 Btu/h and <760,000 Btu/h	AC	No Heating or Electric Resistance Heating	EER = 11.0	January 10, 2011.[2]
			All Other Types of Heating	EER = 10.8	January 10, 2011.[2]
		HP	No Heating or Electric Resistance Heating	EER = 11.0	January 10, 2011.[2]
			All Other Types of Heating	EER = 10.8	January 10, 2011.[2]

[1] And manufactured before June 1, 2013. See Table 3 of this section for updated efficiency standards.
[2] And manufactured before June 1, 2014. See Table 3 of this section for updated efficiency standards.

TABLE 2 TO § 431.97—MINIMUM HEATING EFFICIENCY STANDARDS FOR AIR-CONDITIONING AND HEATING EQUIPMENT

[Heat pumps]

Equipment type	Cooling capacity	Efficiency level	Compliance date: Products manufactured on and after . . .
Small Commercial Packaged Air-Conditioning and Heating Equipment (Air-Cooled, 3 Phase).	<65,000 Btu/h	HSPF = 7.7	June 16, 2008.
Small Commercial Packaged Air-Conditioning and Heating Equipment (Air-Cooled).	≥65,000 Btu/h and <135,000 Btu/h	COP = 3.3	January 1, 2010.
Large Commercial Packaged Air-Conditioning and Heating Equipment (Air-Cooled).	≥135,000 Btu/h and <240,000 Btu/h	COP = 3.2	January 1, 2010.
Very Large Commercial Packaged Air-Conditioning and Heating Equipment (Air-Cooled).	≥240,000 Btu/h and <760,000 Btu/h	COP = 3.2	January 1, 2010.
Small Commercial Packaged Air-Conditioning and Heating Equipment (Water-Source).	<135,000 Btu/h	COP = 4.2	October 29, 2003.

TABLE 3 TO § 431.97—UPDATES TO THE MINIMUM COOLING EFFICIENCY STANDARDS FOR WATER-COOLED AND EVAPORATIVELY-COOLED AIR-CONDITIONING AND HEATING EQUIPMENT

Equipment type	Cooling capacity	Heating type	Efficiency level	Compliance date: Products manufactured on and after . . .
Small Commercial Packaged Air-Conditioning and Heating Equipment (Water-Cooled).	≥65,000 Btu/h and <135,000 Btu/h	No Heating or Electric Resistance Heating	EER = 12.1	June 1, 2013.
		All Other Types of Heating	EER = 11.9	June 1, 2013.
Large Commercial Packaged Air-Conditioning and Heating Equipment (Water-Cooled).	≥135,000 Btu/h and <240,000 Btu/h	No Heating or Electric Resistance Heating	EER = 12.5	June 1, 2014.
		All Other Types of Heating	EER = 12.3	June 1, 2014.
Very Large Commercial Packaged Air-Conditioning and Heating Equipment (Water-Cooled).	≥240,000 Btu/h and <760,000 Btu/h	No Heating or Electric Resistance Heating	EER = 12.4	June 1, 2014.
		All Other Types of Heating	EER = 12.2	June 1, 2014.
Small Commercial Packaged Air-Conditioning and Heating Equipment (Evaporatively-Cooled).	≥65,000 Btu/h and <135,000 Btu/h	No Heating or Electric Resistance Heating	EER = 12.1	June 1, 2013.
		All Other Types of Heating	EER = 11.9	June 1, 2013.
Large Commercial Packaged Air-Conditioning and Heating Equipment (Evaporatively-Cooled).	≥135,000 Btu/h and <240,000 Btu/h	No Heating or Electric Resistance Heating	EER = 12.0	June 1, 2014.
		All Other Types of Heating	EER = 11.8	June 1, 2014.
Very Large Commercial Packaged Air-Conditioning and Heating Equipment (Evaporatively-Cooled).	≥240,000 Btu/h and <760,000 Btu/h	No Heating or Electric Resistance Heating	EER = 11.9	June 1, 2014.
		All Other Types of Heating	EER = 11.7	June 1, 2014.

(c) Each packaged terminal air conditioner (PTAC) and packaged terminal heat pump (PTHP) manufactured on or after January 1, 1994, and before October 8, 2012 (for standard size PTACs and PTHPs) and before October 7, 2010 (for non-standard size PTACs and PTHPs) must meet the applicable minimum energy efficiency standard level(s) set forth in Table 4 of this section. Each PTAC and PTHP manufactured on or after October 8, 2012 (for standard size PTACs and PTHPs) and on or after October 7, 2010 (for non-standard size PTACs and PTHPs) must meet the applicable minimum energy efficiency standard level(s) set forth in Table 5 of this section.

TABLE 4 TO § 431.97—MINIMUM EFFICIENCY STANDARDS FOR PTAC AND PTHP

Equipment type	Cooling capacity	Efficiency level	Compliance date: products manufactured on and after . . .
PTAC	<7,000 Btu/h	EER = 8.88	January 1, 1994.
	≥7,000 Btu/h and <15,000 Btu/h	EER = 10.0—(0.16 × Cap [1])	January 1, 1994.
	≥15,000 Btu/h	EER = 7.6	January 1, 1994.
PTHP	<7,000 Btu/h	EER = 8.88 COP = 2.72	January 1, 1994.
	≥7,000 Btu/h and <15,000 Btu/h	EER = 10.0—(0.16 × Cap [1]) COP = 1.3 + (0.16 × EER [2])	January 1, 1994.
	≥15,000 Btu/h	EER = 7.6 COP = 2.52	January 1, 1994.

[1] "Cap" means cooling capacity in thousand Btu/h at 95 °F outdoor dry-bulb temperature.
[2] The applicable minimum cooling EER prescribed in this table.

TABLE 5 TO § 431.97 UPDATED MINIMUM EFFICIENCY STANDARDS FOR PTAC AND PTHP

Equipment type	Cooling capacity	Sub-category	Efficiency level	Compliance date: products manufactured on and after . . .
PTAC	Standard Size	<7,000 Btu/h	EER = 11.7	October 8, 2012.
		≥7,000 Btu/h and <15,000 Btu/h	EER = 13.8 − (0.3 × Cap[1])	October 8, 2012.
		≥15,000 Btu/h	EER = 9.3	October 8, 2012.
	Non-Standard Size	<7,000 Btu/h	EER = 9.4	October 7, 2010.
		≥7,000 Btu/h and <15,000 Btu/h	EER = 10.9 − (0.213 × Cap[1])	October 7, 2010.
		≥15,000 Btu/h	EER = 7.7	October 7, 2010.
PTHP	Standard Size	<7,000 Btu/h	EER = 11.9 COP = 3.3	October 8, 2012.
		≥7,000 Btu/h and <15,000 Btu/h	EER = 14.0 − (0.3 × Cap[1]) COP = 3.7—(0.052 × Cap[1])	October 8, 2012.
		≥15,000 Btu/h	EER = 9.5 COP = 2.9	October 8, 2012.
	Non-Standard Size	<7,000 Btu/h	EER = 9.3 COP = 2.7	October 7, 2010.
		≥7,000 Btu/h and <15,000 Btu/h	EER = 10.8 − (0.213 × Cap[1]) COP = 2.9 − (0.026 × Cap[1])	October 7, 2010.
		≥15,000 Btu/h	EER = 7.6 COP = 2.5	October 7, 2010.

1 "Cap" means cooling capacity in thousand Btu/h at 95 °F outdoor dry-bulb temperature.

(d) Each single package vertical air conditioner and heat pump manufactured on or after January 1, 2010, must meet the applicable minimum energy efficiency standard level(s) set forth in this section.

TABLE 6 TO § 431.97 MINIMUM EFFICIENCY STANDARDS FOR SINGLE PACKAGE VERTICAL AIR CONDITIONERS AND SINGLE PACKAGE VERTICAL HEAT PUMPS

Equipment type	Cooling capacity	Sub-category	Efficiency level	Compliance date: Products manufactured on and after . . .
Single package vertical air conditioners and single package vertical heat pumps, single-phase and three-phase.	<65,000 Btu/h	AC	EER = 9.0	January 1, 2010.
		HP	EER = 9.0 COP = 3.0	January 1, 2010.
Single package vertical air conditioners and single package vertical heat pumps.	≥65,000 Btu/h and <135,000 Btu/h	AC	EER = 8.9	January 1, 2010.
		HP	EER = 8.9 COP = 3.0	January 1, 2010.
Single package vertical air conditioners and single package vertical heat pumps.	≥135,000 Btu/h and <240,000 Btu/h	AC	EER = 8.6	January 1, 2010.
		HP	EER = 8.6 COP = 2.9	January 1, 2010.

(e) Each computer room air conditioner with a net sensible cooling capacity less than 65,000 Btu/h manufactured on or after October 29, 2012, and each computer room air conditioner with a net sensible cooling capacity greater than or equal to 65,000 Btu/h manufactured on or after October 29, 2013, must meet the applicable minimum energy efficiency standard level(s) set forth in this section.

TABLE 7 TO § 431.97—MINIMUM EFFICIENCY STANDARDS FOR COMPUTER ROOM AIR CONDITIONERS

Equipment type	Net sensible cooling capacity	Minimum SCOP efficiency		Compliance date: Products manufactured on and after . . .
		Downflow unit	Upflow unit	
Computer Room Air Conditioners, Air-Cooled	<65,000 Btu/h	2.20	2.09	October 29, 2012.
	≥65,000 Btu/h and <240,000 Btu/h	2.10	1.99	October 29, 2013.
	≥240,000 Btu/h and <760,000 Btu/h	1.90	1.79	October 29, 2013.
Computer Room Air Conditioners, Water-Cooled	<65,000 Btu/h	2.60	2.49	October 29, 2012.
	≥65,000 Btu/h and <240,000 Btu/h	2.50	2.39	October 29, 2013.
	≥240,000 Btu/h and <760,000 Btu/h	2.40	2.29	October 29, 2013.
Computer Room Air Conditioners, Water-Cooled with a Fluid Economizer.	<65,000 Btu/h	2.55	2.44	October 29, 2012.
	≥65,000 Btu/h and <240,000 Btu/h	2.45	2.34	October 29, 2013.
	≥240,000 Btu/h and <760,000 Btu/h	2.35	2.24	October 29, 2013.
Computer Room Air Conditioners, Glycol-Cooled	<65,000 Btu/h	2.50	2.39	October 29, 2012.
	≥65,000 Btu/h and <240,000 Btu/h	2.15	2.04	October 29, 2013.
	≥240,000 Btu/h and <760,000 Btu/h	2.10	1.99	October 29, 2013.
Computer Room Air Conditioner, Glycol-Cooled with a Fluid Economizer.	<65,000 Btu/h	2.45	2.34	October 29, 2012.
	≥65,000 Btu/h and <240,000 Btu/h	2.10	1.99	October 29, 2013.
	≥240,000 Btu/h and <760,000 Btu/h	2.05	1.94	October 29, 2013.

(f) Each variable refrigerant flow air conditioner or heat pump manufactured on or after the compliance date listed in this table must meet the applicable minimum energy efficiency standard level(s) set forth in this section.

TABLE 8 TO § 431.97—MINIMUM EFFICIENCY STANDARDS FOR VARIABLE REFRIGERANT FLOW MULTI-SPLIT AIR CONDITIONERS AND HEAT PUMPS

Equipment type	Cooling capacity	Heating type[1]	Efficiency level	Compliance date: Products manufactured on and after . . .
VRF Multi-Split Air Conditioners (Air-Cooled)	<65,000 Btu/h	All	13.0 SEER	June 16, 2008.
	≥65,000 Btu/h and <135,000 Btu/h.	No Heating or Electric Resistance Heating.	11.2 EER	January 1, 2010.
		All Other Types of Heating	11.0 EER	January 1, 2010.
	≥135,000 Btu/h and <240,000 Btu/h.	No Heating or Electric Resistance Heating.	11.0 EER	January 1, 2010.
		All Other Types of Heating	10.8 EER	January 1, 2010.
	≥240,000 Btu/h and <760,000 Btu/h.	No Heating or Electric Resistance Heating.	10.0 EER	January 1, 2010.
		All Other Types of Heating	9.8 EER	January 1, 2010.
VRF Multi-Split Heat Pumps (Air-Cooled)	<65,000 Btu/h	All	13.0 SEER 7.7 HSPF	June 16, 2008.
	≥65,000 Btu/h and <135,000 Btu/h.	No Heating or Electric Resistance Heating.	11.0 EER 3.3 COP	January 1, 2010.
		All Other Types of Heating	10.8 EER 3.3 COP	January 1, 2010.
	≥135,000 Btu/h and <240,000 Btu/h.	No Heating or Electric Resistance Heating.	10.6 EER 3.2 COP	January 1, 2010.
		All Other Types of Heating	10.4 EER 3.2 COP	January 1, 2010.
	≥240,000 Btu/h and <760,000 Btu/h.	No Heating or Electric Resistance Heating.	9.5 EER 3.2 COP	January 1, 2010.
		All Other Types of Heating	9.3 EER 3.2 COP	January 1, 2010.
VRF Multi-Split Heat Pumps (Water-Source)* * *	<17,000 Btu/h	Without heat recovery	12.0 EER 4.2 COP	October 29, 2012. October 29, 2003.
		With heat recovery	11.8 EER 4.2 COP	October 29, 2012. October 29, 2003.
	≥17,000 Btu/h and <65,000 Btu/h	All	12.0 EER 4.2 COP	October 29, 2003.
	≥65,000 Btu/h and <135,000 Btu/h.	All	12.0 EER 4.2 COP	October 29, 2003.
	≥135,000 Btu/h and <760,000 Btu/h.	Without heat recovery	10.0 EER 3.9 COP	October 29, 2013.
		With heat recovery	9.8 EER 3.9 COP	October 29, 2013

[1] VRF Multi-Split Heat Pumps (Air-Cooled) with heat recovery fall under the category of ''All Other Types of Heating'' unless they also have electric resistance heating, in which case it falls under the category for ''No Heating or Electric Resistance Heating.''

■ 9. Add § 431.104 to read as follows:

§ 431.104 Sources for information and guidance.

(a) *General.* The standards listed in this paragraph are referred to in the DOE test procedures and elsewhere in this part but are not incorporated by reference. These sources are given here for information and guidance.

(b) *ASTM.* American Society for Testing and Materials, 100 Barr Harbor Drive, PO Box C700, West Conshohocken, PA, 19438–2959, 1–(877) 909–2786, or go to: *http://www.astm.org/index.shtml.*

(1) ASTM Standard Test Method C177–97, ''Standard Test Method for

Steady-State Heat Flux Measurements and Thermal Transmission Properties by Means of the Guarded-Hot-Plate Apparatus.''

(2) ASTM Standard Test Method C518–91, ''Standard Test Method for Steady-State Heat Flux Measurements and Thermal Transmission Properties by Means of the Heat Flow Meter Apparatus.''

(3) ASTM Standard Test Method D2156–80, ''Method for Smoke Density in Flue Gases from Burning Distillate Fuels.''

■ 10. Section 431.105 is revised to read as follows:

§ 431.105 Materials incorporated by reference.

(a) *General.* DOE incorporates by reference the following test procedures into subpart G of part 431. The materials listed have been approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Any subsequent amendment to the listed materials by the standard-setting organization will not affect the DOE regulations unless and until such regulations are amended by DOE. Materials are incorporated as they exist on the date of the approval, and a notice of any change in the materials will be published in the **Federal Register**. All approved materials are available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal regulations/ibr_locations.html.* Also, this material is available for inspection at U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, 6th Floor, 950 L'Enfant Plaza, SW., Washington, DC 20024, (202) 586–2945, or go to: *http://www1.eere.energy.gov/buildings/appliance_standards* The referenced test procedure standards are listed below by relevant standard-setting organization, along with information on how to obtain copies from those sources.

(b) *ANSI.* American National Standards Institute, 25 W. 43rd Street, 4th Floor, New York, NY 10036, (212) 642–4900, or go to: *http://www.ansi.org.*

(1) ANSI Z21.10.3–1998 (''ANSI Z21.10.3–1998''), ''*Gas Water Heaters, Volume III, Storage Water Heaters With Input Ratings Above 75,000 Btu Per Hour, Circulating and Instantaneous,* Z21.10.3–1998, CSA 4.3–M98, and its Addenda, ANSI Z21.10.3a–2000, CSA 4.3a–M00,'' approved by ANSI on October 18, 1999, IBR approved for § 431.106.

(2) ANSI Z21.10.3–2011 (''ANSI Z21.10.3–2011''), ''*Gas Water Heaters, Volume III, Storage Water Heaters With Input Ratings Above 75,000 Btu Per Hour, Circulating and Instantaneous,*'' approved on March 7, 2011, IBR approved for § 431.106.

(3) [Reserved].

■ 11. Section 431.106 is revised to read as follows:

§ 431.106 Uniform test method for the measurement of energy efficiency of commercial water heaters and hot water supply boilers (other than commercial heat pump water heaters).

(a) *Scope.* This section covers the test procedures you must follow if, pursuant to EPCA, you are measuring the thermal efficiency or standby loss, or both, of a storage or instantaneous water heater or hot water supply boiler (other than a commercial heat pump water heater).

(b) *Testing and Calculations.* Determine the energy efficiency of each covered product by conducting the test procedure(s), set forth in the two rightmost columns of the following table, that apply to the energy efficiency descriptor(s) for that product:

TABLE 1 TO § 431.106—TEST PROCEDURES FOR COMMERCIAL WATER HEATERS AND HOT WATER SUPPLY BOILERS

[Other than commercial heat pump water heaters]

Equipment type	Energy efficiency descriptor	Use test setup, equipment and procedures in subsection labeled ''Method of Test'' of	Test procedure required for compliance until	With these additional stipulations
Gas-fired Storage and Instantaneous Water Heaters and Hot Water Supply Boilers *.	Thermal Efficiency Standby Loss	ANSI Z21.10.3–1998 **, § 2.9 ANSI Z21.10.3–1998 **, § 2.10	May 13, 2013 May 13, 2013	A. For all products, the duration of the standby loss test shall be until whichever of the following occurs first after you begin to measure the fuel and/or electric consumption: (1) The first cut-out after 24 hours or (2) 48 hours, if the water heater is not in the heating mode at that time. B. For oil and gas products, the standby loss in Btu per hour must be calculated as follows: SL (Btu per hour) = S (% per hour) × 8.25 (Btu/gal-F) × Measured Volume (gal) × 70 (degrees F).

TABLE 1 TO § 431.106—TEST PROCEDURES FOR COMMERCIAL WATER HEATERS AND HOT WATER SUPPLY BOILERS—Continued

[Other than commercial heat pump water heaters]

Equipment type	Energy efficiency descriptor	Use test setup, equipment and procedures in subsection labeled ''Method of Test'' of	Test procedure required for compliance until	With these additional stipulations
				C. For oil-fired products, apply the following in conducting the thermal efficiency and standby loss tests: (1) Venting Requirements—Connect a vertical length of flue pipe to the flue gas outlet of sufficient height so as to meet the minimum draft specified by the manufacturer. (2) Oil Supply—Adjust the burner rate so that: (a) The hourly Btu input rate lies within ±2 percent of the manufacturer's specified input rate, (b) the CO_2 reading shows the value specified by the manufacturer, (c) smoke in the flue does not exceed No. 1 smoke as measured by the procedure in ASTM–D–2156–80, and (d) fuel pump pressure lies within ±10 percent of manufacturer's specifications. D. For electric products, apply the following in conducting the standby loss test: (1) Assume that the thermal efficiency (Et) of electric water heaters with immersed heating elements is 98 percent. (2) Maintain the electrical supply voltage to within ±5 percent of the center of the voltage range specified on the water heater nameplate. (3) If the set up includes multiple adjustable thermostats, set the highest one first to yield a maximum water temperature in the specified range as measured by the topmost tank thermocouple. Then set the lower thermostat(s) to yield a maximum mean tank temperature within the specified range. E. Install water-tube water heaters as shown in Figure 2, ''Arrangement for Testing Water-tube Type Instantaneous and Circulating Water Heaters.''

* As to hot water supply boilers with a capacity of less than 10 gallons, these test methods become mandatory on October 21, 2005. Prior to that time, you may use for these products either (1) these test methods if you rate the product for thermal efficiency, or (2) the test methods in Subpart E if you rate the product for combustion efficiency as a commercial packaged boiler.

** Incorporated by reference, see § 431.105.

TABLE 2 TO § 431.106—TEST PROCEDURES FOR COMMERCIAL WATER HEATERS AND HOT WATER SUPPLY BOILERS

[Other than commercial heat pump water heaters]

Equipment type	Energy efficiency descriptor	Use test setup, equipment and procedures in subsection labeled ''Method of Test'' of	Test procedure required for compliance on and after	With these additional stipulations
Gas-fired Storage and Instantaneous Water Heaters and Hot Water Supply Boilers *.	Thermal Efficiency	ANSI Z21.10.3–2011 **, Exhibit G1	May 13, 2013	A. For all products, the duration of the standby loss test shall be until whichever of the following occurs first after you begin to measure the fuel and/or electric consumption: (1) The first cut-out after 24 hours or (2) 48 hours, if the water heater is not in the heating mode at that time. B. For oil and gas products, the standby loss in Btu per hour must be calculated as follows: SL (Btu per hour) = S (% per hour) × 8.25 (Btu/gal-F) × Measured Volume (gal) × 70 (degrees F). C. For oil-fired products, apply the following in conducting the thermal efficiency and standby loss tests: (1) Venting Requirements—Connect a vertical length of flue pipe to the flue gas outlet of sufficient height so as to meet the minimum draft specified by the manufacturer. (2) Oil Supply—Adjust the burner rate so that: (a) The hourly Btu input rate lies within ±2 percent of the manufacturer's specified input rate, (b) the CO_2 reading shows the value specified by the manufacturer, (c) smoke in the flue does not exceed No. 1 smoke as measured by the procedure in ASTM–D–2156–80, and (d) fuel pump pressure lies within ±10 percent of manufacturer's specifications. D. For electric products, apply the following in conducting the standby loss test: (1) Assume that the thermal efficiency (Et) of electric water heaters with immersed heating elements is 98 percent. (2) Maintain the electrical supply voltage to within ±5 percent of the center of the voltage range specified on the water heater nameplate. (3) If the set up includes multiple adjustable thermostats, set the highest one first to yield a maximum water temperature in the specified range as measured by the topmost tank thermocouple. Then set the lower thermostat(s) to yield a maximum mean tank temperature within the specified range. E. Install water-tube water heaters as shown in Figure 2, ''Arrangement for Testing Water-tube Type Instantaneous and Circulating Water Heaters.''
Oil-fired Storage and Instantaneous Water Heaters and Hot Water Supply Boilers *.	Standby Loss	ANSI Z21.10.3–2011 **, Exhibit G2	May 13, 2013	
Electric Storage and Instantaneous Water Heaters.	Thermal Efficiency	ANSI Z21.10.3–2011 **, Exhibit G1	May 13, 2013	
	Standby Loss	ANSI Z21.10.3–2011 **, Exhibit G2	May 13, 2013	
	Standby Loss	ANSI Z21.10.3–2011 **, Exhibit G2	May 13, 2013	

* As to hot water supply boilers with a capacity of less than 10 gallons, these test methods become mandatory on October 21, 2005. Prior to that time, you may use for these products either (1) these test methods if you rate the product for thermal efficiency, or (2) the test methods in Subpart E if you rate the product for combustion efficiency as a commercial packaged boiler.

** Incorporated by reference, *see* § 431.105.

Note: The following will not appear in the Code of Federal Regulations.

BILLING CODE 6450–01–P

U.S. DEPARTMENT OF JUSTICE
Antitrust Division

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March 27, 2012

Mr. Eric Fygi
Deputy General
Counsel Department
of Energy
Washington, DC
20585

Re: Energy Conservation Standards

Dear Deputy General Counsel Fygi:

I am responding to your January 31, 2012 letter seeking the views of the Attorney General about the potential impact on competition of proposed energy conservation standards for certain types of commercial heating, air-conditioning, and water-heating equipment. Specifically, you are proposing amended standards for small, large, and very large water-cooled and evaporatively-cooled commercial package air conditioners and variable refrigerant flow (VRF) water-source heat pumps less than 17,000 Btu/h, and proposing new standards for VRF water-source heat pumps greater than or equal to 135,000 Btu/h and computer room air conditioners. Your request was submitted under Section 325(o)(2)(B)(i)(V) of the Energy Policy and Conservation Act, as amended (ECPA), 42 U.S.C. 6295(o)(2)(B)(i)(5) and 42 U.S.C. 6316(a), which requires the Attorney General to make a determination of the impact of any lessening of competition that is likely to result from the imposition of

proposed energy conservation standards. The Attorney General's responsibility for responding to requests from other departments about the effect of a program on competition has been delegated to the Assistant Attorney General for the Antitrust Division in 28 CFR § 0.40(g).

In conducting its analysis the Antitrust Division examines whether a proposed standard may lessen competition, for example, by substantially limiting consumer choice, by placing certain manufacturers at an unjustified competitive disadvantage, or by inducing avoidable inefficiencies in production or distribution of particular products. A lessening of competition could result in higher prices to consumers, and perhaps thwart the intent of the revised standards by inducing substitution to less efficient products.

We have reviewed the proposed standards contained in the Notice of Proposed Rulemaking (77 Fed. Reg. 2356, January 17, 2012). We have also reviewed supplementary information submitted to the Attorney General by the Department of Energy and listened by webinar to the February 14, 2009 public hearing on the proposed standards. Based on this review, our conclusion is that the proposed energy conservation standards for the above-mentioned types of commercial heating, air-conditioning, and water-heating equipment are unlikely to have a significant adverse impact on competition. In reaching our conclusion, we note the absence of any competitive concerns raised by industry participants at the hearing and that these proposed energy standards correspond to the latest version of the relevant industry consensus standard.

Sincerely,

Sharis A. Pozen

Acting Assistant Attorney General
Antitrust Division

[FR Doc. 2012–10650 Filed 5–15–12; 8:45 am]
BILLING CODE 6450–01–C

FEDERAL REGISTER

Vol. 77 Wednesday,

No. 95 May 16, 2012

Part III

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Chapter IV

Medicare and Medicaid Program; Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Chapter IV

[CMS–9070–F]

RIN 0938–AQ96

Medicare and Medicaid Program; Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule identifies reforms in Medicare and Medicaid regulations that CMS has identified as unnecessary, obsolete, or excessively burdensome on health care providers and beneficiaries. This rule increases the ability of health care professionals to devote resources to improving patient care, by eliminating or reducing requirements that impede quality patient care or that divert providing high quality patient care. This is one of several rules that we are finalizing to achieve regulatory reforms under Executive Order 13563 on Improving Regulation and Regulatory Review and the Department's Plan for Retrospective Review of Existing Rules.

DATES: These regulations are effective on July 16, 2012.

FOR FURTHER INFORMATION CONTACT: Ronisha Davis, (410) 786–6882. We have also included a subject matter expert and contact information under the ''Provisions of the Proposed Regulations and Analysis of and Responses to Public Comments'' section for each provision set out in this rule.

SUPPLEMENTARY INFORMATION:

I. Executive Summary for This Final Rule

A. Purpose

In Executive Order 13563, ''Improving Regulations and Regulatory Review'', the President recognized the importance of a streamlined, effective, and efficient regulatory framework designed to promote economic growth, innovation, job-creation, and competitiveness. To achieve a more robust and effective regulatory framework, the President has directed each executive agency to establish a plan for ongoing retrospective review of existing significant regulations to identify those rules that can be eliminated as obsolete, unnecessary, burdensome, or counterproductive or that can be modified to be more effective, efficient, flexible, and streamlined. This final rule responds directly to the President's instructions in Executive Order 13563 by reducing outmoded or unnecessarily burdensome rules, and thereby increasing the ability of health care entities to devote resources to providing high quality patient care.

B. Summary of the Major Provisions

Removes Unnecessary Burdensome Requirements: We have reduced burden to providers and suppliers by modifying, removing, or streamlining current regulations that we have identified as excessively burdensome.

- *End Stage Renal Disease Facilities Life Safety Code:* We have limited mandatory compliance with the Life Safety Code to those ESRD facilities located adjacent to high hazardous occupancies. We clarified that the requirement for sprinklers in facilities housed in high rise buildings is intended to be applicable to those buildings constructed after January 1, 2008.
- *Ambulatory Surgical Centers (ASC) Emergency Equipment:* We have removed the detailed list of emergency equipment that must be available in an ASC's operating room. The current list includes outdated terminology as well as equipment that are not suitable for ASCs that furnish minor procedures that do not require anesthesia.
- *Re-enrollment Bar for Providers and Suppliers:* We have eliminated the unnecessarily punitive enrollment bar for providers and suppliers when it is based on the failure of a provider or supplier to not respond timely to revalidation or other requests for information.
- *Intermediate Care Facilities for Individuals who are Intellectually Disabled (ICR/IID):* We have eliminated the requirement for time-limited agreements for ICFs/IID and replaced the requirement with an open ended agreement which, consistent with nursing facilities, would remain in effect until the Secretary or a State determines that the ICF/IID no longer meets the ICF/IID conditions of participation. We have also added a requirement that a certified ICF/IID must be surveyed, on average, every 12 months with a maximum 15-month survey interval. This action provides States with more flexibility related to the current process.

Removes Obsolete or Duplicative Regulations or Provides Clarifying Information: We have removed requirements in the Code of Federal Regulations (CFR) that have become obsolete and are no longer needed or enforced.

- *OMB Control Numbers for Approved Collections of Information:* We have removed the obsolete list of OMB control numbers, approval numbers, and information collections in the CFR because the list is now displayed on the OMB public Web site. In our quarterly notice of all CMS issuances, we will remind the public that the complete listing is available on the OMB Web site.
- *Appeals of Part A and Part B Claims Determinations:* We have removed obsolete pre-BIPA regulations that apply to initial determinations, re-openings, and appeals of claims under original Medicare. This will eliminate confusion by Medicare beneficiaries, providers, and suppliers regarding which appeals rights and procedures apply.
- *Ambulatory Surgical Centers (ASC) Infection Control Program:* We have removed the obsolete requirement that an ASC must establish a program for identifying and preventing infections, maintaining a sanitary environment, and reporting the results to the appropriate authorities. This requirement should have been removed when a new condition for coverage dedicated to infection control was adopted.
- *E-prescribing:* We have retired older versions of e-prescribing transactions for Medicare Part D and adopted the newer versions to be in compliance with the current e-prescribing standards.
- *Physical and Occupational Therapist Qualifications:* We have removed the outdated personnel qualifications in the current Medicaid regulations and refer to the updated Medicare regulations.
- *Organ Procurement Organizations (OPOs) Definitions:* We have updated definitions related to organ procurement as the meaning of these definitions has changed over time.
- *Organ Procurement Organizations (OPOs) Administration and Governing Body:* We have removed duplicate regulations. This change does not alter or change the existing regulations related to the requirements that the OPO governing body must meet, such as, having full legal authority for the management of all OPO services.

Responds to Stakeholder Concerns: We have identified nomenclature and definition changes that will improve clarity and update our regulations to terms widely used by the public.

- *Removal of the Term ''Recipient'' for Medicaid:* We have removed the term ''recipient'' from current CMS regulations and made a nomenclature

change to replace ''recipient'' with ''beneficiary'' throughout the CFR. In response to comments from the public to discontinue our use of the unflattering term ''recipient'' under Medicaid, we have been using the term ''beneficiary'' to mean all individuals who are eligible for Medicare or Medicaid services.

• *Replace the Term ''Mental Retardation'' with ''Intellectual Disability'':* We have replaced all references in CMS regulations to the unflattering term ''mentally retarded'' with ''individuals who are intellectually disabled'' that has gained wide acceptance in more recent disability laws.

C. Summary of Costs and Benefits

1. Overall Impact

There are cost savings in many areas. Two areas of one-time savings are particularly substantial. First, we estimate that one-time savings to ESRD facilities are likely to range from about $47.5 to $217 million, but we are using $108.7 million as our estimate. Second, we also estimate a one-time savings of $18.5 million to ASCs through reduced emergency equipment requirements. Both of these estimates are conservative and total savings could be significantly higher. The many types of recurring savings that these provisions will create include avoidance of business and payment losses for physicians and other providers that are difficult to estimate but likely to be in the tens of millions of dollars annually through the reforms we propose for re-enrollment and billing processes. We have identified other kinds of savings that providers and patients will realize throughout the preamble. Taking all of the reforms together, we estimate that the overall cost savings that this rule will create will exceed $200 million in the first year. This includes the one-time savings related to ESRD and ASC reforms, as well as the savings to providers in reductions in lost billings, paperwork costs, confusion, and other burden reductions discussed throughout this preamble. All of these potential savings are summarized in the table that follows.

2. Section-by-Section Economic Impact Estimates for 2012

The following chart summarizes the provisions for which we are able to provide specific estimates for savings or burden reductions:

Provisions	Frequency	Likely savings or benefits (millions)	Likely five year saving or benefits (rounded to nearest ten million)
End-Stage Renal Disease (ESRD) Facilities (§ 494.60)	One-Time	$108.7	$110
ASC Emergency Equipment (§ 416.44)	One-Time	18.5	20
Revocation of Enrollment/Billing Privileges (§ 424.535)	Recurring	100.0	500

II. Background

In January 2011, the President issued Executive Order 13563, ''Improving Regulations and Regulatory Review.'' Section 6 of that order requires agencies to identify rules that may be ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' In accordance with the Executive Order, the Secretary of the Department of Health & Human Services (HHS) published on May 18, 2011, a Preliminary Plan for Retrospective Review of Existing Rules (*http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system*). As shown in the plan, the Centers for Medicare & Medicaid Services (CMS) has identified many obsolete and burdensome rules that could be eliminated or reformed to improve effectiveness or reduce unnecessary red tape and other costs, with a particular focus on freeing up resources that health care providers, health plans, and States could use to improve or enhance patient health and safety. CMS has also examined policies and practices not codified in rules that could be changed or streamlined to achieve better outcomes for patients while reducing burden on providers of care. CMS has also identified non-regulatory changes to increase transparency and to become a better business partner.

As explained in the plan, HHS is committed to the President's vision of creating an environment where agencies incorporate and integrate the ongoing retrospective review of regulations into Department operations to achieve a more streamlined and effective regulatory framework. The objective is to improve the quality of existing regulations consistent with statutory requirements; streamline procedural solutions for businesses to enter and operate in the marketplace; maximize net benefits (including benefits that are difficult to quantify); and reduce costs and other burdens on businesses to comply with regulations. Consistent with the commitment to periodic review and to public participation, HHS will continue to assess its existing significant regulations in accordance with the requirements of Executive Order 13563. HHS welcomes public suggestions about appropriate reforms. If, at any time, members of the public identify possible reforms to streamline requirements and to reduce existing burdens, HHS will give those suggestions careful consideration.

We received several comments from the public that identified areas for possible future reform. We received comments from different industries including but not limited to national organizations (for example, the American Academy of Family Physicians and the American Academy of Ophthalmology), associations, and hospitals. Suggestions for areas of reform ranged across provider and supplier types and included a variety of ideas on how to streamline requirements, reduce excessive burdens, and increase transparency. We are reviewing these recommendations to determine if and where possible improvements can be made through future rulemaking or other vehicles. We note that some of the recommendations in the comments were closely related to areas being reformed in this rule. Therefore, we have provided responses to those comments in the related sections below.

III. Provisions of the Proposed Rule and Analysis of and Response to Public Comments

The following is a description of each of the proposals set forth in the October 24, 2011 proposed rule (76 FR 65909). We grouped the proposals into three

categories—(1) Removes unnecessarily burdensome requirements; (2) removes obsolete regulations; and (3) responds to stakeholder concerns. There were 14 specific reforms included in the proposed rule. As noted above, we requested comments on additional areas for future reforms in these three areas or others. We seek to address these goals while maintaining high standards for the quality of care delivered to Medicare and Medicaid beneficiaries.

A. Removes Unnecessarily Burdensome Requirements

The following provisions provide some form of burden relief to providers and suppliers by modifying, removing, or streamlining current regulations that we have identified as excessively burdensome.

1. End-Stage Renal Disease (ESRD) Facilities (§ 494.60)

Current regulations at 42 CFR part 494 provide Conditions for Coverage (CfCs) for Medicare-participating end-stage renal disease (ESRD) facilities. Effective February 9, 2009, these regulations were updated to include Life Safety Code (LSC) provisions that we applied to ESRD facilities to standardize CMS regulations across provider types. When the new regulation was first promulgated, we believed that standardized application of the LSC was desirable and that the costs for ESRD facilities would not be excessive. However, we have since determined that standardization may not be appropriate given the non-residential and unique characteristics of ESRD facilities and the increased burden created by these requirements without the commensurate benefit. Chapters 20 and 21 of the National Fire Protection Agency's (NFPA) 101 LSC, 2000 Edition, were incorporated by reference in the ESRD regulations at § 494.60(e).

When implemented, these LSC regulations were found to duplicate many provisions of existing State and local fire safety codes covering ESRD facilities. Although the State and local codes protected patients from fire hazards, our rule incorporating the NFPA 101 LSC by reference retroactively imposed some additional structural requirements. We believe that some of these additional requirements, such as smoke compartments (per section 20.3.7/21.3.7 of NFPA 101) are unnecessary for most ESRD facilities. Smoke compartments, for example, are required in hospital and ambulatory surgical centers where patients are anesthetized, unconscious, or sleeping overnight. Smoke compartments are unnecessary in ESRD facilities as these compartments support a ''defend in place'' fire strategy which assumes the occupants of a location cannot immediately evacuate in case of fire. However, in dialysis facilities, this is not the case because the evacuation process from fire entails rapid disconnection from the dialysis machine and a quick exit.

In retrospect, the additional structural requirements of NFPA 101 potentially could improve patient safety from fire in specific dialysis facilities that pose a higher risk for life safety from fire by their proximity to a potential fire source or their barriers to prompt evacuation from fire. These higher risk locations are those dialysis facilities that are adjacent to ''high hazardous'' occupancies and those facilities that do not have a readily available exit to the outside for swift, unencumbered evacuation.

However, data demonstrate that there is an extremely low risk of fire in outpatient dialysis facilities, and there are no recorded patient injuries or death due to fire in the 40 years of the Medicare ESRD program. The Federal Emergency Management Agency's (FEMA) Topical Fire Report Series (TFRS) documented the low fire risk of ESRD facilities, which ranked lowest (0.1 percent) in fire incidence among all health care facilities. (Medical Facility Fires, TFRS Volume 9, Issue 4). We believe that the reason the fire risk is so low in dialysis facilities is due to the following combination of factors:

- ESRD facilities do not have fire ignition sources commonly found in other medical facilities, for example, cooking, anesthesia, paint shops, or piped-in gases, and are generally configured with open patient treatment areas providing exits directly to the outside;
- Dialysis patients are not anesthetized and are required at § 494.60(d)(2) of the ESRD regulation to be trained in emergency disconnect from their dialysis treatment and evacuation from the building;
- Section 494.60(c)(4) of the ESRD regulation requires that staff be present in the patient treatment area at all times during treatment and therefore immediately available to assist in emergency evacuation.

While the risks of fire are very low in a dialysis facility, the costs of complying with the LSC requirements in dialysis facilities are high. Through research discussed in the following paragraph, CMS learned that the actual costs for renovation and construction necessary for compliance with the additional requirements of NFPA 101 for dialysis facilities were considerable and profoundly exceed the original government estimate of $1,960 per facility, as published in the proposed rule for the 2008 ESRD CfC (70 FR 6242).

To estimate the true costs for renovation and construction necessary to comply with the requirements for NFPA 101, in June 2011, CMS asked ESRD providers to provide estimates of the financial impact of implementing four potentially-costly additional requirements of NFPA 101. They included smoke compartment barriers, occupancy separations, hazardous area separations, and upgraded fire alarms. Owners of 3,756 of 5,600 existing certified dialysis facilities responded to the CMS request for cost projections. The responders represented approximately 70 percent of existing dialysis facilities, including hospital-owned facilities and those owned by small, medium, and large dialysis organizations.

The data collected showed that approximately 50 percent (an estimated 2,800) of the existing ESRD facilities would require renovations or upgrading of at least one of the four elements to comply with the requirements of NFPA 101. There are several reasons why, in June 2011, approximately 50 percent of existing dialysis facilities had not been renovated to comply with the February 2009 implementation date. The primary reason was the pervasive inconsistency in knowledge, interpretation, and application of NFPA 101 to ESRD facilities that we have become aware of since the 2009 implementation date. There was a high variability in the cost estimates submitted, ranging from a low of $23,500 to a high of $222,000 for an existing facility which needed to renovate, construct and upgrade all four components. The average per-facility cost estimates submitted for the additional structural requirements of NFPA 101 are as follows:

- Smoke compartments—$32,544
- Occupancy separation—$28,139
- Hazardous areas separation—$16,976

The total average cost for a facility to meet all three requirements would be $77,659. We suspect that the variability of the estimates may be due to differing State and local requirements already in existence, differences in contractor costs, varying building characteristics (for example, age, size, construction type), and the inconsistent interpretations and applications of NFPA 101 that are prevalent across the nation. The wide range of estimates makes it difficult to determine an average cost related to implementation of NFPA 101. However, using the average costs for the individual

structural requirements listed above, if 50 percent or 2,800 facilities required only renovation for hazardous area separation, the savings would be $47.5 million. If 2,800 facilities required renovation for all three structural requirements, the total savings from the burden reduction at the average estimate for all three would be $217 million.

These amounts represent a significant financial burden on facilities, and we believe that there will be little or no improvement in patient safety from fire for a majority of them. Expenditures of this magnitude would likely divert resources away from areas which do affect dialysis patient safety, such as infection control and prevention.

The cost estimates do not account for the added burden that renovation to comply with NFPA 101 would impose on dialysis patients who must be relocated to other ESRD facilities for their treatments during construction. Significant additional costs would also be incurred by Federal government agencies and State Survey Agencies for oversight activities of LSC surveys which often duplicate State LSC surveys.

Based on information gained since publication of the updated ESRD CfC, we have concluded that the enforcement of the LSC requirements of NFPA 101 add costs out of proportion to any added protection that they may afford in dialysis facilities which are not at higher risk of fire penetration from adjacent industrial ''high hazard'' occupancies and where swift, unencumbered evacuation to the outside is available. Therefore, we proposed revising § 494.60(e)(1) to restrict mandatory compliance with the NFPA 101 LSC to those ESRD facilities located adjacent to ''high hazardous'' occupancies and those facilities whose patient treatment areas are not located at grade level with direct access to the outside. This revision will retain the NFPA 101 LSC protections for those facilities in higher-risk locations while relieving burden on those for whom the subdivision of building space and other additional LSC requirements of NFPA 101 are unnecessary.

We intend to use the NFPA definition of ''high hazard occupancy'' found at A.3.3.134.8.2, Annex A, NFPA 101, Life Safety Code 2000, which applies to ''occupancies where gasoline and other flammable liquids are handled, used or stored under such conditions that involve possible release of flammable vapors; where grain dust, wood flour or plastic dusts, aluminum or magnesium dust, or other explosive dusts are produced; where hazardous chemicals or explosives are manufactured, stored, or handled; where cotton or other combustible fibers are processed or handled under conditions that might produce flammable flyings; and where other situations of similar hazard exist.''

We noted that all ESRD facilities would still be required to comply with State and local fire codes and safety standards under § 494.20. We also proposed revising § 494.60(e)(2) to clarify which ESRD facilities must use sprinkler-equipped buildings: Those housed in multi-story buildings of lesser fire protected construction types (Types II(000), III(200), or V(000), as defined in NFPA 101), which were constructed after January 1, 2008; and those housed in high rise buildings over 75 feet in height. We noted that this revision would not change the meaning or intent of § 494.60(e)(2), but instead would clarify it. That provision states that dialysis facilities participating in Medicare as of October 14, 2008, may continue to use non-sprinklered buildings if such buildings were constructed before January 1, 2008, and if permitted by State law.

The ESRD CfCs also address other topics related to fire and building safety that will remain in place under our revision. These existing CfC requirements include specific rules on how to handle chemicals related to the dialysis process, as well as general requirements for appropriate training in emergency preparedness for the staff and patients, including provisions for instructions on disconnecting from the dialysis machine during an emergency and instructions on emergency evacuation. We sought comments from the public on whether the other ESRD CfCs can be improved in a way that minimizes provider burden while protecting patient safety or, alternately, the extent to which remaining requirements are necessary and appropriate for the care and safety of dialysis patients. Similarly, we note that other CMS regulations include CfCs, and we sought comments on whether we should revisit these or other regulatory provisions or whether existing requirements are necessary and appropriate.

We received 15 public comments on our proposed changes to the LSC requirements for ESRD facilities. Commenters represented the entire dialysis community, including small, independent dialysis providers, large corporate dialysis organizations, dialysis provider coalitions, a nephrology nursing organization, a dialysis product manufacturer, and individual dialysis community members. Two comments were submitted by building and fire safety organizations.

All of the comments, with one exception, expressed strong support for the proposed rule and its intent to limit the application of the LSC requirements to ESRD facilities whose physical locations present a higher risk to life safety from fire. One commenter generally disagreed with the proposed changes.

Comment: All but one of the commenters supported our rationale for the proposed rule: that there is a historically low fire incidence in outpatient ESRD facilities; that most ESRD facilities provide available direct exits from the patient treatment area level to the outside at grade level; and that dialysis patients are routinely trained in emergency disconnect and evacuation procedures, as required in the ESRD CfCs, facilitating quick evacuation. The commenters concurred that these combined elements make the building and structural ''defend in place'' requirements of the LSC (as incorporated by reference into our regulations), which may differ from those of some State and local fire codes, a significant added burden with little or no gain in patient safety. Commenters also agreed that the requirements of current State and local fire safety codes sufficiently protect dialysis patients, and that many provisions in the LSC provisions are duplicative of those existing codes.

One comment from a building safety association agreed that, due to the overlapping, duplicative, and sometimes conflicting requirements between the LSC and State and local fire and building codes, limited application of the Federal LSC in ESRD would realize cost savings in not duplicating survey activities, but also for the dialysis facilities that may be required to comply with the overlapping and conflicting codes. The commenter also suggested that the cost savings published with the proposed rule were under-estimated.

Some of the commenters agreed that the expenditures for compliance with the LSC would be significantly higher than was predicted in the proposed rule for the 2008 ESRD CfC. One commenter from a large dialysis organization stated that the projection of costs for their facilities alone was just short of $120 million. Several commenters specifically agreed with the preamble language that expenditures for renovations and construction to comply with LSC requirements would divert resources away from issues which have been demonstrated to negatively impact dialysis patients, such as infections.

Many commenters expressed appreciation that we reconsidered the strict application of the LSC to all ESRD facilities and for our responsiveness to the dialysis community's concerns and desire to expend their resources where the greatest patient safety will be realized.

Response: We thank the commenters for their comments. We share the common goals of optimizing the health and safety of dialysis patients and allocating resources where they will benefit patients most. We appreciate your support for these proposed changes.

Comment: Two commenters suggested that more facilities should be included in the proposed exemption from the LSC requirements. One commenter suggested that ESRD facilities that do not have exits at grade level should also be exempted from the LSC requirements. The rationale for this suggestion was that these facilities do not generate a risk equivalent to those facilities located adjacent to ''high hazardous'' occupancies. Another commenter suggested that dialysis facilities providing only home dialysis training and support services be exempted from the LSC, citing the limited provision of on-site dialysis and generally higher staff-to-patient ratios.

Response: While there may be a higher risk of fire when an ESRD facility is located adjacent to a ''high hazardous'' occupancy, we consider the provision of swift, unencumbered evacuation integral to dialysis patients' life safety from fire. Once a dialysis patient has performed emergency disconnection from their treatment, the additional time it may take to traverse stairwells and/or passageways from a non-grade level treatment area to reach an outside exit justifies the additional structural requirements of the LSC provisions for ''defend in place''. Home dialysis patients who may be intermittently receiving their dialysis treatments at the dialysis home training and support facility have the same life safety and fire risks as do in-center dialysis patients. To ensure patient safety, we are not making changes to the proposed regulations in response to these comments.

Comment: Three commenters requested further clarification regarding the provision of exits from the patient treatment level to grade level. The commenters inquired whether ESRD facilities which were slightly above grade level and supplied interior Americans with Disabilities Act (ADA)-compliant accessibility ramps from patient treatment areas to grade level (for example, down 5–10 feet) would be considered as providing exits at grade level, and therefore exempt from the LSC requirements.

Response: The terminology for the provision of exit ''to the outside at grade level from the patient treatment area level'' is intended to apply to ESRD facilities that are on the ground/grade level of a building where patients do not have to traverse up or down stairways or passageways within the building to evacuate to the outside. ADA-compliant accessibility ramps in the exit area that provide ease of access between the patient treatment level and the outside street level would not be considered stairways or passageways. An ESRD facility which provides one or more exits to the outside at grade level from the patient treatment level, and a patients' exit path which includes an ADA-compliant accessibility ramp to the outside would be exempt from the LSC requirement, as long as it was not located adjacent to a high hazardous occupancy.

Comment: Three commenters requested further clarification of how ''adjacent to'' would be defined. All three commenters suggested that the definition of ''adjacent to'' should be equivalent to sharing a wall with the other occupancy. One added that sharing a ceiling or floor with the other occupancy should be included in the definition.

Response: We recognize that there are different definitions of the term ''adjacent'', and use it in reference to ESRD facilities that share a common wall, floor, or ceiling with a high hazardous occupancy. Because of the higher risk of fire occurrence in high hazardous occupancies, sharing a common wall, floor, or ceiling increases the risk of fire penetration to the ESRD facility. This increased risk makes the additional structural requirements of the LSC appropriate for patient protection.

Comment: Two commenters requested further clarification regarding the definition of a ''high hazardous occupancy'', and suggested the definition from the preamble language be retained.

Response: As stated in the preamble to the proposed rule, we use the definition of ''high hazardous occupancy'' from the National Fire Protection Association (NFPA) 101, 2000 Edition at section A.3.3.134.8.2: ''occupancies where gasoline and other flammable liquids are handled, used or stored under such conditions that involve possible release of flammable vapors; where grain dust, wood or plastic dusts, aluminum or magnesium dust, or other explosive dusts are produced; where hazardous chemicals or explosives are manufactured, stored, or handled; where cotton or other combustible fibers are processed or handled under conditions that might produce flammable flyings; and where other situations of similar hazard exist.''

Comment: Two commenters requested clarification regarding the proposed language change for ESRD facilities that require sprinkler systems. The first issue raised was how to determine when a building was constructed. The second issue raised was whether the language in the proposed rule indicating that ESRD facilities located in high rise buildings are required to have sprinkler systems would be binding regardless of the building construction date.

Response: We appreciate the comments pointing out ambiguities in the proposed rule language, which was intended to clarify, but not change, the sprinkler requirement finalized in the April 15, 2008 ESRD CfC final rule (73 FR20370), and set out at § 494.60(e)(2). For the purposes of the sprinkler requirement, the date of building ''construction'' is the date the structural permit approvals and plan reviews were completed by the authority having jurisdiction.

Regarding sprinklers in high-rise buildings, the commenters are correct that the requirement for sprinklers in facilities housed in high rise buildings was intended to be applicable to those buildings constructed after January 1, 2008. We have revised the language in the final rule accordingly.

Comment: Two commenters believe that the effective date for compliance with the LSC requirement of February 9, 2009, the date published in the ESRD CfC Final Rule published in 2008, is no longer meaningful. The commenters stated the uncertainties about the applicability and scope of the LSC requirements that have existed since the ESRD CfC Final Rule have prevented facilities from undergoing the necessary construction for compliance, and that a phase-in period would be needed for applicable facilities. One commenter suggested that a new effective date for compliance be established at 12 months from the date of publication of this rule.

Response: We recognize that the delay in enforcement of the LSC requirements for ESRD facilities may appear to make the February 9, 2009 date less meaningful, but that date will still be used to determine whether the building housing an ESRD facility which must comply with the LSC requirement is considered ''new'' or ''existing''. We did not make any changes based on this comment.

Comment: One commenter agreed that most ESRD facilities are covered by

State and local fire and building safety codes. For example, the commenter stated that 43 of 50 States have adopted the International Fire Code in coordination with the International Building Code. The commenter suggested that there would be no reason in such jurisdictions that enforce a current building code and life safety and maintenance code to require enforcement of a LSC requirement. The commenter suggested that a LSC requirement would be appropriate for enforcement in jurisdictions where there is no State or local code. Although the commenter stated that ''most states, and most large population jurisdictions'' do have and enforce such current codes, they suggested that this rule apply only to those ESRD facilities located in jurisdictions that do not adopt a current national model building and fire code.

Response: We do not currently maintain an accounting of the fire and building safety codes adopted in individual States and local jurisdictions. Also, we do not adopt CfCs that vary by jurisdiction, although CMS defers to state law where such laws impose stricter standards than CMS requirements. We believe that limiting required adherence to the NFPA LSC requirements based on ESRD location is appropriate and did not make any changes in response to this comment.

Comment: Several commenters expressed concerns about the ESRD survey process in conjunction with the LSC. The issues they raised included how the designation of ESRD facilities as exempt from LSC requirements would be made; who would conduct the LSC compliance surveys; what education those survey personnel would receive to prevent inconsistent and inaccurate application; and how the enforcement of the LSC for the applicable facilities would be implemented. Some commenters provided suggestions relevant to these topics.

Response: We appreciate the many suggestions for assuring a smooth, efficient, and consistent method for implementing a standardized ESRD LSC compliance survey and enforcement process for applicable facilities. We will take them into consideration in the development of such a process.

Comment: The sole opposing commenter agreed that there is low risk and few fire incidents in outpatient ESRD facilities, and suggested that this is because ''a majority of'' ESRD facilities already meet the requirements of NFPA 101.

Response: We agree that application of a fire and building safety code may reduce injuries from fire. However, the ESRD CfCs did not include a Medicare LSC requirement until 2008, and, as stated in the preamble to the proposed rule, there have been no reported patient injuries or deaths due to fire in dialysis facilities in the 35 years of the Medicare ESRD program. We believe this comment supports the conclusion that existing State and local fire and building safety codes were adequately protecting patients and staff prior to the ESRD CfC requirement finalized in 2008. In the preamble to the proposed rule, we noted that all ESRD facilities must continue to comply with State and local fire codes and safety standards under § 494.20.

Comment: The opposing commenter also expressed concern that the procedure for emergency disconnect from hemodialysis treatment is ''potentially life threatening if carried out by a dialysis patient.'' The commenter cited a CMS publication from 2002, which listed instructions for an emergency disconnection procedure.

Response: We appreciate the commenter's concern; however cited the publication is 10 years old and no longer reflects current standards. In the 2008 ESRD Conditions for Coverage at § 494.60(d)(2), we require that all dialysis patients be instructed in how to disconnect themselves from treatment and evacuate in case of emergency. We contend that it is the unencumbered evacuation process that is primary to outpatient ESRD life safety from fire. We did not make any changes in response to this comment.

We received three public comments that suggested areas of ESRD policy for possible future reform.

Comment: Two commenters expressed concerns about the mandatory reporting of infection data to the Centers for Disease Control and Prevention (CDC) system, the National Healthcare Safety Network (NHSN) that is included in the ESRD Quality Incentive Program (QIP). The commenters support the requirement for infection data reporting as an incentive to improve care, but detailed multiple reasons why NHSN was burdensome, cumbersome, and, because it is a manual data entry system, subject to error and inaccurate data. One commenter outlined predicted labor costs for enrollment and manual data submission to NHSN, and estimated that it would cost in excess of $1,000,000 total for existing ESRD facilities. Both commenters suggested that we arrange an alternative method for mandatory infection data submission to NHSN, such as direct electronic data transfer and/or batch data submission.

Response: We are aware of the many concerns regarding the mandatory infection data submission to NHSN that is included in the ESRD QIP, and are currently working with the CDC to explore methods for facilitating the use of NHSN as a reliable national system for this important ESRD infection data.

Comment: One commenter addressed burdens of obtaining and documenting data regarding ESRD patients' co-morbid conditions for the purpose of claiming the case-mix adjustments in the ESRD Prospective Payment System (PPS). The commenter provided reasons why the required documentation of this patient information was difficult and costly to obtain, resulting in loss of revenue, due to under-reporting and the costs of collecting, reviewing, and auditing medical records.

Response: The requirement for documentation of certain co-morbidities, for the purpose of receiving additional payment for those conditions, is a condition of payment. That is, ESRD facilities have the option of providing appropriate, designated criteria in the medical record to support the co-morbidity in order to receive a payment adjustment for those co-morbidities. For example, there must be documentation that a patient had a positive chest x-ray or positive sputum in order to receive the payment adjustment for certain bacterial pneumonias. ESRD facilities can choose not to provide appropriate documentation, but they will not receive the payment adjustment. Because these payments are elective and not mandatory, we consider the associated paperwork requirements to be appropriate.

Comment: One commenter recommended revisions to the ESRD CfC addressing Patients' Rights (42 CFR 494.70(a)(7)) that would clarify expectations for educating ESRD patients on their options for dialysis modalities and settings.

Response: We appreciate the commenter's suggestions, and will take them into consideration for possible future reform.

Comment: One commenter suggested an annual CMS review and update of the ESRD CfCs, to reflect the dynamic clinical and technological aspects of the dialysis industry.

Response: We recognize the dynamic nature of dialysis care and treatment, but when new standards of care are developed, it may take years to determine the appropriateness of precise requirements. With this understanding, we strive to develop regulations that allow room for providers and suppliers to appropriately

adopt new standards of care without having to wait for new regulations.

The above summarizes the ESRD LSC provision made in our proposed rule and the comments we received. We are finalizing the policies above as proposed and clarifying in the regulatory text that the requirement for sprinklers in facilities housed in high rise buildings was intended to be applicable to those buildings constructed after January 1, 2008.

Contact: Lauren Oviatt, 410–786–4683.

2. ASC Emergency Equipment

Section 1832(a)(2)(F)(i) of the Act specifies that Ambulatory Surgical Centers (ASCs) must meet health, safety, and other requirements specified by the Secretary in regulation in order to participate in Medicare. The Secretary is responsible for ensuring that the Conditions for Coverage (CfCs) and their enforcement are adequate to protect the health and safety of all individuals treated by ASCs, whether they are Medicare beneficiaries or other patients.

To implement the CfCs, we determine compliance through State survey agencies that conduct onsite inspections using these requirements. ASCs also may be deemed to meet Medicare standards if they are certified by one of the national accrediting organizations whose standards meet or exceed the CfCs. The ASC regulations were first published on August 5, 1982 (47 FR 34082). Most of the revisions since then have been payment-related, with the exception of a final rule published on November 18, 2008 (73 FR 68502) that revised four existing health and safety CfCs and created three new health and safety CfCs (42 CFR 416.41 through 416.43 and 416.49 through 416.52).

Sections 416.44(c)(1) through (c)(9) provide a detailed list of specific emergency equipment that must be available to the ASC's operating room, for example, emergency call system; oxygen; mechanical ventilator assistance equipment including airways, manual breathing bag, and ventilator; cardiac defibrillator; cardiac monitoring equipment; tracheotomy set; laryngoscopes and endotracheal tubes; suction equipment; and emergency medical equipment and supplies specified by the medical staff. In recent years, we have learned from the ASC community that some of these equipment requirements are outdated, while other equipment requirements would not be applicable to the emergency needs of all ASCs. The emergency equipment CfC has not been revised since its inception in 1982. To ensure that no ASC is burdened with maintaining unnecessary equipment, we proposed to revise the requirements for this CfC.

In the October 24, 2011 proposed rule (76 FR 65909 through 65911), we proposed to remove the list of emergency equipment at § 416.44(c)(1) through (c)(9) and proposed at § 416.44(c) to require that ASCs, in conjunction with their governing body and the medical staff, develop policies and procedures which specify the types of emergency equipment that would be appropriate for the facility's patient population, and make the items immediately available at the ASC to handle intra- or post-operative emergencies. We also proposed that the emergency equipment identified by an ASC meet the current acceptable standards of practice in the ASC industry. We stated that we believe these proposed changes would enable ASCs to better meet current demands, while also ensuring ASCs have the flexibility necessary to respond to emergency needs and incorporate the use of modern equipment most suitable for the procedures performed in the facility.

We received ten public comments on our proposed changes to the ASC emergency equipment requirements. Commenters included organizations and associations that represent surgeons, anesthesiologists, nurse anesthetists, gastroenterologists, hospitals, state health commissions, ophthalmologists, health policy and ambulatory surgical centers.

Seven out of the ten comments that we received expressed support for the proposed rule and its intent to remove the prescribed list of outdated and unnecessary emergency equipment from the current ASC regulations. Two commenters opposed the removal of the list and recommended the current regulation requirements stay in place. One commenter opposed the removal of the list, but offered an alternative list of emergency equipment for ASCs.

Comment: Several commenters supported our rationale for the proposed rule. The commenters concurred that the proposed changes would allow ASCs to have more flexibility to respond to emergency needs and also incorporate the use of modern and specific emergency equipment most suitable for the procedures performed in each facility.

Response: We thank the commenters for their support. We share the common goals of optimizing the health and safety of ASC patients and allowing ASCs to allocate their resources to the most current and specific emergency equipment that is tailored to the needs of patients who receive treatment in their facilities.

Comment: One commenter opposed the elimination of the current emergency equipment list and instead offered an alternative list of emergency equipment that ASCs must have available in an emergency situation.

Response: As we stated in the proposed rule preamble, the purpose of removing the outdated list of emergency equipment is to remove the burden of requiring ASCs to maintain unnecessary equipment, incorporate the use of modern emergency equipment, and give the ASC the flexibility to meet the needs of patients for the procedures performed in ASC facilities. We would like to reiterate that the removal of the prescribed list of emergency equipment in no way relieves the ASCs of maintaining a comprehensive supply of emergency equipment and supplies that are necessary to respond to a patient emergency in an ASC facility. Under this final rule, an ASC's governing body and medical staff are required to work in conjunction to develop policies and procedures which specify the types of emergency equipment appropriate for the facility and to make all of these items immediately available at the ASC to handle intra- or post-operative emergencies. Every ASC will be required to have emergency equipment in its facility that meets current acceptable standards of practice for the types of surgeries performed in the ASC. Moreover, we believe replacing the current list of emergency equipment with a revised standard list of emergency equipment would create the same problems that we are trying to eliminate in terms of mandating acquisition of the same equipment by every ASC, even when some of that equipment is not needed for the types of surgeries performed in a particular ASC. In addition, removing a prescriptive list of emergency equipment will eliminate the need to continually update the ASC regulations with a revised list whenever there is a new piece of equipment whose use becomes standard for handling various types of surgical emergencies.

Comment: We received two comments that suggested the emergency equipment list remain in place since it is the same list of equipment required for hospital surgery that is located in the current hospital Conditions of Participation.

Response: We note that the list of equipment required for hospitals at 42 CFR 482.51(d)(3), while similar to that in the current ASC rule at 42 CFR 416.44(c), is not worded identically and is in some cases less specific, providing more flexibility to hospitals. Further, as

we stated in the previous response, we are still requiring ASCs to identify and maintain a comprehensive, current and appropriate set of emergency equipment, supplies and medications that meet current standards of practice, and which will enable the ASC to appropriately respond to anticipated emergencies that are specific to the types of surgery performed in the ASC as well as being appropriate to the ASC's patient population. In addition, because hospital operating room suites typically handle a wider range of surgeries, including more complex surgeries than those performed in an ASC, it is reasonable that there would be differences in the standards for hospitals as compared to ASCs. We believe the requirement we have proposed for ASCs is appropriate to assure the safety of ASC patients without creating undue burdens on ASCs.

Comment: One commenter that supported our proposed changes to the emergency equipment requirement noted the Malignant Hyperthermia Association of the United States recommendation that all facilities that administer malignant hyperthermia-triggering anesthetics should stock a minimum of 36 vials of dantrolene sodium for injection.

Response: We thank the commenter for their support of the proposed rule. Currently, the ASC requirements do not mandate that ASCs stock a prescribed supply of any specific medication needed to handle specific intra-operative or post-surgical emergencies, such as malignant hyperthermia. However, we would expect that ASCs that perform procedures using anesthetics that involve a risk of malignant hyperthermia would address this risk in the emergency procedures they develop, and would stock appropriate supplies, including medications, to handle such emergencies. The proposed changes to the standard governing emergency equipment and supplies requires that ASCs meet the current acceptable standards of practice, and that all Medicare-certified ASC facilities incorporate the identified emergency equipment, supplies and medications that are most suitable for the potential emergencies associated with the procedures performed in the ASC, and the population the ASC serves.

Therefore, for the reasons set forth above, we are finalizing our proposal, without modification, to remove the list of emergency equipment at § 416.44(c)(1) through (c)(9). Further, we are finalizing our proposal to modify § 416.44(c) to require that ASCs, in conjunction with their governing body and the medical staff, develop policies and procedures specifying the types of emergency equipment that are appropriate for the facility's patient population, and make the items immediately available at the ASC to handle inter- or post-operative emergencies. We are also finalizing our proposal that the emergency equipment identified by the ASC meet the current acceptable standards of practice in the ASC industry. CMS will monitor the implementation of this change in emergency equipment requirements and will revisit the issue if it is determined to have an adverse impact on patients.

Contact: Jacqueline Morgan, 410–786–4282.

3. Revocation of Enrollment and Billing Privileges in the Medicare Program (§ 424.535)

On June 27, 2008, we published a final rule in the **Federal Register** (73 FR 36448) entitled ''Medicare Program; Appeals of CMS or CMS Contractor Determinations When a Provider or Supplier Fails to Meet the Requirements for Medicare Billing Privileges.'' In that rule, we added a new provision at § 424.535(c) to provide that: ''After a provider, supplier, delegated official, or authorizing official has had their billing privileges revoked, they are barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar. The re-enrollment bar is a minimum of 1 year, but not greater than 3 years, depending on the severity of the basis for revocation.'' The purpose of this provision was to prevent providers and suppliers from being able to immediately re-enroll in Medicare after their Medicare billing privileges were revoked.

In our October 24, 2011 proposed rule, we proposed to revise § 424.535(c) to eliminate the re-enrollment bar in instances where providers and suppliers have had their billing privileges revoked under § 424.535(a) solely for failing to respond timely to a CMS revalidation request or other request for information. As we explained in the proposed rule, we believe that this change is appropriate because the re-enrollment bar in such circumstances often results in unnecessarily harsh consequences for the provider or supplier and causes beneficiary access issues in some cases. We have learned of numerous instances where the provider's failure to respond to a revalidation request was unintentional; that is, the provider was not aware of the request due to, for instance, misrouted mail or a clerical mistake. This is different from other revocation reasons, which may be more serious—for example, when providers have been excluded from Medicare, Medicaid or other Federal health care programs or have been convicted of a felony as described in § 424.535(a)(2) and (a)(3), respectively. Moreover, there is another, less restrictive regulatory remedy available for addressing a failure to respond timely to a revalidation request. This remedy was identified in proposed § 424.540(a)(3).

We received 9 public comments on our proposed change to § 424.535(c). The comments, which we have summarized, and our responses, are as follows:

Comment: Many commenters expressed support for our proposed revision to § 424.535(c). They agreed with our view that the imposition of a re-enrollment bar is unduly harsh in cases where a revocation is based solely upon the provider or supplier's failure to respond timely to a revalidation request or other request for information. Several commenters added that a re-enrollment bar in such instances could also cause beneficiary access issues. Another commenter stated that a re-enrollment bar is more appropriate for providers and suppliers that intentionally break laws and violate the trust of their patients.

Response: We appreciate the commenters' support for our proposal. We are finalizing our proposed change to § 424.535(c), which we believe will help reduce the administrative burden on providers and suppliers whose revocations are based solely on a failure to respond timely to a revalidation or other request for information. As commenters pointed out and as we explained above, some legitimate providers and suppliers were barred from being able to treat and bill for Medicare patients because of the wide scope of this reenrollment bar.

Comment: Several commenters, while expressing support for our proposed change to § 424.535(c), sought clarification as to: (1) When this change would become effective, and (2) whether it would apply to providers and suppliers that were mailed a revalidation notice in September 2011 but unintentionally missed the 60-day deadline for revalidating their enrollment.

Response: The revision to § 424.535(c) will become effective upon the effective date of this final rule. It will not be applied retroactively.

Comment: Several commenters opposed our proposed change to § 424.535(c). One commenter stated that under § 424.535(a), CMS may—but is not required to—revoke and establish a

re-enrollment bar if a provider or supplier has not responded timely to a revalidation or other informational request. Hence, CMS should not remove its discretionary authority to impose a re-enrollment bar in these instances. The commenter also recommended that CMS provide data regarding the number of times that Medicare contractors have revoked Medicare billing privileges and established a re-enrollment bar in such cases. Another commenter asked how our proposed revision to § 424.535(c) would reduce fraud, waste and abuse and how CMS would deal with providers and suppliers that repeatedly fail to respond to revalidation or other informational requests; the commenter asked, for instance, whether a site visit would be performed and whether the provider's ownership would be verified.

Response: While CMS has the discretion to revoke a provider or supplier's Medicare billing privileges under § 424.535(a) for a provider or supplier's failure to respond to a revalidation or other informational request, the imposition of a re-enrollment bar under § 424.535(c) is not discretionary. If the provider or supplier is revoked, a re-enrollment bar must follow. As explained above, we believe that an automatic re-enrollment bar for a revocation based on a failure to respond to a revalidation or other informational request is overly punitive. The most appropriate remedy, therefore, is to remove the re-enrollment bar in such situations.

With respect to the commenter's request that CMS furnish data regarding the number of revocations and associated re-enrollment bars that have been imposed, we do not believe that such information is necessary for our analysis. We proposed this change in an effort to reduce the administrative burden on any provider or supplier subject to the bar, regardless of how often CMS or its contractors have imposed re-enrollment bars.

We do not believe that the finalization of our proposed revision to § 424.535(c) will impact our ability to prevent or combat fraudulent activity in our programs. Providers and suppliers that fail to respond once or repeatedly to a revalidation or other informational request will still be subject to adverse consequences, including—as explained below—the deactivation of their Medicare billing privileges. CMS does—and will continue to—closely scrutinize every provider and supplier that seeks to reactivate its billing privileges or re-enroll in Medicare after a revocation. In fact, in the latter case, the provider or supplier would be subject to the ''high'' level of categorical screening under § 424.518(c)(3), which would include additional screening tools. In sum, the aforementioned safeguards should alleviate any program integrity concerns regarding our proposed change—which, as already noted, focuses on reducing the unfair burden to providers and suppliers that inadvertently fail to respond to revalidation or other informational requests.

The above summarizes this provision in our proposed rule and the comments received. We are finalizing our changes to § 424.535(c) as proposed.

Contact: Morgan Burns, 202–690–5145.

4. Deactivation of Medicare Billing Privileges (§ 424.540)

On April 21, 2006, we published a final rule in the **Federal Register** (71 FR 20753) titled ''Medicare Program; Requirements for Providers and Suppliers to Establish and Maintain Medicare Enrollment.'' As part of that rule, we established provisions for the deactivation of Medicare billing privileges at § 424.540.

a. Section 424.540(a)(1)

Section 424.540(a)(1) specifies that Medicare billing privileges may be deactivated if Medicare claims are not submitted for 12 consecutive months. The purpose of this provision was to prevent situations in which unused, idle Medicare billing numbers could be accessed by individuals and entities to submit false claims. Currently, Medicare billing privileges are deactivated (made ineligible for Medicare billing purposes) for providers or suppliers that have not submitted a Medicare claim for 12 consecutive months. If the deactivated provider attempts to submit a claim after the date of deactivation, the claim would be denied. To reactivate its Medicare billing privileges, a provider or supplier is required to recertify—generally via the submission of a complete CMS–855 enrollment application—that the provider or supplier's enrollment information currently on file with Medicare is accurate. Physicians and non-physician practitioners are deactivated most often due to billing inactivity.

In our October 24, 2011 proposed rule, we proposed to revise § 424.540(a)(1) to apply only to those providers and suppliers that do not submit a Form CMS–855I (the enrollment form for individual physicians and non-physician practitioners) to enroll in the Medicare program. As we explained in the proposed rule, we were mostly concerned with organizations that fail to submit a claim within a 12-month period, since business organizations would generally submit a claim on a more frequent basis. We felt, on the other hand, that there are instances in which individual practitioners had valid reasons for not filing claims within a 12-month period. These included, but were not limited to, cases where the practitioner: (1) Was enrolled in Medicare, but generally only treated non-Medicare patients, or (2) had multiple, separately-enumerated practice locations, yet typically only performed services at one of them. We also believed that the 12-month deactivation and reactivation processes increased the workload and administrative costs of Medicare contractors. For these reasons, we proposed the above-mentioned revision to § 424.540(a)(1)

We received 27 separately submitted public comments on our proposed change to § 424.540(a)(1). The comments, which we have summarized, and our responses, are as follows:

Comment: A significant number of commenters either opposed or expressed concerns about our proposed revision to § 424.540(a)(1). One commenter, for instance, stated that by allowing unused Medicare billing numbers to remain active, CMS is fundamentally increasing the risk of fraud, waste and abuse (for example, identity theft) in Medicare. Other commenters cited a number of Health and Human Services Office of Inspector General (OIG) reports, including OEI–03–01–00270 and OEI–04–08–4470, in support of OIG's contention that CMS should retain its existing discretionary authority to deactivate physicians and non-physician practitioners for 12 months of non-billing. Commenters also stated that these reports identified, among other things, the risks involved in allowing unused billing numbers to remain active.

Response: We understand the commenters' concerns and have elected not to finalize our proposed change to § 424.540(a)(1) at this time. The commenters are correct that our current deactivation authority for non-billing is discretionary. Upon further analysis, and based on the input we received from several commenters voicing reservations about our proposal, we do not believe it is necessary to revise this authority at this time. As commenters pointed out, a provider or supplier's failure to bill Medicare for an extended period of time raises numerous questions, such as whether the provider is still operational and meets the standards for his or her provider type. We believe that deactivation can protect the agency from risks associated with

misused provider numbers by (1) allowing CMS to confirm whether the provider or supplier continues to meet all Medicare requirements based on the provider or supplier's submission of a complete CMS–855 application; and (2) preventing others from misusing the provider or supplier's billing number, which was a concern that several commenters expressed.

CMS intends to study this issue further, as we believe that an appropriate balance between protecting the Medicare Trust Fund and reducing the burden on provider and suppliers is achievable. For example, CMS implemented in December 2011 a system for Automated Provider Screening that both simplifies enrollment into Medicare for providers and suppliers while increasing the ability of CMS to identify potentially ineligible or fraudulent providers and suppliers.

Our decisions not to finalize the proposed change to § 424.540(a)(1) and finalize our proposed change to § 424.535(c) are both grounded in efforts to weigh the potential benefits and costs to our program and providers. In the former case, we concluded that the program integrity risks associated with removing our discretionary deactivation authority in § 424.540(a)(1) outweighed the potential benefits of a reduced burden on providers and suppliers. However, as explained, we believe our proposed changes to § 424.535(c) will result in a decrease in provider and supplier burden without adversely impacting our ability to prevent and combat fraudulent activity in our programs. In the latter case, we do not see any increased program integrity risks that could potentially outweigh the benefits of reduced provider burden.

Comment: One commenter stated that almost all State Medicaid agencies deactivate physician and non-physician practitioner billing numbers based on a lack of claim submissions over a given time. The commenter asked CMS to explain—(1) Whether the Federal Employee Health Benefit Program (FEHBP) also deactivates billing privileges based on claim non-submissions, and; (2) why CMS will forgo deactivation in its proposed revision to § 424.540(a)(1) while most State Medicaid agencies will continue deactivations.

Response: Approximately 200 private plans participate in the FEHBP. In the FEHBP, providers bill plans, not the Federal government. Hence, there is no federal deactivation authority as such in the FEHBP. Other management approaches, most notably private plan decisions on participating providers and program-wide debarment, are used to deal with provider billing problems related to program integrity. Regardless, as explained above, we have decided not to finalize our proposed revision to § 424.540(a)(1).

Comment: Several commenters requested that CMS explain why it will continue its deactivation process for Medicare-enrolled provider and supplier organizations, yet did not fully implement the deactivation process for Medicaid and Children's Health Insurance Program providers that was proposed in the February 2, 2011 final rule titled ''Medicare, Medicaid, and Children's Health Insurance Programs; Additional Screening Requirements, Application Fees, Temporary Enrollment Moratoria, Payment Suspensions and Compliance Plans for Providers and Suppliers.'' The commenter believes that this represents an inconsistency in CMS's approach to deactivation.

Response: As we stated in the February 2, 2011 final rule, we decided not to finalize the 12-month deactivation provision in proposed § 455.418 based on the comments received and certain operational considerations. However, we also stated in that rule that while States should have the discretion ''to police their own provider enrollment,'' we recommended that States ''deactivate provider numbers that have not been used for an extended period of time.'' This recommendation, in our view, is consistent with our decision not to finalize our proposed change to § 424.540(a)(1).

Comment: One commenter agreed with CMS' policy to continue to deactivate billing privileges associated with physicians and non-physician practitioners who complete and submit the ''Medicare Enrollment Application—For Eligible Ordering and Referring Physicians and Non-Physician Practitioners (CMS–855O).''

Response: While we appreciate the commenter's support, we note that physicians and non-physician practitioners who complete the Form CMS–855O are not granted Medicare billing privileges. They do not and cannot send claims to Medicare for services they provide. They submit the form for the sole purpose of ordering or referring Medicare-covered items and services.

Comment: One commenter recommended that CMS continue to deactivate Medicare billing numbers for physicians and non-physician practitioners who submit the CMS–855O and the CMS–855R and who do not bill the Medicare program for 12 consecutive months. The commenter added that since CMS did not consider the impact of deactivation on physicians and other practitioners in the proposed rule's preamble or regulation text, the inclusion of our proposed change in final rulemaking without adequate public notice would violate the Administrative Procedures Act.

Response: As stated above, physicians and non-physician practitioners who complete the CMS–855O do not receive Medicare billing privileges and are thus not subject to deactivation under § 424.540(a)(1). In addition, we did not predicate our proposed change based on whether the physician or non-physician practitioner completed the CMS–855R. Deactivation for non-billing, in our view, should not be based solely on whether the physician or non-physician practitioner reassigns his or her benefits. Finally, we disagree with the commenter's assertion regarding CMS's consideration of the impact of deactivation on physicians and non-physician practitioners. We expressly outlined in the preamble to the proposed rule the burden imposed on such individuals because of the deactivation process. Indeed, it was this burden that encouraged us to propose our change to § 424.540(a)(1).

Comment: One commenter noted our statement in the proposed rule: ''We have issued guidance that requires our contractors to conduct certain verification activities to guard against physician and non-physician practitioner identity theft.'' The commenter asked CMS to furnish additional information about the techniques being used to prevent physician and non-physician practitioner identity theft.

Response: Since January 2010, Medicare contractors have been required to perform additional verification activities to confirm the identity of a physician or non-physician practitioner who is reporting, for instance, a change in his or her practice location address, special payment address, or correspondence address. Specifically, the contractor is required to compare the signature on the submitted Form CMS–855 change request with the signature on file. If they do not match, the provider must submit proper identification, such as a copy of a driver's license or passport. These and other verification procedures are outlined in Chapter 15 of CMS's Program Integrity Manual.

Comment: A commenter cited our statement in the proposed rule: ''Currently Medicare provider and supplier enrollment billing privileges are deactivated (made ineligible for

Medicare billing purposes) for providers and suppliers that have not submitted a Medicare claim for 12 consecutive months.'' The commenter believed that this statement was incorrect, arguing that CMS discontinued the automatic deactivation process in late 2010 or early 2011. The commenter requested that CMS explain why it: (1) Discontinued the automatic deactivation process for physicians, non-physician practitioners, medical groups and other suppliers, and (2) has not implemented an automatic deactivation process for Part A providers.

Response: To clarify, the statement the commenter quotes was meant to describe CMS' existing deactivation authority at § 424.540(a)(1). Insofar as the automatic deactivation process, we believed that a case-by-case approach was more appropriate, in part for reasons which we have discussed in this final rule. Indeed, the burdens posed by automatic deactivations—both on our contractors and on those providers and suppliers that have legitimate reasons for not billing Medicare for 12 months—did not at that time justify the continuation of such a ''one-size-fits-all'' process. It is primarily for this reason, moreover, that an automatic deactivation mechanism has not been initiated for Part A providers.

Comment: One commenter recommended that CMS explain the linkage, if any, between the current deactivation policy and the maximum period for claim submissions. The commenter also asked CMS to explain why a physician or non-physician practitioner should remain enrolled in Medicare if he/she cannot bill for services within 12 months from the date of service.

Response: We do not see a significant linkage between deactivation and the timeframe in which a provider must submit a claim for payment. Rather, the deactivation policy, as already explained, was based largely on the need to prevent others from accessing unused billing numbers and to ensure—via the deactivated provider's submission of a complete Form CMS–855—that the provider and supplier continues to meet Medicare enrollment requirements. With respect to the commenter's second statement, we do not believe that a failure to submit claims justified the revocation of a provider or supplier's billing privileges so long as the provider or supplier is still in compliance with all Medicare requirements.

Comment: Several commenters stated that CMS did not fully explain its rationale for its proposed change to § 424.540(a)(1). They requested that CMS do so or otherwise withdraw the proposal. They also recommended that CMS explain how this change will affect CMS's efforts to reduce fraud, waste and abuse. One commenter requested that CMS outline the benefits that have accrued from the annual deactivation process. Another commenter urged CMS to explain how it will ensure that physician billing numbers are not misused by clearinghouses, billing agents, or former employees.

Response: We believe that we provided sufficient rationale for the proposed change to § 424.540(a)(1) in the proposed rule. However, based on the concerns that commenters have expressed, we will not be finalizing our proposed change.

Comment: A commenter stated that CMS should have explained the impact that our proposed change would have on fraud, waste and abuse by physicians and practitioners who only order and refer services to Medicare beneficiaries.

Response: We assume that the commenter is referring to physicians and non-physician practitioners who complete the Form CMS–855O. As stated above, such individuals do not have Medicare billing privileges. They are therefore unaffected by the deactivation provisions in § 424.540(a)(1).

Comment: A commenter requested that CMS explain: (1) Why it did not include information regarding the supplier notification aspect of the deactivation process in the proposed rule, and (2) whether the post-deactivation process allowed physicians and non-physician practitioners to update their re-enrollment in the Medicare program.

Response: We did not include information about the supplier notification process in the proposed rule because we believed it was immaterial to the larger question of the burden that the deactivation process poses as a whole. As for the commenter's reference to a ''post-deactivation process,'' we are unclear as to what the commenter means. If the commenter is asking whether a reactivation application can always be simultaneously used as a revalidation application, CMS does not generally hold that position; reactivation and revalidation applications are for separate purposes and are governed by separate rules.

Comment: One commenter cited a Government Accountability Office (GAO) report (GAO–04–707) stating that out-of-date information increases the risk that Medicaid will pay individuals who are not eligible to bill Medicaid. The commenter asked CMS to explain why it disagrees with this statement and why its proposed change will decrease the risk to the Medicare program.

Response: We agree that out-of-date enrollment information poses a risk to all of our programs. Our ongoing effort, in fact, to revalidate all providers and suppliers reflects the importance we place on the need for Medicare to have accurate and up-to-date information on all enrolled individuals and entities. As explained above, we are not finalizing our proposed change due to the program integrity concerns raised by comments such as this one.

Comment: One commenter cited a December 1995 OIG report (OEI–01–94–00231) that: (1) Generally stated that CMS should require carriers to deactivate unused provider numbers, (2) recommended that a 1-year non-billing period be used, and (3) pointed out certain risks involved with unused numbers. The commenter asked why CMS did not discuss the history and background of the deactivation process in the proposed rule. The commenter also asked why CMS, through its proposal to eliminate non-billing deactivations for physicians and non-physician practitioners, is disregarding the OIG's above-referenced recommendation.

Response: We did not and do not believe that a detailed history of the deactivation process is necessary, as many providers and suppliers are already familiar with the concept of deactivation. We add that, as explained earlier, we are not finalizing our proposed change to § 424.540(a)(1).

Comment: Several commenters supported our proposed revision to § 424.540(a)(1). They generally stated that it would reduce the burden on providers, suppliers and Medicare contractors, and would ensure better access to care for beneficiaries. They added that there are indeed valid reasons for a physician or non-physician practitioner not to submit a Medicare claim for 12 consecutive months; for instance, he or she may: (1) Simply not have many Medicare patients, (2) have been ill, or (3) have been working outside the country. Another commenter stated that the reimbursement delays associated with deactivations can be devastating to some providers.

Response: We appreciate these supportive comments. However, for reasons already discussed, we will not be finalizing our proposed change.

Comment: One commenter urged CMS to expand our proposed change to § 424.540(a)(1) to include physician group practices.

Response: As already stated, we are not finalizing our proposed change.

Based on the comments received and for the reasons expressed above, we have decided not to finalize our proposed change to § 424.540(a)(1). We may, however, seek other approaches—including future rulemaking—to address the concerns of providers and suppliers regarding the deactivation of providers and suppliers for 12 consecutive months of non-billing.

b. Section 424.540(a)(2)

Section 424.540(a)(2) specifies that a provider or supplier's Medicare billing privileges may be deactivated if the provider or supplier fails to report a change to its enrollment information within 90 calendar days or, for changes in ownership or control, within 30 calendar days. We did not propose to alter this provision. We believe it is necessary for providers and suppliers to understand the importance of furnishing updated enrollment information to the Medicare program, for incorrect or aged data can lead to improper payments.

We did not receive any comments with respect to § 424.540(a)(2).

c. Section 424.540(a)(3)

We proposed to add a new § 424.540(a)(3) that would allow us to deactivate, rather than revoke, the Medicare billing privileges of a provider or supplier that fails to furnish complete and accurate information and all supporting documentation within 90 calendar days of receiving notification to submit an enrollment application and supporting documentation, or resubmit and certify to the accuracy of its enrollment information. While the deactivated provider or supplier would still need to submit a complete enrollment application to reactivate its billing privileges, it would not be subject to other, ancillary consequences that a revocation entails; for instance, a prior revocation must be reported in section 3 of the Form CMS–855I application, whereas a prior deactivation need not. Indeed, it is for this reason that we believed our proposal would reduce the burden on the provider and supplier communities.

We received 5 public comments on proposed § 424.540(a)(3), all of which supported our proposed addition of § 424.540(a)(3). The comments stated that revocation is often too harsh a penalty and that deactivation is a more suitable remedy. They added that our proposal would reduce the burden on providers and suppliers that inadvertently miss the 90-day deadline. We appreciate the support of these commenters and are finalizing the policy as proposed.

We note that we received several comments in response to our request for feedback regarding additional ways to reduce the burden on providers and suppliers. The comments below pertain to the provider enrollment process:

Comment: A commenter suggested that CMS allow providers and suppliers 120 days—rather than the 90 days referred to in § 424.540(a)(2)—to report a change of information. The commenter believed that such an extension would be beneficial in light of CMS's ongoing revalidation effort and would reduce the burden on Medicare providers and suppliers.

Response: While we appreciate this suggestion, we believe that 90 days constitutes more than sufficient time for a provider or supplier to submit a change of information. We have repeatedly stressed to the provider community how important it is for CMS to have accurate information on individuals and entities that bill Medicare. Erroneous data can lead to improper payments, thereby endangering the Medicare Trust Fund.

Comment: A commenter recommended that CMS extend the timeframe for reporting a change in ownership or control from 30 days to 90 days. The commenter felt that 30 days is too short a timeframe for compliance. A 90-day period would: (1) Make this reporting requirement consistent with that applied to other types of informational changes that must be reported, and (2) ease the burden on the provider community.

Response: We recognize that 30 days is a significantly shorter period than that given for reporting most types of changes of information. Given, however, the relative importance of information regarding the provider's ownership, we believe that a 30-day period is appropriate.

Comment: A commenter urged CMS to implement safeguards designed to avoid contractor application processing errors, which can lead to delays in payment to providers and, in turn, interruptions in patient access to care. The commenter also recommended that CMS implement a clearer and more direct process for streamlining Medicare enrollment; this includes identifying and resolving application processing errors and issues related to the customer service hotlines.

Response: We appreciate these recommendations. We can assure the commenter that CMS is currently undertaking a number of initiatives designed to streamline and improve the provider enrollment process, such as the ongoing enhancement of the Provider Enrollment, Chain and Ownership System (PECOS) Internet-based enrollment mechanism.

Comment: One commenter recommended that CMS reduce the risk categorization—as described in CMS final rule, published in the **Federal Register** on February 2, 2011, titled ''Medicare, Medicaid, and Children's Health Insurance Programs; Additional Screening Requirements, Application Fees, Temporary Enrollment Moratoria, Payment Suspensions and Compliance Plans for Providers and Suppliers''—for certain types of DMEPOS suppliers. Specifically, the commenter suggested that the risk category for ''non-commercial'' DMEPOS suppliers—that is, physicians and non-physician practitioners who furnish DMEPOS items to their own patients—be changed from ''high'' to ''limited.'' The commenter argued that such suppliers would have to undergo fingerprinting and a criminal background check each time they enrolled in Medicare or opened a new location. This could spur many physicians to opt-out of Medicare, rather than be subjected to these burdens.

Response: We understand the commenter's concerns. As we stated in the February 2, 2011 final rule, however, we predicated our screening level assignments on the collective experience of provider and supplier categories. Based on the continued problem of fraud and abuse in the DMEPOS arena, we believe that all newly enrolling DMEPOS suppliers—irrespective of subcategory—should be in the ''high'' level of categorical screening. We will, nonetheless, continue to monitor this issue and may make adjustments to the risk categories when appropriate.

Comment: One commenter suggested that hospital-based physician groups be permitted to submit enrollment applications more than 30 days before the effective date listed on the application. This would allow such groups to begin billing Medicare sooner.

Response: We appreciate this suggestion. We will study the issue further and, if needed, furnish clarifying guidance to the public.

Comment: A commenter urged CMS to reduce the period in which contractors must process enrollment applications to no later than 60 days for paper applications and 45 days for Web-based applications. The commenter asked CMS to modify the proposed deadlines in the re-designated § 405.818 in accordance therewith.

Response: Medicare contractors must process enrollment applications in accordance with the timeframes outlined in CMS Publication 100–08,

chapter 15, and as specified in their respective Statements of Work. We note that the vast majority of initial enrollment applications today must be processed within 60 days (paper) and 45 days (Web-based).

Comment: Several commenters requested that CMS reduce all unnecessary paperwork from the enrollment process.

Response: We appreciate this comment and are working towards making the enrollment process as paperless as possible, in part through enhancements to the Internet-based PECOS enrollment mechanism.

Comment: A commenter requested that CMS: (1) Exempt federally qualified health centers (FQHCs) from the provider enrollment application fee described in § 424.514; (2) have each Medicare Administrative Contractor assign an FQHC subject matter expert and customer service representative who can help better facilitate the processing of FQHC applications; and (3) no longer require each individual FQHC site to separately enroll, but to allow the parent to enroll with the individual sites listed as practice locations. The commenter believed that these changes would greatly reduce the burden on FQHCs.

Response: Section 1866(j) of the Act requires the Secretary to impose a fee on each ''institutional provider of medical or other items or services or supplier.'' The term ''institutional provider'' is defined in § 424.502 as ''any provider or supplier that submits a paper Medicare enrollment application using the CMS–855A, CMS–855B (not including physician and non-physician practitioner organizations), CMS–855S or associated Internet-based PECOS enrollment application.'' Since FQHCs complete the Form CMS–855A to enroll in Medicare, they are subject to the application fee.

We appreciate the commenter's suggestion regarding the assignment of designated contacts at Medicare contractor sites to handle FQHC enrollment applications. While we are not adopting the commenter's recommendation at this time, we will take it under advisement.

Although we understand the commenter's concern about the FQHC ''site-by-site'' process, we intend to retain the policy at 42 CFR 491.5(a)(3)(iii) which states: ''If clinic or center services are furnished at permanent units in more than one location, each unit is independently considered for approval as * * * an FQHC.'' We believe it is important that each individual FQHC site be able—on its own merits—to meet all CMS requirements. Since we did not propose to change this requirement, it is considered outside the scope of the regulation, though we may take this comment into consideration for future rulemaking.

Comment: A commenter recommended that CMS eliminate PECOS—which the commenter believes is a redundant system—and instead standardize the Medicare enrollment process with other public and private payers via the adoption of the Council for Affordable Quality Healthcare Universal Provider Datasource.

Response: We do not believe that PECOS should be eliminated. It has proven to be an extremely valuable tool in capturing provider enrollment information that is unique to the Medicare program.

Comment: A commenter requested that CMS standardize its fraud and abuse regulations, arguing that such changes would reduce physicians' burden of complying with multiple inconsistent regulatory schemes.

Response: As the commenter has not specifically identified any inconsistencies within CMS's program integrity regulations, we unfortunately are not in a position to address this comment further.

We also received several comments not clearly related to regulatory matters:

Comment: One commenter recommended that CMS consider civil monetary penalties for physicians and other providers and suppliers who fail to report changes in a timely manner.

Response: We believe that this comment is out-of-scope, as it pertains neither to the issue of burden reduction nor the provisions of the proposed rule; nonetheless, we believe that the remedies we have outlined in this final rule, as well as those which already exist, are the most appropriate ones.

Comment: One commenter recommended that CMS remove the ordering and referring file from the CMS Web site. The commenter argued that providing the names of physicians and non-physician practitioners and their active National Provider Identifiers to the public increases the likelihood of fraud, waste and abuse. The commenter also: (1) Contended that CMS has no statutory or regulatory requirement mandating the issuance of ordering and referring information to the public, and (2) requested that CMS explain why it is posting the ordering and referring file when it has not yet implemented any ordering and referring claims edits.

Response: We believe that this comment, too, is out-of-scope, as it is unrelated to the issue of burden reduction and the provisions of the proposed rule. We note, however, that making NPIs available online is important for the processing of many standard health care transactions, for Medicare and other payers.

The above summarizes this proposal and the comments we received. As noted above, we are not finalizing our proposed changes to § 424.540(a)(1) and intend to study this issue further and possibly address in future rulemaking or another suitable vehicle. However, we are finalizing our provision to add a new § 424.540(a)(3) as proposed.

Contact: Morgan Burns, 202–690–5145.

5. Duration of Agreement for Intermediate Care Facilities for Individuals With Intellectual Disabilities (Referred to in Current Regulations as Intermediate Care Facilities for the Mentally Retarded) (§ 442.15 Through § 442.109)

As described elsewhere in this preamble, we are replacing the use of the term ''mentally retarded'' with the term ''individuals with intellectual disabilities'' as described in this program, so we have used the new term in these final provisions.

Section 1910 of the Act provides for the certification and approval of Intermediate Care Facilities for the Individuals with Intellectual Disabilities (ICF/IIDs). These facilities were formerly known as Intermediate Care Facilities for the Mentally Retarded (ICF–MRs) and are renamed through the change in nomenclature described below in this rule. Current regulations at § 442.109 and § 442.110 address ICFs-IIDs provider agreements and limit the ICFs-IIDs provider agreements under Medicaid to annual time limits. We proposed to remove the time limited agreements for ICF/IIDs at § 442.16. We also proposed to eliminate this requirement at § 442.15, § 442.109, and § 442.110. In order to give more flexibility to States, we proposed to replace the requirement with an open ended agreement which, consistent with nursing facilities (NFs), would remain in effect until the Secretary or a State determines that the ICF/IID no longer meets the conditions of participation for ICF/IIDs at subpart I part 483.

Also, we proposed to add a requirement that a certified ICF/IID must be surveyed on average every 12 months with a maximum 15 month survey interval. Current regulations at 42 CFR part 442 require that ICF/IIDs be surveyed for compliance with conditions of participation at least every 12 months on a relatively fixed schedule. By contrast, nursing homes must be surveyed for compliance with

certification standards at intervals of between 12 and 15 months. We anticipate the change in the certification period will have positive impacts on the care provided in these facilities because the new process will be less predictable and will require facilities to be more proactive in maintaining high standards of care. The new process will also improve the efficient and effective operation of State survey agencies responsible for regulating ICF/IIDs.

In addition, State survey agency resources are strained by the rigid timelines imposed in the current regulation. For example, if a complaint results in an abbreviated survey 10 or 11 months into the facility's certification period, the current regulation does not allow the State agency to expand the complaint survey for the purpose of completing the requirements of annual certification at the same time. Instead, the State is required to conduct another full survey at 12 months, which is duplicative. More flexibility would allow States to use their survey staff in a targeted fashion, allocating resources where needed to assure resident safety and quality of care, rather than being forced to meet rigid regulatory timelines that do not bear a relationship to the needs of residents.

We received three public comments on our proposed changes to the duration of agreement for ICF/IID.

Comment: One commenter representing a state survey agency agreed with CMS's belief that the change will provide opportunities to increase operational efficiency at the state level by enabling more flexible scheduling and by reducing duplication when complaint survey timing may coincide with annual recertification. The commenter noted that with the proposed changes survey times would be less predictable and the expanded interval range will improve the quality improvement impact of surveys. The commenter also noted that the changes will provide a reduction in paperwork at the survey agency, the state Medicaid agency, and certified facilities, and that the additional flexibility afforded by the change will allow resources to be focused on problematic facilities and validation processes.

The commenter requested the survey time for ICF/IIDs be expanded to 24 months to provide States opportunities to focus resources on poor performing facilities.

The commenter also requested that CMS consider relaxing the requirement that surveys be unannounced. The state has recently implemented a system of announced state surveys and believes the practice contributes to improved quality improvement efforts by encouraging state agency cooperation.

Response: The commenter's observations regarding the efficiencies and process improvements afforded by this change reinforce the rationale for revising the duration of the agreement.

The change to the survey time will make ICF/IID's consistent with certified nursing facilities regarding survey scheduling. At this time CMS has not found that extending the survey time for ICF/IID's beyond 12 months on average could be accomplished without negative impacts on the quality of care delivered by these facilities. Therefore, the same standard survey time period for nursing facilities has been applied to ICF/IID's. However, the proposed change will allow states greater latitude to survey poor performing facilities more frequently and high quality facilities less frequently, as long as the overall time-frames are observed. The requirement that surveys be unannounced is intended to assure that facilities provide a consistent quality of services and care required under the conditions of participation. While announced surveys may improve state and facility cooperation, CMS has not determined that overall program performance or the quality of care for residents would benefit by announcing survey visits.

Comment: One commenter requested that CMS allow states, through the State Performance Standards, as much flexibility as possible during the first year of implementation to modify survey schedules and thereby produce a higher level of survey unpredictability.

Response: CMS seeks to eliminate the administrative burden of the completion of forms which extend the provider agreement in cases where the survey activity has not been completed within the required 12 month period. These forms, currently exchanged between two units of State government and the provider, require administrative work without adding value or increasing the survey frequency. They also serve, to some extent, in alerting ICF/IID facilities to the prospect of an imminent survey. Therefore, in addition to reducing administrative burden the regulatory change also provides an increased opportunity for the State Survey Agencies to more greatly vary their survey schedules and to decrease the predictability of the survey visits by the provider. We agree with the commenter with regard to State performance expectations, and will ensure that the State Performance Standards for this measure will be listed as ''developmental'' to encourage the State Survey Agencies to make significant changes to their survey schedules for ICF/IID and thus enhance the unpredictability of surveys

Comment: Another commenter from a state agency expressed the concern that the 12 month average survey interval is inconsistent with the 15 month maximum time interval allowed. The commenter also expressed concern that the rule does not specify whether the state or CMS will determine the statewide average interval, nor how the state may appeal a determination of compliance with the interval if the state disagrees.

Response: As discussed above, the proposed change in the rule will make the timing of ICF/IID surveys consistent with the requirements for surveys of certified nursing facilities. Each facility will be surveyed at least once every 15 months, and facilities must be surveyed an average of every 12 months. Necessarily, this means that if some facilities are surveyed only after 12 months but before the end of 15 months from the last survey, other facilities in the state must be surveyed more frequently than 12 months. We will publish in our Mission and Priority Document (MPD) the methodology to be applied in computing the maximum and average survey intervals for ICF/IID's. While there is no formal appeal process for States to dispute the calculations included in the MPD, this methodology will be available to the states which can use it to verify CMS's calculation of the average survey interval.

The above summarizes this provision as proposed in our proposed rule and the comments we received. We are finalizing the policy above as proposed.

Contact: Thomas Hamilton, 410–786–9493.

B. Removes Obsolete or Duplicative Regulations or Provides Clarifying Information

The following provisions remove requirements in the Code of Federal Regulations (CFR) that are no longer needed or enforced. We have identified regulations that have become obsolete and need to be updated.

1. OMB Control Numbers for Approved Collections of Information (§ 400.300 and § 400.310)

Part 400 subpart C requires the collection and display of control numbers assigned by the Office of Management and Budget (OMB) to collections of information contained in CMS regulations. The chart at § 400.310 that displays the OMB control numbers has not been updated since December 8, 1995. We believe that, it is no longer necessary to maintain the chart, because

an inventory of currently approved CMS information collections, including OMB control numbers, is displayed on a public Web site at *http://www.reginfo.gov/public/do/PRAMain.* The Web site provides more timely access to the OMB control numbers for CMS information collection requests than the process of publishing updates in the CFR. Also, as part of our quarterly notice of CMS issuances, which is published each quarter in the **Federal Register**, we will remind reviewers where they can find the most current list of information collections and OMB control numbers. For these reasons, we proposed to remove and reserve subpart C since the content of the information contained in this subpart is obsolete and more readily available on the public Web site.

We did not receive any public comments on our proposed changes to remove the list of OMB control and approval numbers in subpart C. Therefore, we are finalizing the policy as proposed.

Contact: Ronisha Davis, 410–786–6882.

2. Removal of Obsolete Provisions Related to Initial Determinations, Appeals, and Reopenings of Part A and Part B Claims and Entitlement Determinations (§ 405.701 Through § 405.877)

In the proposed rule, we proposed to remove obsolete provisions contained in 42 CFR part 405 subparts G and H governing initial determinations, appeals, and reopenings of Medicare Part A and Part B claims, and determinations and appeals regarding an individual's entitlement to benefits under Medicare Part A and Part B. See 76 FR 65913, October 24, 2011. Currently, initial determinations, appeals and reopenings of Medicare Part A and B claims are governed by the provisions in section 1869 of the Act and in 42 CFR part 405 subpart I. Initial determinations and reconsiderations of an individual's entitlement to Medicare Parts A and B are governed by the provisions in 20 CFR part 404, subpart J, and entitlement appeals beyond the reconsideration level are governed by part 405 subpart I. The part 405 subpart I regulations implemented pertinent sections of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) (Pub. L. 106–554) and the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173). (For more detail see 76 FR 65913–65914).

Part 405 subparts G and H contain policies that applied to initial determinations, appeals, and reopenings of Medicare Part A and Part B claims, as well as determinations and appeals regarding an individual's entitlement to benefits under Medicare Part A and Part B, prior to the implementation of the part 405 subpart I provisions (collectively referred to as ''pre-BIPA'' actions). Although we phased in the implementation of the part 405 subpart I regulations, these regulations were effective for all claims processed on or after January 1, 2006 (See 70 FR 11425, March 8, 2005). Once all pre-BIPA claims appeals were completed, the provisions in part 405 subparts G and H would be considered obsolete and replaced by the provisions in part 405 subpart I.

As explained in the proposed rule (76 FR 65914), we believe that all pre-BIPA claims appeals have been processed. Therefore, we proposed to remove the obsolete provisions in part 405 subparts G and H. However, since we cannot be completely certain that there are no pending pre-BIPA claims appeals, we also proposed that any newly identified pre-BIPA claims appeals would be handled under the current appeals provisions set forth in the part 405 subpart I regulations to ensure that parties would have due process for their disputes (See 76 FR 65914). We believe maintaining a separate pre-BIPA claim appeals process in the unlikely event such an appeal is discovered is inefficient and impracticable. Using the current appeals provisions in part 405 subpart I for all claim appeal requests filed on or after the effective date of this final rule, reduces potential confusion about applicable appeal procedures, and enables parties to take advantage of the reduced decision-making timeframes and other process improvements offered throughout the part 405 subpart I regulations.

We proposed that parties who demonstrate that they requested an appeal of a pre-BIPA claim but did not receive a decision would be entitled to refile their appeal request, and would have their appeal processed under the part 405 subpart I regulations in the manner set forth below. Any pre-BIPA claims appeals identified on or after the effective date of this final rule (''newly identified pre-BIPA appeals'') that are still pending at the first level of appeal (a reconsideration for Part A claims (42 CFR 405.710) and review of the initial determination for Part B claims (42 CFR 405.807)) would be processed beginning at the redetermination level under the part 405 subpart I regulations (see 42 CFR 405.940–405.958). Any newly identified pre-BIPA appeals that are still pending at the second level of appeal (ALJ hearing for Part A claims (42 CFR 405.720) and carrier hearing for Part B claims (42 CFR 405.821)) would be processed beginning at the QIC reconsideration level under the part 405 subpart I regulations (see 42 CFR 405.960–405.978). In addition, any newly identified pre-BIPA appeals of Part B claims that are pending at the ALJ hearing level (42 CFR 405.855) would be processed as QIC reconsiderations under the part 405 subpart I regulations. Any newly identified pre-BIPA appeals that are still pending at the final level of administrative appeal, Departmental Appeals Board review (42 CFR 405.724 for Part A claims and 42 CFR 405.856 for Part B claims) would be processed at the Medicare Appeals Council review level under the part 405 subpart I regulations (see 42 CFR 405.1100–405.1134). See 76 FR 65914–65915 for additional information.

We also explained that several sections in part 405 subparts G and H were either unrelated to claims or entitlement appeals and were still in effect, or were inadvertently not included in part 405 subpart I. See 76 FR 65915. We proposed to retain § 405.874, ''Appeals of CMS or a CMS contractor'' and redesignate it as §§ 405.800–405.818 in part 405 subpart H, and to retain § 405.706, ''Decisions of utilization review committees'' and redesignate it as § 405.925 in part 405 subpart I. Finally, we proposed to remove § 405.753 and § 405.877 (''Appeal of a categorization of a device.'') because these sections are obsolete and no longer comport with the definition of ''national coverage determination'' in section 1869(f) of the Act, as amended by section 522 of BIPA. See 76 FR 65915.

We received one public comment regarding several of the appeals proposals described above. A summary of the commenter's concerns regarding these proposals and our responses are included below.

Comment: The commenter stated that the proposed changes do not afford appeal rights to all initial determinations, and expressed concern that the complexity and length of the appeals process requires legal counsel to navigate, is expensive, and does not provide physicians a meaningful opportunity to challenge claim determinations.

Response: In this rule, we are not changing existing policy with respect to appeal rights under part 405 subpart I. Rather, we are removing obsolete provisions in part 405 subparts G and H, and redesignating existing policy that is not obsolete. We are also finalizing our proposal that any newly identified pre-BIPA appeals that are still pending in

the administrative process will be handled under the current appeals regulations in 42 CFR part 405 subpart I. As discussed previously, these regulations were effective for all claims processed on or after January 1, 2006 (See 70 FR 11425, March 8, 2005).

The appeals process for claim determinations set forth in the 42 CFR part 405 subpart I regulations implements the statutory requirements found in section 1869 of the Act. In this rule, we are not changing what we consider to be initial determinations under part 405 subpart I (42 CFR 405.924). When contractors make initial determinations, as defined in 42 CFR 405.924, those determinations may be appealed by the parties to the determination. However, some actions taken by CMS or its contractors are not initial determinations and, therefore, do not trigger appeal rights. See 42 CFR 405.926. For example, there is no initial determination and, therefore, no right to appeal when there is no valid claim or request for payment for which a determination is made (such as when claims are returned to providers as incomplete or invalid, in which case they must be resubmitted rather than appealed), or when administrative review is precluded by statute (such as for coinsurance amounts prescribed by regulation for outpatient services under the prospective payment system, see § 1833(t)(12)(B) of the Act).

We respectfully disagree with the commenter's characterization of the administrative appeals process as overly complex, expensive and lengthy, and the commenter's assertion that it does not provide physicians a meaningful opportunity to challenge claim determinations and requires legal counsel to navigate. As we explain above, the appeals process for claim determinations set forth in the 42 CFR part 405 subpart I regulations implements the statutory requirements found in section 1869 of the Act. Although there are four levels of administrative claims appeals, an overwhelming majority of disputes are resolved at the first level of appeal through informal proceedings with the claims processing contractor. In addition, we offer parties the opportunity to correct minor claims errors through the reopening process set forth in 42 CFR 405.980, *et seq.* For disputes that are not resolved at the first level of appeal, parties have an opportunity for review by a Qualified Independent Contractor, a hearing before an Administrative Law Judge, and review by the Medicare Appeals Council prior to commencing litigation in federal district court. Furthermore, adjudicators have relatively short timeframes for issuing decisions (60 days at the first and second levels and 90 days at the third and fourth levels). In most cases, these administrative proceedings are non-adversarial, and less formal than proceedings in federal or state court. We believe the administrative process crafted by the Congress under section 1869 of the Act adequately balances the need to develop a full and complete administrative record should a case result in a civil action in federal district court, with the ability for parties to obtain quick, informal and independent review of claim determinations.

Comment: The commenter also expressed concern that adequate time may not have elapsed for the resolution of all pre-BIPA claims, and that channeling pre-BIPA appeals through the procedures in 42 CFR part 405 subpart I does not streamline the process for such appeals. The commenter also urged CMS to develop materials that are widely available to explain the claims appeals process.

Response: It has been over six years since we began to transition from the claims appeals process in 42 CFR part 405 subparts G and H to the current process in 42 CFR part 405 subpart I. As explained in the preamble to the proposed rule, it is our expectation that in the 6 years since implementation began for the part 405 subpart I appeals process, any party with a pending pre-BIPA claims appeal would have received a decision or would have brought the pending matter to our attention (see 76 FR 65914). We proposed, and are finalizing in this rule, that parties who demonstrate that they requested an appeal of a pre-BIPA claim but did not receive a decision would be entitled to refile their appeal request, and would have their appeal processed under the part 405 subpart I regulations (see 76 FR 65914–65915). We believe that channeling appeals of pre-BIPA claims through the current process in part 405 subpart I will eliminate confusion and uncertainty by having parties and adjudicators follow a single set of rules that have been in place for over six years. In addition, as explained in the proposed rule (76 FR 65914), using the current appeals process under part 405 subpart I for all claims appeal requests filed on or after the effective date of this final rule, will enable parties to take advantage of reduced decision-making timeframes and other process improvements offered throughout part 405 subpart I. For example, pre-BIPA claims appeals did not have timeframes within which decisions must be issued. Applying the decision making timeframes for current claims appeals to pre-BIPA claims appeals will likely result in quicker turnaround times for pre-BIPA claims appeals, and a more streamlined process in comparison to the pre-BIPA appeals process. Thus, we believe our proposal to channel all claims appeals through the current process in part 405 subpart I will be more efficient and effective than maintaining separate appeals processes.

Materials that explain the steps in the first and second levels of the claims appeals process are currently available at: *http://www.cms.gov/OrgMedFFSAppeals/* and also at: *http://www.medicare.gov/navigation/medicare-basics/understanding-claims/medicare-appeals-and-grievances.aspx.* Information about hearings before an ALJ is available at: *http://www.hhs.gov/omha,* and information about the proceedings before the Medicare Appeals Council is available at: *http://www.hhs.gov/dab.* In addition, shortly after this rule becomes effective, we will update the CMS online manuals and CMS' Web site to provide instructions on how requests for newly identified pre-BIPA claims appeals should be made, and how such appeals will be processed.

Comment: The commenter raised additional concerns about existing policies regarding effective dates of revocation actions and enrollment determinations and existing policies regarding submission of claims during the appeal of an enrollment determination (see, 42 CFR 405.800–818).

Response: The commenter's concerns regarding existing policies for enrollment appeals are outside the scope of this rule. In this rule, we are not changing existing policy with respect to enrollment appeals or the submission of claims while appeals of enrollment determinations are pending. Rather, we are removing obsolete provisions in part 405 subparts G and H, and redesignating existing policy that is not obsolete. The technical corrections proposed with respect to enrollment appeals are purely editorial in nature. We are maintaining existing policies in 42 CFR 405.874 that were previously subject to formal notice and comment rulemaking (see 73 FR 36460, June 27, 2008) and redesignating them as 42 CFR 405.800–818. However, we will consider the concerns raised by the commenter. Should we determine that changes to current enrollment appeals policy are necessary, we will conduct separate rulemaking.

Comment: Finally, the commenter disagreed with our policy that decisions of utilization review committees are not

''initial determinations'' and may not be appealed under the part 405 subpart I regulations. The commenter stated that such decisions have an impact on substantive rights.

Response: Decisions of utilization review committees (URC) are decisions made by health care professionals at hospitals. They are not initial determinations made by the Secretary within the meaning given in section 1869 of the Act. It has been our longstanding policy that URC decisions are not initial determinations, and thus, are not appealable; however, the decision of a URC may be considered by CMS along with other pertinent medical evidence in determining whether or not an individual has the right to have payment made under Medicare Part A (42 CFR 405.706). In this rule, we are not changing existing policy with respect to URC decisions. We are simply redesignating the existing provisions in § 405.706 as § 405.925.

Accordingly, we are finalizing our proposed policies without modification.

Contact: David Danek (617) 565–2682.

3. ASC Infection Control Program (§ 416.44)

In existing regulations at 42 CFR 416.51, we require all ASCs to adhere to regulations regarding Infection Control, which include the requirement that all ASCs develop an infection control program. The regulations also describe how ASCs must set up their infection control program, such as the requirement that the ASC designate a qualified professional who has training in infection control and the ASC's obligation to establish a plan of action regarding preventing, identifying, and managing infections and communicable diseases.

Current regulations also contain a provision for infection control that is located within the physical environment standard in 42 CFR 416.44(a)(3). The requirement states that an ASC must establish a program for identifying and preventing infections, maintaining a sanitary environment, and reporting the results to the appropriate authorities. This regulatory requirement was part of the original CfCs first published for ASCs in 1982. The revised CfC final rule published in the **Federal Register** November 2008 (73 FR 68502) elevated the infection control requirements from a standard level under the Environment condition to a separate condition level requirement, thus making the regulatory requirement in the Environment CfC section of the CFR duplicative. The Infection Control CfC located at 42 CFR 416.51 expands and broadens the infection control requirements that were part of the original ASC requirements in the Environment CfC section. Therefore, we proposed to remove the requirement at § 416.44(a)(3), located in the Environment CfC section, as it is unnecessary and obsolete. We believe this change will alleviate any duplicative efforts and confusion regarding the infection control requirements.

We received two public comments on our proposed changes to the ASC Environment CfC section.

Comment: One commenter supported our proposal to remove the unnecessary and redundant requirement regarding infection control. In addition, the commenter supported the elevation of the infection control requirements from a standard level under the Environment CfC section to a separate condition level requirement.

Response: We thank the commenter for the comment and appreciate the commenter's support for the proposed changes.

Comment: We received one comment that opposed the removal of a particular section of the requirement that states ASCs must report the results of any identified infections to the appropriate authorities. In addition, the commenter stated it was ill-advised to remove the reporting requirement and that the Centers for Disease Control recently published studies analyzing infection rates in ASCs.

Response: The Federal regulations for ASCs do not have specific infection control reporting requirements. The language we have proposed to delete states that ''ASCs must report the results to the appropriate authorities''. We have not changed the normal procedures that ASCs must follow in order to meet their State reporting requirements. Currently, there is sufficient authority in the infection control CfC at 42 CFR 416.51(b)(3) that will continue to support CMS requirements for such reporting. In addition, CMS has similar hospital infection control regulations and the guidance includes complying with reportable disease requirements of the local health authorities.

The above summarizes this provision made in our proposed rule and the comments we received. We are finalizing the policy above as proposed.

Contact: Jacqueline Morgan, 410–786–4282.

4. E-prescribing (§ 423.160)

The MMA amended title XVIII of the Act to establish a voluntary prescription drug benefit program. Under those provisions, prescription Drug Plan (PDP) sponsors and Medicare Advantage (MA) organizations offering Medicare Advantage-Prescription Drug Plans (MA–PD) are required to establish electronic prescription drug programs to provide for electronic transmittal of certain information to the prescribing provider and dispensing pharmacy and pharmacist. This includes information about eligibility, benefits (including drugs included in the applicable formulary, any tiered formulary structure and any requirements for prior authorization), the drug being prescribed or dispensed and other drugs listed in the medication history, as well as the availability of lower cost, therapeutically appropriate alternatives (if any) for the drug prescribed. The MMA directed the Secretary to promulgate uniform standards for the electronic transmission of this data.

In the November 7, 2005, final rule (70 FR 67568), titled ''Medicare Program; E–Prescribing and the Prescription Drug Program,'' CMS adopted three e-prescribing foundation standards to be used for e-prescribing for the Medicare Part D program. The three foundation standards are—(1) The National Council for Prescription Drug Programs (NCPDP) SCRIPT version 5.0., which provides for communications between the prescriber and dispenser; (2) the NCPDP Telecommunication Standard Version 5 release 1 and equivalent NCPDP Batch Standard Batch Implementation Guide version 1.,1 (NCPDP Telecom 5.1) which provides for communication between the dispenser and the Plan, and the ASC X12N 270/271 Health Care Eligibility Benefit Inquiry and Response, Version 4010; and (3) the Addenda to Health Care Eligibility Inquiry and Response, Version 4010A1 (4010/4010A) for conducting eligibility and benefit inquiries between the prescriber and Plan Sponsor. The latter two transactions, NCPDP Telecom 5.1 and the 4010/4010A are also adopted as HIPAA transaction standards.

In the November 7, 2005 final rule, we discussed the means for updating the Part D e-prescribing standards. In instances in which an e-prescribing standard has also been adopted as a HIPAA transaction standard in 45 CFR Part 162, the process for updating the e-prescribing standard would have to be coordinated with the maintenance and modification of the applicable HIPAA transaction standard. Additional discussion on the updating of the Medicare Part D e-Prescribing standards can be found in the October 24, 2011 proposed rule (76 FR 65909).

For consistency with the current HIPAA transaction standards, and the need for covered entities (prescribers

and dispensers) to comply with HIPAA, we proposed to revise § 423.160(b)(3), to—(1) Update Version 4010/4010A with the ASC X12 Standards for Electronic Data Interchange Technical Report Type 3—Health Care Eligibility Benefit Inquiry and Response (270/271), April 2008, ASC X12N/005010X279, (2) adopt the NCPDP Telecommunication Standard Implementation Guide, Version D, Release 0 (Version D.0) and equivalent NCPDP Batch Standard Implementation Guide, Version 1, Release 2 (Version 1.2); and (3) retire NCPDP Telecommunication Standard Implementation Guide, Version 5, Release 1 (Version 5.1) and equivalent NCPDP Batch Standard Implementation Guide, Version 1, Release 1 (Version 1.1), for transmitting eligibility inquiries and responses between dispensers and Part D sponsors. As noted above, this change will promote consistency and ensure that covered entities are compliant with the most current transaction standards.

We received three public comments on our proposed changes to the Medicare Part D e-prescribing foundation standards (§ 423.160). One commenter was from a standards development organization (SDO) and two were from professional medical organizations.

Comment: All commenters agreed with our proposal to adopt the above-referenced standards and guide for transmitting eligibility inquiries and responses between dispensers and Part D sponsors.

Response: For consistency with the current HIPAA transaction standards, and the need for covered entities (prescribers and dispensers) to comply with HIPAA, we agree with the commenters and we are finalizing what we proposed for § 423.160.

Comment: One commenter supports finalizing what was proposed, but noted disappointment that CMS has not yet finalized a comprehensive set of standards that would fully support the Medicare Part D e-prescribing program. They commented that, although CMS has finalized the formulary and benefits, medication history, and fill status notification e-prescribing standards, it has not addressed the National Committee on Vital and Health Statistics' (NCVHS) recommendations about the adoption of standards for a clinical drug terminology, electronic prior authorization (ePA), and Structured and Codified Sig Format (SIG) (instructions on the prescription label). They suggested that CMS should propose and finalize such standards.

Response: We appreciate the commenter's support of our proposed changes, and appreciate their interest in the adoption of a comprehensive set of e-prescribing standards. While several of the necessary standards are still under development, we are not currently in a position to propose additional standards that, if finalized, would more fully support the Medicare Part D e-prescribing Program. Some of the standards that the commenter mentioned as having support from NCVHS, such as ePA and SIG are still in the development stage and have not yet been pilot tested by industry. Thus, it would be premature for us to propose the adoption of standards that have not been fully developed and tested.

Since all commenters agreed with our proposal to adopt the ASC X12 Technical Reports Type 3, Version 005010 (Version 5010), as a replacement of the current X12 Version 4010 and 4010A1 standards (Version 4010/4010A) and to adopt the NCPDP Telecommunication Standard Implementation Guide, Version D, Release 0 and equivalent NCPDP Batch Standard Implementation Guide, Version 1, Release 2 as a replacement to NCPDP Telecommunication Standard Version 5.1, we are finalizing the proposals in this final rule. We note that we updated the regulatory text at § 423.160(c) to adopt the updated standards and retire the old standards as discussed above. Compliance with these new adopted standards will be 60 days after the publication of this final rule.

Contact: Andrew Morgan, 410–786–2543.

5. Physical and Occupational Therapist Qualifications (§ 440.110)

Current regulations detail provider qualifications for a 'qualified physical therapist' under Medicaid at 42 CFR 440.110(a)(2). Current regulations detail provider qualification for a ''qualified occupational therapist'' under Medicaid at 42 U.S.C. 440.110(b)(2). These current regulations contain outdated terminology referencing several professional organizations. Additionally, some of the current qualification requirements do not address individuals who have been trained outside of the United States, or refer to outdated requirements, which could unintentionally exclude otherwise qualified therapists resulting in diminished access to care for Medicaid beneficiaries.

Medicare regulations at § 484.4 were updated through a November 27, 2007 final rule (72 FR 66406), effective January 1, 2008. While these personnel qualifications are detailed under home health services, we indicated in the preamble to the November 27, 2007 final rule, that therapy services must be provided according to the same standards and policies in all settings, to the extent possible and consistent with statute, and we revised multiple regulations to cross-reference the personnel qualifications for therapists in § 484.4 to the personnel requirements in many other sections.

We proposed at § 440.110 to remove the outdated personnel qualifications language in the current Medicaid regulations and instead cross reference the updated Medicare personnel qualifications for physical therapists and occupational therapists under § 484.4. This proposal has the potential to broaden the scope of providers that may be able to provide PT and OT services, by streamlining the qualifications so that certain providers are not excluded from providing services under Medicaid. In addition, it strengthens the consistency of standards across Medicare and Medicaid.

We received 12 public comments on this proposed change.

Comment: We received several comments in support of the proposed revisions.

Response: We appreciate the expressions of support.

Comment: We received several comments requesting that we also allow individuals who meet State licensure requirements to be recognized in the Medicaid program as a qualified physical or occupational therapist.

Response: State licensure is already taken into account in existing Medicare requirements found at 42 CFR 484.4. Aligning Medicaid provider qualifications with Medicare will continue this practice. Adopting these qualifications for the Medicaid program will ensure consistency among programs and enhance the scope of individuals qualified to deliver Medicaid services. If practices at the State level are prohibiting individuals from meeting Medicaid qualifications, we suggest addressing those concerns with the State Medicaid Agency.

Comment: We received one comment requesting retroactive applicability of these revised provider qualifications.

Response: The effective date of these changes must be prospective, rather than retrospective, as it would be impractical to do otherwise.

Comment: One commenter urged HHS to review the ''therapy incident-to'' rule contained in the 2005 physician fee schedule regulation, which disallowed Medicare Part B payments for outpatient rehabilitative therapy services provided as incident to services furnished by other practitioners.

Response: We appreciate this comment, but it is outside the scope of this regulation.

Comment: We received two comments in opposition to the proposed revisions, as they would exclude other health care professionals from providing PT and OT services, even when they are under the direct supervision of a physician.

Response: We disagree with these commenters. Aligning Medicare and Medicaid provider qualifications will increase the number of individuals eligible to furnish PT and OT services under the Medicaid program. We also point out that current regulations for PT and OT at § 440.110 require therapy providers to either meet the specified qualifications themselves, or furnish services under the direction of a qualified therapist. Individuals not meeting these qualifications could potentially still be qualified providers of Medicaid services, however, these services could not be billed to CMS as PT or OT services.

Comment: We received one comment suggesting that HHS modify policies set forth in the final provider enrollment rule.

Response: We appreciate this comment, but it is outside the scope of this regulation.

Comment: We received one comment suggesting that we also incorporate by reference into 42 CFR 440.110 the Medicare definition of Occupational Therapy Assistant found at 42 CFR 484.4.

Response: We do not believe that such action is necessary at this time. As the commenter noted, Medicaid regulations are silent as to the qualifications of a PT or OT assistant. This is partly due to the fact that individuals other than a PT or OT assistant could furnish PT or OT services under the direction of a qualified therapist. However, we do agree that States utilizing PT or OT assistants would be well served to follow the Medicare definition found at 42 CFR 484.4, to ensure consistency across programs.

The above summarizes this provision made in our proposed rule and the comments we received. We are finalizing the policy above as proposed.

Contact: Adrienne Delozier, 410–786–0278.

6. Definition of Donor Document (§ 486.302)

Section 486.302 includes the following definition: ''Donor document is any documented indication of an individual's choice in regard to donation that meets the requirements of the governing State law.'' In recent years, the concept of the donor document and the opportunities for individuals to express their wishes concerning organ and/or tissue donation have changed. An individual can indicate his or her wishes not only on a driver's license through a State's Department of Motor Vehicles, but also on various registries or even in separate documents. Therefore, we believe that our definition in § 486.302 should be updated. Moreover, the focus on patient rights has increased over the last several years. For example, we published a final rule on November 19, 2010 titled, ''Changes to the Hospital and Critical Access Hospital Conditions of Participation to Ensure Visitation Rights for All Patients'' (CMS–3228–F). In light of this increased focus, we believe that the current definition, does not fully allow for the various ways individuals can express their choices in the donor process. In addition, we believe it is important to emphasize that the decision to donate organs and/or tissue before death is the decision of the individual.

We proposed replacing the current definition of ''donor document'' in § 486.302 with the following definition, ''[D]onor document means any documented indication of an individual's choice that was executed by the patient, in accordance with any applicable State law, before his or her death, and that states his or her wishes regarding organ and/or tissue donation.'' The definition as finalized in this rule modifies the previous definition in two ways. First, while the current definition refers to ''an individual's choice'' it does not recognize the right of the individual to identify their wishes more specifically. Donor documents may simply allow for the choice of whether or not to be an organ and/or tissue donor, however, some individuals may choose to use documents that allow them to express their wishes in more detail. For example, some people may choose to be an organ donor, but not a tissue donor. Others may not want to consent to the donation of specific organs. Therefore, we believe that the definition as finalized should cover documents or other ways for individuals to express their wishes more specifically, and we have modified the definition accordingly.

Second, we also believe that it is important to include the requirement that the donor document be ''executed by the patient.'' While this may appear self-evident, we want to emphasize that the decision by a living person to donate organs and/or tissue after his or her death is always a voluntary decision. Therefore, we have modified the definition to account for this.

These changes to the definition of the donor document only affect the documentation of an individual's wishes concerning organ and/or tissue donation while they are alive and can legally make those decisions. In the absence of a valid donor document, the donation decisions would rest with the individual who is legally responsible for making these decisions, usually the person's next of kin.

We received three public comments on our proposed changes to the donor document definition located in § 486.302. The commenters represented a major patient advocacy organization, a major industry organization, and a state health and human services commission. All three commenters suggested changes to the proposed definition of donor document.

Comment: Two of the commenters were opposed to the new definition for donor document because the proposed definition does not appear to be consistent with the Uniform Anatomical Gift Act (UAGA). The commenters suggested that under the UAGA, there are other individuals who can make a legally binding gift on behalf of the donor before his or her death. In addition, they felt the new definition did not fully address alternatives, such as a situation where people may choose to be an organ donor but not a tissue donor, or may only want to consent to the donation of specific organs. The commenters noted that the UAGA does allow for such alternatives.

Response: We agree that the proposed definition does not acknowledge that the UAGA allows other individuals to make a legally binding anatomical gift during the donor's lifetime. Section 4 of the 2006 revision of the UAGA allows for ''an agent of the donor, unless the power of attorney for health care or other record prohibits the agent from making an anatomical gift; a parent of the donor, if the donor is an unemancipated minor; or the donor's guardian'' to make an anatomical gift for the donor while he or she is still alive. We believe this is an unusual circumstance; however, we want to avoid any confusion. If another individual is authorized to make an anatomical gift and documents his or her decision to do so in accordance with any applicable state law, we believe that constitutes a valid donor document under the OPO CfCs. Therefore, we have modified the definition of donor document to include that circumstance.

We agree that the proposed definition does not fully address alternatives. One commenter noted the use of the word ''executed'' implied that donor documents must be in writing and noted

that under Texas law (citing Tex. Health & Safety Code Ann. § 692A.005(West), a valid donation can be made if a terminally ill or injured donor communicates in any way his or her desire to donate to at least two adult witnesses. One of these individuals must be a disinterested witness. We believe that a non-written communication can be a valid expression of the donor's wishes, as long as it is made in accordance with any applicable state law. However, there must be some documentation of that non-written communication. For example, if a terminally ill or injured patient communicates to his or her next of kin and a nurse that he or she wants to donate his or her organs in a non-written communication and that satisfies any applicable state law, we would agree that was a valid consent to donate from the patient. The next-of-kin or the nurse should then document the patient's consent consistent with requirements under state law, if applicable, and hospital policy. That documentation of the patient's consent to donate would then become the donor document. Therefore, we have modified the definition of ''donor document''. We have removed the word ''executed'' and inserted the word ''made.''

We disagree that the definition does not allow for individuals to indicate consent to donation of specific organs. The proposed definition allows for individuals to indicate ''his or her wishes regarding organ and/or tissue donation.'' We believe this allows individuals to express their wishes concerning organ and/or tissue donation, including their wishes regarding any specific organs.

Comment: One commenter asked for clarification whether, under the amendment to the definition of ''donor document'', an organ procurement organization may continue to recognize a donation made by a communication between the patient and at least two witnesses.

Response: Yes, if the communication between the patient or potential donor and the two witnesses is in accordance with any applicable state law.

The above summarizes our proposal in this rule and the comments we received. After consideration of the public comments, we are finalizing the definition of ''donor document'' as follows: ''Donor document means any documented indication of an individual's choice regarding his or her wishes concerning organ and/or tissue donation that was made by that individual or another authorized individual in accordance with any applicable State law.''

Contact: Diane Corning, 410–786–8486.

7. Administration and Governing Body (§ 486.324)

On May 31, 2006, we published a final rule in the **Federal Register** (71 FR 30982) titled, ''Conditions for Coverage for Organ Procurement Organizations (OPOs).'' The final rule established several requirements, for OPOs at § 486.324, including a number of requirements related to the administration and governing body of an OPO. Due to an error in publishing the final rule, paragraph (e) was inadvertently inserted twice (71 FR 31052).

In the proposed rule (76 FR 65917), we proposed to remove the duplicate paragraph (e), which appears immediately after § 486.324(d). We stated that this deletion will not alter or change the legal requirement, nor will it create a change in information collection requirements or other regulatory burden.

We received no comments on this proposed change and are therefore finalizing it as proposed.

Contact: Diane Corning, 410–786–8486.

8. Requirement for Enrolling in the Medicare Program (§ 424.510)

We have identified an incorrect reference in § 424.510(a), due to a typographic error. We are proposing to replace the incorrect reference to paragraph (c) (the effective date for reimbursement for providers and suppliers seeking accreditation from a CMS-approved accreditation organization) with a reference to paragraph (d) (the enrollment requirements).

We received no comments on this proposed change and are therefore finalizing it as proposed.

Contact: Morgan Burns, 202–690–5145.

C. Responds to Stakeholder Concerns

The following provisions responded to some of the concerns and feedback that we have received from the public. We have identified nomenclature and definition changes that will increase transparency and enhance our relationship with the public.

Nomenclature Changes

1. Redefining the Term ''Beneficiary'' (§ 400.200 through § 400.203)

In response to comments from the public to discontinue our use of the term ''recipient'' under Medicaid, we have been using the term ''beneficiary'' to mean all individuals who are entitled to, or eligible for, Medicare or Medicaid services. We proposed to add a definition of ''beneficiary'' in § 400.200 that applies to patients under the Medicare and Medicaid programs. We will remove the terms ''beneficiary'' and ''recipient'' from § 400.202 and § 400.203, respectively, and we will make a nomenclature change to replace ''recipient'' with ''beneficiary'' throughout 42 CFR chapter IV. The action to refer to beneficiaries instead of recipients has already been implemented. We are simply conforming our regulations to our current use of the term ''beneficiary.'' In creating this definition it is not our intent to exclude or include anyone who would or would not have previously been understood to be a beneficiary. We sought comments on whether this definition could be improved to attain that objective.

We received no comments on this proposed change and are therefore finalizing it as proposed.

Contact: Ronisha Davis, 410–786–6882.

2. Replace All the Terms: ''the Mentally Retarded; ''Mentally Retarded Persons;'' and ''Mentally Retarded Individuals'' With ''Individuals With Intellectual Disabilities'' and Replace ''Mentally Retarded or Developmentally Disabled'' With ''Individuals With Intellectual Disabilities or Developmental Disabilities''

We proposed to change the terminology we use in the program currently called Intermediate Care Facilities for the Mentally Retarded. Section 1905 (d) of the Act states that, ''The term ''intermediate care facility for the mentally retarded'' means an institution (or distinct part thereof) for the mentally retarded or persons with related conditions * * *.'' In 2010, Rosa's Law (Pub. L. 111–256) amended statutory language in several health and education statues, directing that ''in amending the regulations to carry out this Act, a Federal agency shall ensure that the regulations clearly state—(A) That an intellectual disability was formerly termed ''mental retardation''; and (B) that individuals with intellectual disabilities were formerly termed ''individuals who are mentally retarded.''

CMS regulations at 42 CFR chapter IV include numerous references to ''mental retardation.'' These regulatory provisions reflect the statutory benefit category at section 1905(d) of the Act, which uses the term ''mental retardation'' in the facility type designation, ''Intermediate Care Facility for the Mentally Retarded.'' Rosa's Law

did not specifically list the Act within its scope, and therefore did not require any change to existing CMS regulations. However, consistent with Rosa's Law and in response to numerous inquiries from provider and advocate organizations as to when CMS will comply with the spirit of Rosa's Law, we proposed to adopt the term ''intellectual disability'' (as used under Rosa's Law) in our regulations at § 400.203. We proposed to define the term ''individuals with intellectual disabilities'' to mean the condition referred to as ''mentally retarded'' in section 1919(e)(7)(G)(ii) of the Act. This nomenclature change does not represent any change in information collection requirements or other burden for the provider community or the State survey agencies. Current forms may be used by the State survey agencies until current supplies are exhausted. The change will require revision of forms CMS–3070G and CMS–3070H, as discussed below.

We received four public comments on our proposed nomenclature change, changing ''mental retardation'' to ''intellectual disability.''

Comment: One commenter expressed appreciation for the effort to change the term. He recommends that person-first terminology ''individuals with intellectual disabilities'' be substituted for ''intellectually disabled.''

Response: We appreciate and agree with the comment that the term ''individuals with intellectual disabilities'' is preferable to ''intellectually disabled'' and CMS will use ''person first'' language in our agency policies and our internal and external communications. The nomenclature changes included in the NPRM were, by design, intended to make the current nomenclature in the regulation consistent with the language of Rosa's Law (Pub. L. 111–256). After due consideration of the commenter's suggestion, we believe that reasonable consistency with Rosa's law can be maintained with the adoption, in this final rule, of ''person first'' language, and have made the change accordingly. In the rule itself, we therefore use the term Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID) in place of Intermediate Care Facilities for the Mentally Retarded (ICF/MR).

Comment: Two commenters ask for clarification of the definition of Intellectual Disability. The commenters suggest that CMS is unclear when it defines Intellectual Disability to be equivalent to the term Mental Retardation. They point out that the definition of Mental Retardation at 42 CFR 483.102(b)(3) is from 1983 and is no longer in use. Furthermore, the definition in the Social Security Act still references Mental Retardation and the rule has no effect on that definition. In addition, one commenter notes that in medical usage the terms mental retardation and intellectual disability are not equivalent.

Response: The rule's intent is to extend the intent of Rosa's Law, that ''in amending the regulations to carry out this Act, a Federal agency shall ensure that the regulations clearly state—(A) That an intellectual disability was formerly termed ''mental retardation''; and (B) that individuals with intellectual disabilities were formerly termed ''individuals who are mentally retarded'' to include those regulations that implement the Social Security Act. While the term ''mental retardation'' has various definitions in a variety of contexts, and those definitions may have varied over time, within 42 CFR chapter IV the term has uses in determining benefit eligibility and describing provider types. The change simply makes the terms mental retardation and mentally retarded equivalent to intellectual disability and individuals with intellectual disabilities, respectively, for the purposes of the regulations.

Comment: One commenter notes that the term Mental Retardation also appears in Chapter V at 42 CFR 1001.1301.

Response: We thank the commenter for finding this omission and will review the Chapter V reference for future action.

Comment: One commenter correctly notes that the rule has no effect on the language in section 1919(e)(7)(G)(ii) of the Act.

Response: Making this change to the Act will require legislation. We believe that the Congress will consider doing so in the future. Meanwhile, cross-references can be changed as necessary.

Comment: One commenter correctly notes the incorrect use of ''title'' for ''chapter'' in the discussion.

Response: This error has been corrected.

Comment: One commenter notes that the change might have unintended consequences if applied to historical references.

Response: We will review the suggested sections and make changes if necessary to avoid confusion regarding the meaning of the term as used in the regulations.

The above summarizes this provision made in our proposed rule and the comments we received. We are finalizing the policy above as proposed, while adopting a commenter's suggestion of using person-first terminology.

Contact: Peggye Wilkerson, 410–786–4857.

IV. Provisions of the Final Regulations

For the most part, this final rule incorporates the provisions of the proposed rule without changes. Those provisions of this final rule that differ from the proposed rule are as follows:

- In section II.A.4.a, and for reasons stated in that section, we have decided not to finalize our proposed revisions to § 424.540(a)(1).
- In section II. B. 6, we have revised our proposed definition of ''donor document'' to be defined as ''any documented indication of an individual's choice regarding his or her wishes concerning organ and/or tissue donation that was made by that individual or another authorized individual in accordance with any applicable State law.''
- In the regulatory text, we have revised the proposed language to clarify that the requirement for sprinklers in facilities housed in high rise buildings was intended to be applicable to those buildings constructed after January 1, 2008.
- Also in the regulatory text, we are changing what we proposed to clarify that the term ''Individuals with Intellectual Disabilities'' will replace all of the following terms: ''the mentally retarded''; ''mentally retarded persons''; and ''mentally retarded individuals''. Also we clarify that ''individuals with intellectual disabilities or developmental disabilities'' will replace ''mentally retarded or developmentally disabled.''

We are implementing all other provisions as proposed.

V. Collection of Information Requirements

In the proposed rule, pursuant to the Paperwork Reduction Act, we solicited public comments for 60 days on each of the following issues regarding information collection requirements (ICRs). No comments were received. For the purpose of this final rule, we are soliciting public comment for 30 days for the following sections of this rule regarding ICRs:

A. Removes Unnecessarily Burdensome Requirements

1. ICRs Regarding End-Stage Renal Disease Facilities Condition for Coverage: Physical Environment (§ 494.60)

This rule limits the number of ESRD facilities that must meet the LSC

requirements found in chapters 20 and 21 of NFPA 101. This action will reduce burden on ESRD facilities in terms of costly structural modifications and will not impact any information collections under the Paperwork Reduction Act.

2. ICRs Regarding Condition for Coverage: Emergency Equipment—Ambulatory Surgical Centers (ASCs) (§ 416.44)

Section 416.44(c) requires that ASCs coordinate, develop, and revise ASC policies and procedures to specify the types of emergency equipment required for use in the ASC's operating room. The equipment must be immediately available for use during emergency situations, be appropriate for the facility's patient population and be maintained by appropriate personnel. The burden associated with these requirements is the time and effort required by an ASC to develop revised policies and procedures governing the identification and maintenance of emergency equipment that would typically be required to address the intra- or post-operative emergency complications specific to the types of procedures performed in the ASC and the needs of their specific patient population.

We believe that approximately 5,200 ASCs are subject to these requirements. We estimate that § 416.44(c) imposes a one-time burden of two hours associated with revising the policies and procedures pertaining to the list of the emergency equipment and supplies maintained and commonly used by the ASC during emergency responses to their specific patient population. The total burden associated with this task is estimated to be 10,400 (5,200 ASCs x 2 hours) hours. The cost associated with this requirement is estimated to be $90 per ASC ($45.00—based on an hourly nurse's salary—x 2 hours) or $468,000 total (10,400 x $45), including fringe benefits, as specified by the Bureau of Labor Statistics for 2009).

Consistent with this provision, we are submitting a revision to CMS–10279 (OMB control number 0938–1071; expiration date October 31, 2012) to the Office of Management and Budget for review/approval.

3. ICRs Regarding Revocation of Enrollment and Billing Privileges in the Medicare Program (§ 424.535)

This rule eliminates the re-enrollment bar in instances when Medicare providers and suppliers have not responded timely to requests for revalidation of enrollment or other requests for information. This will allow providers and suppliers to attempt to re-enroll in Medicare sooner than would be the case if the re-enrollment bar applied. However, the overall information collection burden involved—specifically, the need to submit a Form CMS–855 (OMB control number 0938–0685) initial enrollment application—will not change and, therefore, will neither increase nor decrease the existing information collection burden related to this requirement.

4. ICRs Regarding Duration of Agreement for ICFs/ID (§ 442.15)

This rule removes the time limited agreements for intermediate care facilities. There is no reduction in burden or cost for the intermediate care facility providers but the regulation change will help to reduce the paperwork and staff time required by State agencies in processing temporary extensions of the provider agreements that are required until the onsite survey occurs. In addition, providers and State agencies will no longer face the uncertainty created by the issuance of the multiple temporary extensions due to the provider agreements. Extensions may be made for a maximum of 60 days. We estimate that an extension is made for most ICF/IID facilities (about 5900 of the current 6500 facilities). We further estimate that each extension requires approximately one hour of staff time to complete. Based on CMS' FY 2012 rate for State survey agency Medicaid staff of $77.23 per hour, we project an annual national savings of State Medicaid administrative expenditures totaling $455,700 ($77.23 x 5900 ICF/IID facilities), of which 75 percent consists of Federal funds and 25 percent of State funds. Consistent with this change, we are submitting a revision to OMB control number 0938–0062 (CMS–3070G).

B. Removes Obsolete or Duplicative Regulations or Provides Clarifying Information

1. ICRs Regarding Display of Currently Valid OMB Control Numbers (§ 400.310)

This rule removes the chart that displays OMB control numbers since that information has become obsolete. This action does not produce any reduction or increase in burden, but will ensure that the public is viewing the most current information regarding OMB control numbers.

2. ICRs Regarding Removal of Obsolete Provisions Related to Initial Determinations, Appeals, and Reopenings of Part A and Part B Claims and Entitlement Determinations (§ 405.701 through § 405.877)

This rule, removes obsolete provisions from part 405 subparts G and H, and channels any remaining pre-BIPA claims appeals through the current appeals process under part 405 subpart I. In addition, we are redesignating certain sections of part 405 subparts G and H that are still in effect. We do not expect an increase or reduction in burden and believe that using the current appeals process under part 405 subpart I for all claims appeals will be beneficial for appellants and other parties.

3. ICRs Regarding Condition for Coverage: Infection Control—Ambulatory Surgical Centers (ASCs) (§ 416.44)

This rule removes the requirement at § 416.44(a)(3) regarding infection control that substantially duplicates the requirements of § 416.51. The removal of this requirement will not result in any additional burden on ASCs, but will alleviate any duplicative efforts and confusion regarding the infection control requirements.

4. ICRs Regarding Standards for Electronic Prescribing (§ 423.160)

This rule updates the current e-prescribing standards to mirror the HIPAA standards that will become effective after publication of this final rule. There is no burden (addition or reduction) associated with this action.

5. ICRs Regarding Physical Therapy, Occupational Therapy, and Services for Individuals With Speech, Hearing, and Language Disorders (§ 440.110)

This rule updates and aligns provider qualifications for PT and OT professionals. This action has the potential to broaden the scope of providers that may be able to provide PT and OT services, by streamlining the qualifications so that certain providers are not excluded from providing services under Medicaid. However, this change does not impact any information collections under the Paperwork Reduction Act.

6. ICRs Regarding Definitions (§ 486.302)

This rule modifies the definition of ''donor document'' to acknowledge that there are multiple ways for patients or potential donors to indicate their wishes regarding the donation of organs and tissues, while also emphasizing that the

patient's decision is voluntary. We do not expect that there will be any changes in the collection of information requirements for OPOs. We anticipate that the enhanced ability individuals initially will have to more specifically identify their wishes will reduce burden associated with vague and unclear designations.

7. ICRs Regarding Condition: Administration and Governing Body (§ 486.324)

This rule removes the duplicate paragraph (e). This action will not result in any change in information collection or other regulatory burden.

8. ICRs Regarding Requirement for Enrolling in the Medicare Program (§ 424.510)

This rule corrects a typographical error found in § 424.510(a). This action will create no change in information collection or other regulatory burden.

C. Responds to Stakeholder Concerns

Nomenclature Changes

1. ICRs Regarding General Definitions (§ 400.200)

This rule adds a definition of ''beneficiary'' that applies to patients under the Medicare and Medicaid programs. This action will create no change in information collection or other regulatory burden.

2. ICRs Regarding Definitions Specific to Medicaid (§ 400.203)

This rule adds to a definition of ''individuals with intellectual disabilities'' for purposes of the Medicaid program that would define it, consistent with Rosa's law (Pub. L. 111–256), as the condition formerly referred to as ''mental retardation'' and replaces all references in CMS regulations to, ''mental retardation'' with ''intellectual disability.'' Furthermore, we are replacing the term ''the mentally retarded,'' as defined in section 1919(e)(7)(G)(ii) of the Act, with ''individuals with intellectual disabilities.'' This action creates no change in information collection or other regulatory burden. The change will require the revision of forms CMS–3070G and CMS–3070H, which are approved under OMB control number 0938–0062 (expiration date April 30, 2013). CMS is submitting this revised ICR to OMB for their review/approval.

If you comment on these information collection and recordkeeping requirements, please submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: CMS Desk Officer, [CMS–9070–F], Fax: (202) 395–5806; or Email: *OIRA_submission@omb.eop.gov.*

VI. Regulatory Impact Analysis

We have examined the impact of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (February 2, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), and Executive Order 13132 on Federalism (August 4, 1999).

Executive Orders 12866 and 13563 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, reducing costs, harmonizing rules, and promoting flexibility. A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). We estimate that this final rule will reduce costs to regulated entities and to patients by more than $100 million annually and by more than $200 million in the first year. Accordingly, over five years this rule will save about $600 million dollars. It will also create significant life saving benefits. It is therefore an economically significant rule under section 3(f)(1) of Executive Order 12866. Accordingly, this proposed rule was reviewed by the Office of Management and Budget.

A. Statement of Need

In Executive Order 13563, the President recognized the importance of a streamlined, effective, efficient regulatory framework designed to promote economic growth, innovation, job-creation, and competitiveness. To achieve a more robust and effective regulatory framework, the President has directed each executive agency to establish a plan for ongoing retrospective review of existing significant regulations to identify those rules that can be eliminated as obsolete, unnecessary, burdensome, or counterproductive or that can be modified to be more effective, efficient, flexible, and streamlined. This final rule responds directly to the President's instructions in Executive Order 13563 by reducing outmoded or unnecessarily burdensome rules, and thereby increasing the ability of health care entities to devote resources to providing high quality patient care.

B. Overall Impact

There are cost savings in many areas. Two areas of one-time savings are particularly substantial. First, as indicated earlier in the preamble, we estimate that one-time savings to ESRD facilities are likely to range from about $47.5 to $217 million, but we are using $108.7 million as our point estimate. Second, we also estimate a one-time savings of $18.5 million to ASCs through reduced emergency equipment requirements. Both of these estimates are conservative and total savings could be significantly higher. The many types of recurring savings that these provisions will create include avoidance of business and payment losses for physicians and other providers that are difficult to estimate but likely to be in the tens of millions of dollars annually through the reforms we propose for reenrollment and billing processes. We have identified other kinds of savings that providers and patients will realize throughout this preamble. All of these are summarized in the table that follows.

TABLE 3—SECTION-BY-SECTION ECONOMIC IMPACT ESTIMATES FOR 2012

Section	Frequency	Likely savings or benefits (millions)	Likely five year saving or benefits (rounded to nearest ten million)
A. Removes Unnecessarily Burdensome Requirements			
1. End-Stage Renal Disease (ESRD) Facilities (§ 494.60)	One-Time	$108.7	$110.
2. ASC Emergency Equipment (§ 416.44)	One-Time	$18.5	$20.
3. Revocation of Enrollment/Billing Privileges (§ 424.535)	Recurring	$100.0	$500.

TABLE 3—SECTION-BY-SECTION ECONOMIC IMPACT ESTIMATES FOR 2012—Continued

Section	Frequency	Likely savings or benefits (millions)	Likely five year saving or benefits (rounded to nearest ten million)
4. Duration of Agreement for ICFs/ID (§ 442.15–§ 442.109)	Recurring	<$1.	<$1.
B. Removes Obsolete or Duplicative Regulations			
1. OMB Control Numbers for Information Collection (§ 400.300 and § 400.310).	Recurring	<$1.	<$1.
2. Removal of Obsolete Provisions Related to Processing Part A and Part B Claims and Entitlement Determinations (§ 405.701 through § 405.877).	Recurring	<$1.	<$1.
3. ASC Infection Control Program (§ 416.44)	Recurring	<$1.	<$1.
4. E-prescribing (§ 423.160)	Recurring	<$1.	<$1.
5. Physical and Occupational Therapist Qualifications (§ 440.110)	Recurring	<$1.	<$1.
6. Definition of Donor Document (§ 486.302)	Recurring	See Text	See Text.
7. Administration and Governing Body (§ 486.324)	Recurring	<$1.	<$1.
8. Requirement for Enrolling in the Medicare Program (§ 424.510)	Recurring	<$1.	<$1.
C. Responds to Stakeholder Concerns			
Nomenclature Changes:			
1. Redefining the Term ''Beneficiary'' (§ 400.200 through § 400.203).	Recurring	<$1	<$1.
2. Replace ''Mental Retardation'' terminology with ''Intellectual Disability'' (throughout 42 CFR chapter IV).	Recurring	See Text	See Text.

There are two areas of potentially significant benefits, beyond the cost savings to providers. First, the rule acknowledges that individuals can specifically express their wishes and not simply make the choice to donate or not donate. We believe this will encourage individuals to be clearer and more specific concerning their wishes or intentions regarding donation. We also believe that families will be more willing to accept the potential donor's decision if it is a clear and specific statement of his or her wishes concerning donation. There are approximately 8,000 cadaveric organ donors annually in the United States. These donors provide a total of about 21,000 transplanted organs (see the OPTN/SRTR Annual Report at *http://optn.transplant.hrsa.gov/ar2009/*). The decision to make a clear and specific decision concerning donation, and on the willingness of families to honor that decision, can turn on personal preference. We believe that the change we are making could and likely will tip that decision in some cases. However, we do not have a basis for quantifying this potential increase in donations. We requested comment on the extent to which this policy change may increase organ donation, but received no comments on this issue.

In addition, while Rosa's Law began the elimination of official Federal government use of the pejorative term ''mental retardation,'' our final rule will complete this step for CMS regulations. The reform undoubtedly has substantial value to millions of Americans, not only to individuals with intellectual disabilities, but also to their families and friends, and also to the many millions who simply object to such labeling. However, we have no data that would enable a precise calculation of this value.

Taking all of the reforms together, we estimate that the overall cost savings that this rule will create will exceed $200 million in the first year. This includes the one-time savings related to ESRD and ASC reforms, as well as the savings to providers in reductions in lost billings, paperwork costs, confusion, and other burden reductions discussed throughout this preamble.

C. Anticipated Impacts

The potential cost savings from reduced ESRD requirements are discussed extensively in that preamble section on those reforms. Although total cost estimates range from about $47.5 to $217 million, assuming that the average cost for a facility to meet three structural standards would have been $77,659, and that one half of all facilities would have needed to make these investments, total savings will be $108.7 million (2,800 × ($77,659/2)). We received no specific comments on these savings estimates and have not reestimated them.

The only other large one-time savings estimates are those resulting from reforms of Ambulatory Surgical Center Emergency equipment requirements, and reforms in the revocations or deactivation of billing privileges. As to ASC, we estimate that the three most costly types of equipment are as follows: Tracheostomy kit $100.00, cricothyrotomy kit $200.00 and mechanical ventilator $12,000. We utilized fiscal year 2010 surveyor worksheets completed by the States when conducting ASC surveys to project the distribution of the types of ASC services nationally. We estimate that about two-thirds of the approximately Medicare 5,200 certified ASCs are functioning as multipurpose facilities. Those that are not multipurpose facilities would not have to spend $12,300 in total for costly equipment that would not be utilized. We have estimated the savings by breaking down each specialty type of ASC that will not be considered a multipurpose facility and that may not eliminate all three pieces of equipment or choose just one or two depending on the needs of the facility (1500 ASCs × $12,300 = total savings of about $18.5 million). We received no specific comments on these savings estimates and have not reestimated them.

With respect to our revision to § 424.535(c), the number of affected providers is certainly very small as a proportion of the total universe of over 1.4 million Medicare providers, of whom over 800,000 are physicians and over 300,000 are non-physician practitioners. Based on administrative data, we estimate that the number of providers and suppliers that will be affected by this reform is between 1,000

and 2,000, a fraction of one percent of these.

We have no concrete statistical data on the resultant economic effects. We have, however, re-estimated billing losses from the unnecessarily conservative figure of $10 million (or $10,000 per each of the aforementioned 1,000 providers/suppliers) used in the proposed rule. We instead believe that our revision to § 424.535(c) could result in total savings of roughly $100 million annually.

We note that gross annual physician practice revenue in America often exceeds $1 million a year (see, for example, *http://www.merritthawkins.com/pdf/2010_revenuesurvey.pdf).*

(We chose physician revenue as the basis for our estimate because the majority of Medicare providers/suppliers are physicians.) Though it varies widely by physician type and geographic locality, roughly one-third of physician practice revenue is Medicare-related. While, on paper, this could result in up to $333 million in projected savings (1,000 providers × $1 million × ⅓), we believe that a $100 million figure is more appropriate for two reasons. First, non-physician practitioners are likely to be affected by our revision. Their annual revenue, on average, is significantly less than that of physicians. Second, a fair proportion of potentially affected physicians will be those who infrequently bill Medicare, as they may have limited involvement with Medicare and, in turn, may be less familiar with revalidation and other Medicare enrollment requirements. These smaller billers, in our view, bring down the projected savings to closer to $100 million. Although we unfortunately do not, as explained above, have concrete data regarding the actual projected savings, we believe that $100 million is a reasonable estimate.

Of the remaining reforms, most have minor cost savings as shown in Table 1 through entries of $1 million or less.

We received several comments on our cost and burden estimates related to our proposed revisions to § 424.540(a)(1) and § 424.535(c), but none of these comments addressed the average billings estimates we decided to revise.

Comment: Several commenters requested that CMS explain its estimate that only 12,000 physicians and non-physician practitioners per year would have their Medicare billing privileges deactivated pursuant to § 424.540(a)(1). One commenter stated that CMS previously announced that it had deactivated 20,000 Part B billing numbers each month beginning in January 2007—which, the commenter states would have resulted in 240,000 Part B deactivations per year. The commenter requested that CMS recalculate the regulatory impact analysis using the 240,000-figure minus the 12,000-estimate used in the proposed rule.

Response: CMS indeed deactivated approximately 20,000 Provider Transaction Identification Numbers (PTANs) per month between 2007 and 2010. This does not mean, however, that 20,000 physicians and non-physician practitioners had their billing privileges deactivated, as the vast majority of these suppliers had multiple PTANs. We based our estimate on the number of physicians and non-physician practitioners who would be affected, not the number of PTANs. Nonetheless, the issue is largely moot, as we are not finalizing our proposed revision to § 424.540(a)(1).

Comment: Several commenters requested that CMS explain why it did not consider any alternatives to its proposed change to § 424.540(a)(1). They suggested that CMS contemplate alternatives, such as: (1) Having the Medicare contractor attempt to contact the provider by telephone or email prior to deactivating their Medicare billing privileges, or (2) utilizing a 2-year or 3-year deactivation period for non-billing physicians and non-physician practitioners, rather than eliminating deactivation altogether.

Response: CMS did, in fact, explore various ways to reduce the burden of the deactivation process on physicians and non-physicians. Although we are not finalizing our proposed revision to § 424.540(a)(1), we intend, as explained earlier, to examine other possibilities for burden reduction.

Comment: A commenter asked why CMS did not consider alternatives to its proposal to revise § 424.535(c) to eliminate the re-enrollment bar in situations where the provider or supplier has failed to respond to a revalidation or other informational request.

Response: As stated earlier, the goal of the October 24, 2011 proposed rule was to set forth approaches to alleviate unnecessary burdens on providers and suppliers. With respect to provider enrollment, the issue of the re-enrollment bar in cases where the provider or supplier failed to respond to a revalidation or other informational request was one of the two principal concerns expressed by the provider and supplier communities, the other being the deactivation of billing privileges for 12 consecutive months of non-billing. We therefore focused our primary efforts on these two approaches.

Comment: One commenter recommended that CMS provide the number of provider enrollment reactivations that were entered into PECOS in FY 2009, FY 2010 and FY 2011. The commenter also recommended that CMS estimate the annual costs in FY 2009, FY 2010 and FY 2011 associated with: (1) The systematic deactivation process, and (2) reactivation.

Response: As we are not finalizing our proposed revision to § 424.540(a)(1), we do not believe that the requested statistics would be material to our discussion.

Comment: To gauge the impact of the proposed change to § 424.540(a)(1), several commenters recommended that CMS provide information regarding: (a) The number of physicians, non-physician practitioners, and Part B organizations whose billing privileges were deactivated each year from 2006 through 2011, (b) the number of physicians, non-physician practitioners and Part B organizational entities whose billing privileges were reactivated in 2008, 2009, 2010 and 2011, and (c) the number of Medicare contractor-initiated deactivations that have occurred based on the provider or supplier's failure to respond to revalidation or other informational requests.

Response: Again, since we are not finalizing our proposed revision to § 424.540(a)(1), we do not believe that furnishing the requested statistics is necessary.

The above is a summary of all the comments that we received on our impact analysis section.

D. Uncertainty

Our estimates of the effects of this regulation are subject to significant uncertainty. While the Department is confident that these reforms will provide flexibilities to facilities that will yield cost savings, we are uncertain about the magnitude of these effects. In addition, as we previously explained, there may be significant additional health benefits. Thus, we are confident that the rule will yield substantial net benefits. In this analysis we have provided estimates to suggest the potential savings these reforms could achieve under certain assumptions. We appreciate that those assumptions are simplified, and that actual results could be substantially higher or lower. We plan to evaluate these reforms over time, and welcome independent external evaluations of their effects by professional societies, individual providers, provider associations, academics, and others.

E. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), we have prepared an accounting statement. We estimate that the overall cost savings that this rule will create will exceed $200 million in the first year, and will be approximately $100 million per year thereafter. This includes the one-time savings related to ESRD reforms, as well as the savings to providers in lost billings, paperwork costs, confusion, and other burden reductions discussed throughout this preamble. There are also potentially substantial life-saving benefits that could reach hundreds of millions of dollars annually. Annualized savings are shown in the accounting statement below.

TABLE 4—ACCOUNTING STATEMENT

[Dollars in millions]

Category	Primary estimate	Year dollars	Discount rate (percent)	Period covered
Benefits				
Unquantified Qualitative Value of Lives Saved Through Increases in Organ Donations.	Potentially hundreds of lives saved but no precise estimate.	2012	7	2012–16
	Potentially hundreds of lives saved but no precise estimate.	2012	3	2012–16
Annualized savings from reduced ESRD facility investments and reduced ASC costs (see Table 3).	$30	2012	7	2012–16
	$30	2012	3	2012–16
Annualized savings to providers from billing improvements and other reforms (see Table 3).	$100	2012	7	2012–16
	$100	2012	3	2012–16
Costs				
None.				
Transfers				
None.				

F. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires agencies to analyze options for regulatory relief of small entities when proposed rules create a significant economic impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other Medicare or Medicaid providers and suppliers are small entities, either by nonprofit status or by having revenues of $7.0 million to $34.5 million in any 1 year. Individuals and States are not included in the definition of a ''small entity.'' This final rule will reduce costs to tens of thousands of physicians, ASCs, ESRD facilities, and other small entities. Provisions in this final rule will benefit some providers or suppliers in all or virtually all of the industries identified as ''Ambulatory Health Care Services'' under the Census Bureau's North American Industry Classification System (NAICS, codes 621111 through 621999). While most of the effects will be minimal (for example, eliminating obsolete and redundant or confusing regulatory requirements), we estimate that the impact on at least several thousand of these small entities will be economically significant. The purpose of the RFA is to reduce burdens on regulated entities, and HHS interprets the RFA as requiring a Final Regulatory Flexibility Analysis (FRFA) only when a rule creates an adverse economic impact. Accordingly, we certify that this final rule will not have a significant economic impact on a substantial number of small entities. HHS nonetheless voluntarily prepares a FRFA for final rules that, like this one, create a significant positive economic impact by reducing burden on small entities. In this case all of the economic effects of the final rule are positive, and some are economically significant.

Substantial savings will also accrue to most of about 6,500 ESRD providers from our proposal to eliminate fire safety requirements that are vital in residential provider settings, but unnecessary in ambulatory care facilities such as these. Approximately half of the 5,200 ASCs will benefit from more sensible emergency equipment policies. In addition, while we cannot estimate the number of positively affected entities for every provision we proposed, these reforms will benefit about 6,400 Intermediate Care Facilities through elimination of pejorative nomenclature that pervasively affects their names and operations. All of the provisions included in the final rule aim to identify and eliminate duplicative, overlapping, outdated and conflicting regulatory requirements that unnecessarily add confusion or costs to various providers or patients as they attempt to navigate excessive or obsolete or contradictory regulatory requirements. By making these changes, we believe health professionals will have increased resources to devote to improving patient care, increasing accessibility to care and reducing associated health care costs. We invited and welcomed comments on any and all of the provisions of the proposed rule with regard to the impacts of the burden reductions, as well as alternatives, if any, we should consider in the final rule or in future rulemaking on other regulatory provisions.

In addition, section 1102(b) of the Social Security Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of

section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. This rule has no direct effects on hospitals. Therefore, we are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

G. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require expenditures in any 1 year of $100 million in 1995 dollars, updated annually for inflation on either State, local, or tribal governments, or the private sector. In 2011, that threshold is approximately $139 million. This proposed rule mandates no new expenditures by either State, local, or tribal governments, or by the private sector.

H. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this regulation does not impose any costs on State or local governments, the requirements of Executive Order 13132 are not applicable.

List of Subjects

42 CFR Part 400

Grant programs—health, Health facilities, Health maintenance organizations (HMO), Medicaid, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 405

Administrative practice and procedure, Health facilities, Health professions, Kidney diseases, Medical devices, Medicare, Reporting and recordkeeping requirements, Rural areas, X-rays.

42 CFR Part 416

Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 423

Administrative practice and procedure, Emergency medical services, Health facilities, Health maintenance organizations (HMO), Health professionals, Medicare, Penalties, Privacy, Reporting and recordkeeping requirements.

42 CFR Part 424

Emergency medical services, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 440

Grant programs—health, Medicaid.

42 CFR Part 442

Grant programs—health, Health facilities, Health professions, Medicaid, Nursing homes, Reporting and recordkeeping requirements.

42 CFR Part 486

Grant programs—health, Health facilities, Medicare, Reporting and recordkeeping requirements, X-rays.

42 CFR Part 494

Health facilities, Kidney diseases, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, and under the authority of sections 1102(a), 1871(a)(1), and 1871(a)(4) of the Social Security Act, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

Chapter IV

Nomenclature Changes

■ 1–2. In 42 CFR chapter IV:

■ a. Remove ''Recipient'' and ''Recipients'' wherever they appear and add in their place ''Beneficiary'' and ''Beneficiaries,'' respectively; and

■ b. Remove ''Mental Retardation,'' ''the Mentally Retarded'' and the abbreviated form ''MR'' wherever they appear and add in their place ''Intellectual Disability,'' ''Individuals with Intellectual Disabilities'' and ''IID,'' respectively.

PART 400—INTRODUCTION; DEFINITIONS

■ 3. The authority citation for part 400 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh) and 44 U.S.C. Chapter 35.

Subpart B—Definitions

■ 4. Section 400.200 is amended by adding the definition of ''beneficiary'' in alphabetical order to read as follows:

§ 400.200 General definitions.

* * * * *

Beneficiary means a person who is entitled to Medicare benefits and/or has been determined to be eligible for Medicaid.

* * * * *

§ 400.202 [Amended]

■ 5. Section 400.202 is amended by removing the definition of ''beneficiary.''

■ 6. Section 400.203 is amended by removing the definition of ''recipient'' and adding the definition of ''intellectual disability'' in alphabetical order to read as follows:

§ 400.203 Definitions specific to Medicaid.

* * * * *

Intellectual disability means the condition that was previously referred to as mental retardation.

* * * * *

Subpart C—[Removed and Reserved]

■ 7. Subpart C, consisting of §§ 400.300 and 400.310, is removed and reserved.

PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

■ 8. The authority citation for Part 405 continues to read as follows:

Authority: Secs. 205(a), 1102, 1861, 1862(a), 1869, 1871, 1874, 1881, and 1886(k) of the Social Security Act (42 U.S.C. 405(a), 1302, 1395x, 1395y(a), 1395ff, 1395hh, 1395kk, 1395rr and 1395ww(k)), and sec. 353 of the Public Health Service Act (42 U.S.C. 263a).

§ 405.706 [Redesignated as § 405.925]

■ 9. Redesignate § 405.706 in subpart G as § 405.925 in subpart I.

Subpart G—[Removed and Reserved]

■ 10. Remove and reserve subpart G consisting of § 405.701 through § 405.705 and § 405.708 through § 405.753.

■ 11. Subpart H is revised to read as follows:

Subpart H—Appeals Under the Medicare Part B Program

Sec.

405.800 Appeals of CMS or a CMS contractor.

405.803 Appeals rights.

405.806 Impact of reversal of contractor determinations on claims processing.

405.809 Reinstatement of provider or supplier billing privileges following corrective action.

405.812 Effective date for DMEPOS supplier's billing privileges.

405.815 Submission of claims.

405.818 Deadline for processing provider enrollment initial determinations.

Subpart H—Appeals Under the Medicare Part B Program

Authority: Secs. 1102, 1866(j), and 1871 of the Social Security Act (42 U.S.C. 1302, 1395cc(j), and 1395hh).

§ 405.800 Appeals of CMS or a CMS contractor.

A CMS contractor's (that is, a carrier, Fiscal Intermediary or Medicare Administrative Contractor (MAC)) determination that a provider or supplier fails to meet the requirements for Medicare billing privileges.

(a) *Denial of a provider or supplier enrollment application.* If CMS or a CMS contractor denies a provider's or supplier's enrollment application, CMS or the CMS contractor notifies the provider or supplier by certified mail. The notice includes the following:

(1) The reason for the denial in sufficient detail to allow the provider or supplier to understand the nature of its deficiencies.

(2) The right to appeal in accordance with part 498 of this chapter.

(3) The address to which the written appeal must be mailed.

(b) *Revocation of Medicare billing privileges*—(1) *Notice of revocation.* If CMS or a CMS contractor revokes a provider's or supplier's Medicare billing privileges, CMS or a CMS contractor notifies the supplier by certified mail. The notice must include the following:

(i) The reason for the revocation in sufficient detail for the provider or supplier to understand the nature of its deficiencies.

(ii) The right to appeal in accordance with part 498 of this chapter.

(iii) The address to which the written appeal must be mailed.

(2) *Effective date of revocation.* The revocation of a provider's or supplier's billing privileges is effective 30 days after CMS or the CMS contractor mails notice of its determination to the provider or supplier, except if the revocation is based on a Federal exclusion or debarment, felony conviction, license suspension or revocation, or the practice location is determined by CMS or its contractor not to be operational. When a revocation is based on a Federal exclusion or debarment, felony conviction, license suspension or revocation, or the practice location is determined by CMS or its contractor not to be operational, the revocation is effective with the date of exclusion or debarment, felony conviction, license suspension or revocation or the date that CMS or its contractor determined that the provider or supplier was no longer operational.

(3) *Payment after revocation.* Medicare does not pay, and the CMS contractor rejects, claims for services submitted with a service date on or after the effective date of a provider's or supplier's revocation.

§ 405.803 Appeals rights.

(a) A provider or supplier may appeal the initial determination to deny a provider or supplier's enrollment application, or if applicable, to revoke current billing privileges by following the procedures specified in part 498 of this chapter.

(b) The reconsideration of a determination to deny or revoke a provider or supplier's Medicare billing privileges is handled by a CMS Regional Office or a contractor hearing officer not involved in the initial determination.

(c) Providers and suppliers have the opportunity to submit evidence related to the enrollment action. Providers and suppliers must, at the time of their request, submit all evidence that they want to be considered.

(d) If supporting evidence is not submitted with the appeal request, the contractor contacts the provider or supplier to try to obtain the evidence.

(e) If the provider or supplier fails to submit the evidence before the contractor issues its decision, the provider or supplier is precluded from introducing new evidence at higher levels of the appeals process.

§ 405.806 Impact of reversal of contractor determinations on claims processing.

(a) Claims for services furnished to Medicare beneficiaries during a period in which the supplier billing privileges were not effective are rejected.

(b) If a supplier is determined not to have qualified for billing privileges in one period but qualified in another, Medicare contractors process claims for services furnished to beneficiaries during the period for which the supplier was Medicare-qualified. Subpart C of this part sets forth the requirements for the recovery of overpayments.

(c) If a revocation of a supplier's billing privileges is reversed upon appeal, the supplier's billing privileges are reinstated back to the date that the revocation became effective.

(d) If the denial of a supplier's billing privileges is reversed upon appeal and becomes binding, then the appeal decision establishes the date that the supplier's billing privileges become effective.

§ 405.809 Reinstatement of provider or supplier billing privileges following corrective action.

If a provider or supplier completes a corrective action plan and provides sufficient evidence to the CMS contractor that it has complied fully with the Medicare requirements, the CMS contractor may reinstate the provider's or supplier's billing privileges. The CMS contractor may pay for services furnished on or after the effective date of the reinstatement. The effective date is based on the date the provider or supplier is in compliance with all Medicare requirements. A CMS contractor's refusal to reinstate a supplier's billing privileges based on a corrective action plan is not an initial determination under part 498 of this chapter.

§ 405.812 Effective date for DMEPOS supplier's billing privileges.

If a CMS contractor, contractor hearing officer, or ALJ determines that a DMEPOS supplier's denied enrollment application meets the standards in § 424.57 of this chapter and any other requirements that may apply, the determination establishes the effective date of the billing privileges as not earlier than the date the carrier made the determination to deny the DMEPOS supplier's enrollment application. Claims are rejected for services furnished before that effective date.

§ 405.815 Submission of claims.

A provider or supplier succeeding in having its enrollment application denial or billing privileges revocation reversed in a binding decision, or in having its billing privileges reinstated, may submit claims to the CMS contractor for services furnished during periods of Medicare qualification, subject to the limitations in § 424.44 of this chapter, regarding the timely filing of claims. If the claims previously were filed timely but were rejected, they are considered filed timely upon resubmission. Previously denied claims for items or services furnished during a period of denial or revocation may be resubmitted to CMS within 1 year after the date of reinstatement or reversal.

§ 405.818 Deadline for processing provider enrollment initial determinations.

Contractors approve or deny complete provider or supplier enrollment applications to approval or denial within the following timeframes:

(a) *Initial enrollments*—Contractors process new enrollment applications within 180 days of receipt.

(b) *Revalidation of existing enrollments*—Contractors process revalidations within 180 days of receipt.

(c) *Change-of-information and reassignment of payment request*—Contractors process change-of-information and reassignment of payment requests within 90 days of receipt.

PART 416—AMBULATORY SURGICAL SERVICES

■ 12. The authority citation for Part 416 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Subpart C—Specific Conditions for Coverage

■ 13. Section 416.44 is amended by removing paragraph (a)(3) and revising paragraph (c) to read as follows:

§ 416.44 Condition for coverage—Environment.

* * * * *

(c) *Standard: Emergency equipment.* The ASC medical staff and governing body of the ASC coordinates, develops, and revises ASC policies and procedures to specify the types of emergency equipment required for use in the ASC's operating room. The equipment must meet the following requirements:

(1) Be immediately available for use during emergency situations.

(2) Be appropriate for the facility's patient population.

(3) Be maintained by appropriate personnel.

* * * * *

PART 423—VOLUNTARY MEDICARE PRESCRIPTION DRUG BENEFIT

■ 14. The authority citation for Part 423 continues to read as follows:

Authority: Section 1860D–4(e) of the Social Security Act (42 U.S.C. 1395w–104(e)).

Subpart D—Cost Control and Quality Improvement Requirements

■ 15. In § 423.160, paragraphs (b)(3)(i) and (ii) and (c)(1)(iii) and (c)(2)(i) are revised to read as follows:

§ 423.160 Standards for electronic prescribing.

* * * * *

(b) * * *

(3) *Eligibility.* (i) The Accredited Standards Committee X12N 270/271–Health Care Eligibility Benefit Inquiry and Response, Version 5010, April 2008, ASC X12N/005010x279 (incorporated by reference in paragraph (c)(2)(i) of this section), for transmitting eligibility inquiries and responses between prescribers and Part D sponsors.

(ii) The National Council for Prescription Drug Programs Telecommunication Standard Specification, Version D, Release 0 (Version D.0), August 2007, and equivalent NCPDP Batch Standard Batch Implementation Guide, Version 1, Release 2 (Version 1.2), January 2006 supporting Telecommunications Standard Implementation Guide, Version D, Release 0 (Version D.0), August 2007, for the NCPDP Data Record in the Detail Data Record (incorporated by reference in paragraph (c)(1)(iii) of this section), for transmitting eligibility inquiries and responses between dispensers and Part D sponsors.

* * * * *

(c) * * *

(1) * * *

(iii) National Council for Prescription Drug Programs Telecommunication Standard Specification, Version D, Release 0 (Version D.0), August 2007 and equivalent National Council for Prescription Drug Programs (NCPDP) Batch Standard Batch Implementation Guide, Version 1, Release 2 (Version 1.2), August 2007 supporting Telecommunication Standard Implementation Guide, Version D, Release 0 (Version D.0) for the NCPDP Data Record in the Detail Data Record.

* * * * *

(2) * * *

(i) Accredited Standards Committee (ASC X12 Standards for Electronic Data Interchange Technical Report Type 3—Health Care Eligibility Benefit Inquiry and Response (270/271), April 2008, ASC X12N/005010X279.

* * * * *

PART 424—CONDITIONS FOR MEDICARE PAYMENT

■ 16. The authority citation for Part 424 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Subpart P—Requirements for Establishing and Maintaining Medicare Billing Privileges

■ 17. Section 424.510 is amended by revising paragraph (a) to read as follows:

§ 424.510 Requirements for enrolling in the Medicare program.

(a) Providers and suppliers must submit enrollment information on the applicable enrollment application. Once the provider or supplier successfully completes the enrollment process, including, if applicable, a State survey and certification or accreditation process, CMS enrolls the provider or supplier into the Medicare program. To be enrolled, a provider or supplier must meet enrollment requirements specified in paragraph (d) of this section.

* * * * *

■ 18. Section 424.535 is amended by revising paragraph (c) to read as follows:

§ 424.535 Revocation of enrollment and billing privileges in the Medicare program.

* * * * *

(c) *Reapplying after revocation.* After a provider, supplier, delegated official, or authorizing official has had their billing privileges revoked, they are barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar. The re-enrollment bar is a minimum of 1 year, but not greater than 3 years, depending on the severity of the basis for revocation. The re-enrollment bar does not apply in the event a revocation of Medicare billing privileges is imposed under paragraph (a)(1) of this section based upon a provider or supplier's failure to respond timely to a revalidation request or other request for information.

* * * * *

■ 19. Section 424.540 is amended by:

■ a. Revising paragraph (a) introductory text;

■ b. Revising paragraph (a)(2);

■ c. Adding paragraph (a)(3).

The revisions and addition read as follows:

§ 424.540 Deactivation of Medicare billing privileges.

(a) *Reasons for deactivation.* CMS may deactivate the Medicare billing privileges of a provider or supplier for any of the following reasons:

* * * * *

(2) The provider or supplier does not report a change to the information supplied on the enrollment application within 90 calendar days of when the change occurred. Changes that must be reported include, but are not limited to, a change in practice location, a change of any managing employee, and a change in billing services. A change in ownership or control must be reported within 30 calendar days as specified in § 424.520(b) and § 424.550(b).

(3) The provider or supplier does not furnish complete and accurate information and all supporting documentation within 90 calendar days of receipt of notification from CMS to submit an enrollment application and supporting documentation, or resubmit and certify to the accuracy of its enrollment information.

* * * * *

PART 440—SERVICES: GENERAL PROVISIONS

■ 20. The authority citation for Part 440 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 302).

Subpart A—Definitions

■ 21. Section 440.110 is amended by revising paragraphs (a)(2) and (b)(2) to read as follows:

§ 440.110 Physical therapy, occupational therapy, and services for individuals with speech, hearing, and language disorders.

(a) * * *

(2) A ''qualified physical therapist'' is an individual who meets personnel qualifications for a physical therapist at § 484.4.

(b) * * *

(2) A ''qualified occupational therapist'' is an individual who meets personnel qualifications for an occupational therapist at § 484.4.

* * * * *

PART 442—STANDARDS FOR PAYMENT TO NURSING FACILITIES AND INTERMEDIATE CARE FACILITIES FOR INDIVIDUALS WITH INTELLECTUAL DISABILITIES

■ 22. The authority citation for Part 442 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302), unless otherwise noted.

Subpart B—Provider Agreements

■ 23. Section 442.15 is revised to read as follows:

§ 442.15 Duration of agreement for ICF/IIDs.

(a) The agreement for an ICF/IID remains in effect until the Secretary determines that the facility no longer meets the applicable requirements. The State Survey Agency must conduct a survey of the facility to determine compliance with the requirements at a survey interval of no greater than 15 months.

(b) FFP is available for services furnished by a facility for up to 30 days after its agreement expires or terminates under the conditions specified in § 441.11 of this subchapter.

§ 442.16 [Removed and Reserved]

■ 24. Section 442.16 is removed and reserved.

Subpart C—Certification of ICF/IIDs

■ 25. Section 442.109 is revised to read as follows:

§ 442.109 Certification period for ICF/IIDs: General provisions.

(a) A survey agency may certify a facility that fully meets applicable requirements. The State Survey Agency must conduct a survey of each ICF/IID not later than 15 months after the last day of the previous survey.

(b) The statewide average interval between surveys must be 12 months or less, computed in accordance with paragraph (c) of this section.

(c) The statewide average interval is computed at the end of each Federal fiscal year by comparing the last day of the most recent survey for each participating facility to the last day of each facility's previous survey.

■ 26. Section 442.110 is amended by revising paragraph (b) to read as follows:

§ 442.110 Certification period for ICF/IID with standard-level deficiencies.

* * * * *

(b) The survey agency may certify a facility for a period that ends no later than 60 days after the last day specified in the plan for correcting deficiencies. The certification period must not exceed 15 months, including the period allowed for corrections.

* * * * *

PART 486—CONDITIONS FOR COVERAGE OF SPECIALIZED SERVICES FURNISHED BY SUPPLIERS

■ 27. The authority citation for Part 486 continues to read as follows:

Authority: Secs. 1102, 1138, and 1871 of the Social Security Act (42 U.S.C. 1302, 1320b–8, and 1395hh) and section 371 of the Public Health Service Act (42 U.S.C. 273).

Subpart G—Requirements for Certification and Designation and Conditions for Coverage: Organ Procurement Organizations

■ 28. Section 486.302 is amended by revising the definition of ''donor document'' to read as follows:

§ 486.302 Definitions.

* * * * *

Donor document means any documented indication of an individual's choice regarding his or her wishes concerning organ and/or tissue donation that was made by that individual or another authorized individual in accordance with any applicable State law.''

* * * * *

§ 486.324 [Amended]

■ 29. Section 486.324 is amended by removing the second paragraph (e).

PART 494—CONDITIONS FOR COVERAGE FOR END-STAGE RENAL DISEASE FACILITIES

■ 30. The authority citation for Part 494 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. l302 and l395hh).

Subpart B—Patient Safety

■ 31. In § 494.60, paragraphs (e)(1) and (2) are revised to read as follows:

§ 494.60 Condition: Physical environment.

* * * * *

(e) * * *

(1) Except as provided in paragraph (e)(2) of this section, by February 9, 2009, dialysis facilities that are located adjacent to high hazardous occupancies or do not provide one or more exits to the outside at grade level from the patient treatment area level, must comply with applicable provisions of the 2000 edition of the Life Safety Code of the National Fire Protection Association (which is incorporated by reference at § 403.744(a)(1)(i) of this chapter).

(2) Notwithstanding paragraph (e)(1) of this section, dialysis facilities participating in Medicare as of October 14, 2008 that require sprinkler systems are those housed in multi-story buildings construction Types II(000), III(200), or V(000), as defined in the 2000 edition of the Life Safety Code of the National Fire Protection Association (which is incorporated by reference at § 403.744(a)(1)(i) of this chapter), section 21.1.6.3, which were constructed after January 1, 2008, and those housed in high rise buildings over 75 feet in height, which were constructed after January 1, 2008.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program) (Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: February 2, 2012.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: April 2, 2012.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2012–11543 Filed 5–10–12; 9:15 am]

BILLING CODE 4120–01–P

FEDERAL REGISTER

Vol. 77 Wednesday,

No. 95 May 16, 2012

Part IV

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 482 and 485

Medicare and Medicaid Programs; Reform of Hospital and Critical Access Hospital Conditions of Participation; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 482 and 485

[CMS–3244–F]

RIN 0938–AQ89

Medicare and Medicaid Programs; Reform of Hospital and Critical Access Hospital Conditions of Participation

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: This final rule revises the requirements that hospitals and critical access hospitals (CAHs) must meet to participate in the Medicare and Medicaid programs. These changes are an integral part of our efforts to reduce procedural burdens on providers. This rule reflects the Centers for Medicare and Medicaid Services' (CMS) commitment to the general principles of the President's Executive Order 13563, released January 18, 2011, entitled ''Improving Regulation and Regulatory Review.''

DATES: These regulations are effective on July 16, 2012.

FOR FURTHER INFORMATION CONTACT: CDR Scott Cooper, USPHS, (410) 786–9465; Jeannie Miller, (410) 786–3164; Lisa Parker, (410) 786–4665; Mary Collins, (410) 786–3189; Diane Corning, (410) 786–8486; and Sarah Fahrendorf, (410) 786–3112.

SUPPLEMENTARY INFORMATION:

Executive Summary for This Final Rule

A. Purpose

In Executive Order 13563, ''Improving Regulations and Regulatory Review'', the President recognized the importance of a streamlined, effective, and efficient regulatory framework designed to promote economic growth, innovation, job-creation, and competitiveness. To achieve a more robust and effective regulatory framework, the President has directed each executive agency to establish a plan for ongoing retrospective review of existing significant regulations to identify those rules that can be eliminated as obsolete, unnecessary, burdensome, or counterproductive or that can be modified to be more effective, efficient, flexible, and streamlined. This final rule responds directly to the President's instructions in Executive Order 13563 by reducing outmoded or unnecessarily burdensome rules, and thereby increasing the ability of hospitals and CAHs to devote resources to providing high quality patient care.

B. Summary of the Major Provisions

Revisions To Allow Flexibility and Eliminate Burdensome Conditions of Participation (CoPs): We have reduced burden to providers and suppliers by modifying, removing, or streamlining current regulations that we have identified as excessively burdensome.

- *Single governing body for multiple hospitals:* We will allow one governing body to oversee multiple hospitals in a multi-hospital system and have added a requirement for a member, or members, of the hospital's medical staff to be included on the governing body as a means of ensuring communication and coordination between a single governing body and the medical staffs of individual hospitals in the system.
- *Reporting of Restraint-Related Deaths:* We have replaced the requirement that hospitals must report deaths that occur while a patient is only in soft, 2-point wrist restraints with a requirement that hospitals must maintain a log (or other system) of all such deaths. This log must be made available to CMS immediately upon request. We have indicated that the log is internal to the hospital and that the name of the practitioner responsible for the care of the patient may be used in the log in lieu of the name of the attending physician if the patient was under the care of a non-physician practitioner and not a physician.
- *Role of other practitioners on the Medical Staff:* We have broadened the concept of ''medical staff'' and have allowed hospitals the flexibility to include other practitioners as eligible candidates for the medical staff with hospital privileges to practice in the hospital in accordance with State law. All practitioners will function under the rules of the medical staff. This change will clearly permit hospitals to allow other practitioners (e.g., APRNs, PAs, pharmacists) to perform all functions within their scope of practice. We have required that the medical staff must examine the credentials of all eligible candidates (as defined by the governing body) and then make recommendations for privileges and medical staff membership to the governing body.
- *Medical staff leadership:* We have allowed podiatrists to be responsible for the organization and conduct of the medical staff. This change will allow podiatrists to assume a new leadership role within hospitals, if hospitals so choose.
- *Nursing care plan:* We have allowed hospitals the options of having a stand-alone nursing care plan or a single interdisciplinary care plan that addresses nursing and other disciplines.
- *Administration of medications:* We have allowed hospitals to have an optional program for patient(s)/support person(s) on self-administration of appropriate medications. The program must address the safe and accurate administration of specified medications; ensure a process for medication security; address self-administration training and supervision; and document medication self-administration.
- *Administration of blood transfusions and intravenous medications:* We have eliminated the requirement for non-physician personnel to have special training in administering blood transfusions and intravenous medications and have revised the requirement to clarify that those who administer blood transfusions and intravenous medications do so in accordance with State law and approved medical staff policies and procedures. We believe that this clarification will make the requirement consistent with current standards of practice.
- *Orders by other practitioners:* We have allowed for drugs and biologicals to be prepared and administered on the orders of practitioners (other than a doctor), in accordance with hospital policy and State law, and have also allowed orders for drugs and biologicals to be documented and signed by practitioners (other than a doctor), in accordance with hospital policy and State law.
- *Standing Orders:* We have allowed hospitals the flexibility to use standing orders and have added a requirement for medical staff, nursing, and pharmacy to approve written and electronic standing orders, order sets, and protocols. We have required that orders and protocols must be based on nationally recognized and evidence-based guidelines and recommendations.
- *Verbal Orders:* We have eliminated the requirement for authentication of verbal orders within 48-hours and have deferred to applicable State law to establish authentication timeframes.
- *Authentication of Orders:* We have made permanent the previous temporary requirement that all orders, including verbal orders, must be dated, timed, and authenticated by either the ordering practitioner or another practitioner who is responsible for the care of the patient and who is authorized to write orders by hospital policy in accordance with State law.

• *Infection Control Log:* We have eliminated the obsolete requirement for a hospital to maintain an infection control log. Hospitals are already required to monitor infections and do so through various surveillance methods including electronic systems.

• *Outpatient services director:* We have removed the burdensome and outdated requirement for a single Director of Outpatient Services position that oversees all outpatient departments in a hospital. Hospitals already have separate directors for individual outpatient departments, so having a single overall Director position is duplicative and unnecessary.

• *Transplant Center Process Requirements:* We have eliminated a duplicative requirement for an organ recovery team that is working for the transplant center to conduct a ''blood type and other vital data verification'' before organ recovery when the recipient is known. The verification will continue to be completed at two other times in the transplant process.

• *CAH Provision of Services:* We have eliminated the burdensome requirement that CAHs must furnish diagnostic and therapeutic services, laboratory services, radiology services, and emergency procedures directly by CAH staff. This will allow CAHs to provide such services under arrangement.

Clarifying Changes: We have clarified several requirements in the hospital and CAH CoPs to ensure that they are consistent with the statute as well as with other, more current CoP requirements.

• *Pharmaceutical Services:* We have made a technical change to replace the term ''quality assurance program'' with the more current term ''quality assessment and performance improvement program.''

• *Infection Control:* We have made a technical change to replace the term ''quality assurance program'' with the more current term ''quality assessment and performance improvement program.''

• *CAH Personnel Qualifications:* We have aligned the definition of ''clinical nurse specialist'' that is in the rule with the definition that is in the statute.

• *CAH Surgical Services:* We have clarified that ''surgical services'' are an optional service for CAHs.

Other Options Considered: We discussed alternative options for revisions that we considered, but did not propose. In the proposed rule, we also solicited comments and suggestions from both stakeholders and the general public on additional reforms that would reduce burden on hospitals and CAHs. In this rule, we have included our responses to the comments received on those alternatives, as well as a summary of additional recommendations submitted by commenters.

C. Summary of Costs and Benefits

1. Overall Impact

The rule will reduce the total regulatory burden for hospitals and CAHs by nearly $940 million initially and by almost $5 billion over the next five years. Changes to the following CoPs accounted for the greatest potential savings in the final rule: § 482.22, Medical staff ($330 million); § 482.23, Nursing services ($110 million); § 482.24, Medical record services ($170 million); and § 482.54, Outpatient services ($300 million). Our estimates were based on input from stakeholders as well as on our own experience with hospitals.

The potential savings will be achieved through a number of significant regulatory changes. For example, changes to the Medical staff CoP will allow hospitals to broaden the concept of ''medical staff'' through the appointment of non-physician practitioners to the medical staff so that they may perform the duties for which they are qualified through training and education and as allowed within their State scope-of-practice laws. For hospitals that choose this option, significant savings might be achieved as non-physician practitioners will enable physicians to more effectively manage their time so that they may focus on the more medically complex patients. Changes to the Nursing services CoP will allow hospitals to have a stand-alone nursing care plan or a single interdisciplinary care plan that addresses nursing and other disciplines. Providing hospitals with the option for a single, interdisciplinary care plan for each patient that addresses nursing and other disciplines, will not only support and improve the coordination of patient care, it will also result in significant cost reductions and efficiencies.

The revisions will also allow hospitals much greater flexibility and freedom to determine the best ways to oversee and manage outpatients by removing the outdated requirement for a single Director of Outpatient Services. This simple, but necessary change to the Outpatient services CoP will bring hospitals both cost savings and more efficient ways to manage hospital resources. Finally, we will now allow CAHs to provide diagnostic and therapeutic services, laboratory services, radiology services, and emergency procedures under arrangement. For these small hospitals, this change will not only allow them to solve some of their pressing staffing problems in these service areas, it will allow them to increase access to these critical services for their patient populations.

While we feel confident that our estimates reflect a reasonable approach to hospital and CAH cost savings, much will depend on the future staffing and management decisions that individual hospitals and CAHs choose to make.

2. Section-by-Section Economic Impact Estimates for 2012

	Section	Annual savings ($M)	Five year savings ($M)
Patient's Rights—Eliminate and replace burdensome reporting process for deaths involving only soft wrist restraints	482.13	$5.1	$25.5
Medical Staff—Flexibility to consider other practitioners as eligible candidates for the medical staff	482.22	330.0	1,650.0
Nursing Services—Eliminate requirement for nursing care plan when an interdisciplinary plan is already in place	482.23	110.0	550.0
Medical Record Services—Less burdensome process to authenticate verbal orders	482.24	80.0	400.0
Medical Record Services—Allow the use of pre-printed and electronic standing orders for patient orders	482.24	90.0	450.0
Infection Control—Eliminate log of incidents related to infections and communicable diseases	482.42	6.6	33.0
Outpatient Services—Allow one or more individuals to be responsible for the supervision of outpatient services	482.54	300.0	1,500.0
Transplant Organ recovery—Remove duplicative blood typing requirement	482.92	0.2	1.0

	Section	Annual savings ($M)	Five year savings ($M)
CAH Provision of Services—Eliminate the requirement that certain services be provided only by employees and not through contractual arrangements with entities such as community physicians, laboratories, or radiology services	485.635	15.8	79.0
Total		937.7	4,688.5

Acronyms

AHA American Hospital Association
AOA American Osteopathic Association
APRN Advanced Practice Registered Nurse
BBA Balanced Budget Act
CAH Critical Access Hospital
CCN CMS Certification Number
CDC Centers for Disease Control and Prevention
CfC Condition for Coverage
CoP Condition of Participation
CMS Centers for Medicare & Medicaid Services
CNS Certified Nurse Specialist
DNV Det Norske Veritas
EACH Essential Access Community Hospital
H&P History and Physical Examination
HAI Healthcare-Associated Infection
HFAP Healthcare Facilities Accreditation Program
HHS U.S. Department of Health and Human Services
IG Interpretive Guidelines
IOM Institute of Medicine
MRHFP Medicare Rural Hospital Flexibility Program
OBRA Omnibus Budget Reconciliation Act
OPO Organ Procurement Organization
PA Physician Assistant
RIA Regulatory Impact Analysis
RFA Regulatory Flexibility Act
RPCH Rural Primary Care Hospital
SBA Small Business Administration
SBREFA Small Business Regulatory Enforcement Fairness Act
SOM State Operations Manual
TJC The Joint Commission
UMRA Unfunded Mandates Reform Act

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I. Background

A. Introduction

This final rule reflects the Centers for Medicare and Medicaid Services' (CMS) commitment to the general principles of the President's Executive Order 13563, released January 18, 2011, entitled ''Improving Regulation and Regulatory Review.'' In this final rule we seek to reduce the regulatory burden placed on hospitals. We have identified a number of existing hospital Conditions of Participations (CoPs) that we believe could be reformed, simplified, or eliminated in order to reduce unnecessary burden and costs placed on hospitals and critical access hospitals (CAHs) under existing regulations. The January 2011 Executive Order directs agencies to select the least burdensome approaches, to minimize cumulative costs, to simplify and harmonize overlapping regulations, and to identify and consider flexible approaches that maintain freedom of choice for the American public. Executive Order 13563 also requires agencies to engage in a process of reviewing existing regulations to see if those rules make sense and continue to be justified. The provisions of this final rule are intended to meet the letter and spirit of Executive Order 13563, for reviewing existing regulations to see if those rules make sense and continue to be justified. They also meet the objectives of section 610 of the Regulatory Flexibility Act (RFA), which also requires agencies to review the impact of existing rules on small businesses or other small entities for possible reforms to reduce burden and costs.

B. Statutory and Regulatory Authority for Hospital CoPs

Sections 1861(e)(1) through (8) of the Social Security Act (the Act) provide that a hospital participating in the Medicare program must meet certain specified requirements. Section 1861(e)(9) of the Act specifies that a hospital also must meet such other requirements as the Secretary finds necessary in the interest of the health and safety of individuals furnished services in the institution. Under this authority, the Secretary has established regulatory requirements that a hospital must meet to participate in Medicare at 42 CFR Part 482, CoPs for Hospitals. Section 1905(a) of the Act provides that Medicaid payments from States may be applied to hospital services. Under regulations at 42 CFR 440.10(a)(3)(iii), 42 CFR 440.20(a)(3)(ii), and 42 CFR 440.140, hospitals are required to meet the Medicare CoPs in order to participate in Medicaid.

On May 26, 1993, CMS published a final rule in the **Federal Register** entitled ''Medicare Program; Essential Access Community Hospitals (EACHs) and Rural Primary Care Hospitals (RPCHs)'' (58 FR 30630) that implemented sections 6003(g) and 6116 of the Omnibus Budget Reconciliation Act (OBRA) of 1989 and section 4008(d) of OBRA 1990. That rule established requirements for the EACH and RPCH providers that participated in the seven-State demonstration program that was designed to improve access to hospital and other health services for rural residents.

Sections 1820 and 1861(mm) of the Act, as amended by section 4201 of the Balanced Budget Act (BBA) of 1997, replaced the EACH/RPCH program with the Medicare Rural Hospital Flexibility Program (MRHFP), under which a qualifying facility can be designated as a CAH. CAHs participating in the MRHFP must meet the conditions for designation specified in the statute and, under section 1820(c)(2)(B)(i)(I) of the Act, must meet the CoPs located at 42 CFR part 485, subpart F. Among such requirements, a CAH must be located in a rural area (or an area treated as rural) and must be located more than a 35-mile drive (or in the case of mountainous terrain or in areas with only secondary roads available, more than a 15-mile drive) from a hospital or another CAH unless otherwise designated as a ''necessary provider'' prior to January 1, 2006.

The CoPs are organized according to the types of services a hospital may offer, and include specific requirements for each hospital service or department. The purposes of these conditions are to protect patient health and safety and to ensure that quality care is furnished to all patients in Medicare-participating hospitals. In accordance with Section 1864 of the Act, State surveyors assess hospital compliance with the conditions as part of the process of determining whether a hospital qualifies for a provider agreement under Medicare. However, under section 1865 of the Act, hospitals can elect to be reviewed instead by private accreditation organizations approved by CMS as having standards and survey procedures that are at least equivalent to those used by CMS and State surveyors. CMS-approved hospital accreditation programs include those of The Joint Commission (TJC), the American Osteopathic Association/Healthcare Facilities Accreditation Program (AOA/HFAP), and Det Norske Veritas Healthcare (DNV) (See 42 CFR part 488, Survey and Certification Procedures.).

II. Provisions of the Proposed Rule and Response to Comments

On October 24, 2011, we published a proposed rule entitled ''Reform of Hospital and Critical Access Hospital Conditions of Participation'' (76 FR 65891). The proposed rule identified several priority areas in the CoPs for both hospitals (42 CFR Part 482) and CAHs (42 CFR Part 485) and set forth revisions intended to eliminate or significantly reduce those instances where the CoPs are duplicative, unnecessary, and/or burdensome.

We received approximately 1,729 public comments in response to the proposed rule. Many comments were supportive; however, there were some commenters that opposed the proposed provisions. Approximately 1,100 of the comments were part of a write-in campaign from anesthesiologists that supported what they described as CMS' upholding of physician supervision requirements, but objected to what the letters described as an effort to replace physicians with nurses.

In general, the comments can be classified into roughly three categories: comments from hospitals, comments from physicians, and those from non-physician practitioners. Commenters representing the hospital industry, as well as accrediting organizations, expressed overwhelming support for the proposals and agreement with our efforts to bring the CoPs in line with current medical practice, eliminate burdensome and obsolete requirements, and provide hospitals with operational flexibility. Physician groups mostly disagreed with staffing proposals, and expressed disagreement with what they viewed as the Agency's endorsement of the replacement of physicians with nurses and non-physician practitioners. While commenters representing non-physician practitioners expressed support for most of the proposals, they urged us to go further with changes that they believe would allow them to practice to the full extent allowed under their respective State laws and regulations. In the following section, we provide a brief summary of the proposed provisions, followed by responses to public comments received on each issue. For a detailed discussion of the proposals, see the October 24, 2011 proposed rule (76 FR 65891).

A. Revisions To Allow Flexibility and Eliminate Burdensome CoPs

1. Governing Body (§ 482.12)

We proposed to revise and clarify the governing body requirement to reflect current hospital organizational structure, whereby multi-hospital systems have integrated their governing body functions to oversee care in a more efficient and effective manner. Specifically, we proposed to revise the introductory text of § 482.12 to state that ''There must be an effective governing body that is legally responsible for the conduct of the hospital.'' We noted that we would retain the current provision that requires the persons legally responsible for the conduct of the hospital to carry out the functions specified in part 482 of our regulations that pertain to the governing body if the hospital does not have an organized governing body.

Comment: Many commenters wrote in support of the CMS proposal to allow a single governing body for all hospitals within a multi-hospital system and they characterized the current requirement for a separate governing body for each hospital as redundant and obsolete. Several comments suggested the change would provide hospitals with greater flexibility and help them operate more efficiently and effectively. Others noted that the change would simplify governance and administrative processes. These commenters also suggested the change would enhance the continuity and consistency of policies and practices across all hospitals within a multi-hospital system. One commenter suggested the change might streamline the workflow for nurses. Many commenters also remarked that the proposal was appropriate given the more integrated organizational models adopted by many hospitals.

Some comments detailed the greater efficiencies and cost savings that would result, including savings in areas such as finance, human resources, information technology, and purchasing. Many commenters specifically remarked that the change would end the redundant and inefficient practice of multi-hospital systems' holding duplicative, separate meetings for each of the hospital boards.

Some comments stressed the advantages that a single governing body would have in terms of enhancing mutual accountability, interdependence and timely oversight. Commenters remarked that the single governing body structure could facilitate shared learning, promulgation of best practices and help hospitals standardize performance metrics and eliminate variances. Another commenter stated that its policy of allowing a single governing body for a multi-hospital system has not had an adverse impact on quality and safety.

Response: We agree with the commenters that this change will positively affect hospitals. With the addition of a few changes pertaining to board membership, discussed below, we are finalizing this proposal for a single governing body. We will be finalizing the proposed language that refers to a hospital, generally, and removing the language referring to the hospital ''as an institution.''

Comment: Several commenters requested that CMS specify in regulatory text that, ''hospital systems with more than one CMS Certification Number may have a single governing body.''

Response: While we agree with the commenters' intent, and we recognize that the language suggested was excerpted from the preamble text of our proposed rule, we are not making this change in regulatory text. Rather, we will address this clarification in forthcoming sub-regulatory guidance. Our decision against using the term ''CMS Certification Number'' in the final regulatory text is merely a precaution intended to provide flexibility, should the terminology be changed.

Comment: Several commenters requested that CMS take a stronger position in favor of hospitals' adoption of a single governing body for their multi-hospital systems. Specifically, these commenters asked CMS to expressly state that, ''multi-hospital systems can be effectively led by a single governing body.'' On the other hand, we received comments requesting that CMS expressly state that ''multiple

hospitals cannot be effectively governed by a single governing body'' and that ''each hospital, including hospitals in a multi-hospital system, should have its own governing body.'' Still other commenters asked CMS to reaffirm the important role of local sub-boards.

Response: While we believe that multi-hospital systems might gain important efficiencies and achieve significant progress in quality programs under the governance of a single governing body, we also agree that local sub-boards might be a valuable resource in hospital governance. We believe there is an important and essential symbiotic relationship that should exist between a hospital's governing body and its medical staff. The dynamics of this relationship generate critical checks and balances that serve to promote and protect patient health and safety. We believe that the ongoing, timely communication between a governing body and its medical staff is essential to the successful coordination and advancement of patient care, regardless of whether the adopted governance model is one of a single governing body for all hospitals in a multi-hospital system, one of a single governing body with local sub-boards at each hospital in the system, or one of a separate governing body for each hospital. The intent of the proposed revision was to provide hospitals with some regulatory flexibility with regard to hospital governance and to acknowledge that alternative methods of governance exist that might prove as effective as the traditional methods currently required by the CoP. When practically applied in the ''real world'' of hospitals, each model of hospital governance has the potential to be flawed and dysfunctional just as each has the potential to be engaged and effective. We remind the commenters that the proposed revision to this requirement is an option that each multi-hospital system is free to choose or not to choose for itself. Because we have not seen sufficient evidence presented that would indicate that one model works more effectively than another, we do not believe that it would be appropriate for CMS to endorse one model of hospital governance over another.

Comment: Several of the commenters who expressed a clear preference for a hospital-specific governing body asked CMS to require that, at minimum, a member of the medical staff serve on the governing body. The commenters suggested that CMS' proposal to allow for a single governing body within a multi-hospital system would diminish communication and coordination between the governing body and the medical staff as it presently takes place at the individual hospital level. Commenters stated that an effective governing body needs to have an informed understanding of the care coordination challenges at each member hospital and that this can only be achieved when the lines of communication are open between the governing body and the medical staff.

To counter the potential disruption of communication that may be caused by the proposal to allow multi-hospital governing bodies, commenters suggested that CMS require that a member of the medical staff serve on the governing body. Commenters added that such a model would further inform patient health and safety initiatives within the hospital.

Commenters also expressed concern that, even under the current requirements which require a governing body at each institution, hospital physicians are generally not well represented on hospital governing bodies. Commenters stressed the importance of physician input at the governing body level, particularly as they believe it is essential in the context of CMS' proposal to permit a single governing body for a multi-hospital system.

Response: We agree with the commenters' suggestion, and we are modifying our final regulatory language to require that a hospital's governing body must include at least one medical staff member. We agree with the commenters that strong coordination between a hospital's governing body and medical staff is paramount to the delivery of quality care.

We note that these two, separate Conditions of Participation at § 482.12 (Governing body) and § 482.22 (Medical staff) have a long, overlapping, and interrelated history. In 1986, CMS discontinued a requirement for a joint committee to formalize liaison between the medical staff and the hospital's administration. At that time, we decided to leave decisions about liaison and coordination activities to internal hospital management (51 FR 22010, 22017, June 17, 1986). Because we are now making changes to the hospital's management structure by allowing a single governing body for multiple hospitals within a system, we believe that, in accordance with the comments we received on medical staff representation on the governing body, a formalized link between these interdependent entities is appropriate. While it may already be a requirement at some hospitals or simply a convention that others follow, we are not aware that this linked structure is the norm. We believe that adding the requirement for hospitals to have a medical staff member serve on the governing body will build in an important element of continuity and ensure regular communication between a hospital's governing body and its medical staff(s), particularly in light of our decision to permit a single governing body for hospitals in multi-hospital systems.

We also believe that requiring a hospital's governing body to include a medical staff member will directly address a widely voiced concern for stronger communication between a hospital governing body and the medical staffs of its member hospitals. In the case of a multi-hospital system with one governing body, we wish to clarify that we are not requiring that the governing body include a member of each separately certified hospital's medical staff, so long as at least one governing body member is a member of the medical staff of one system hospital. The governing body is free to select as many of its members from its medical staff(s) as it chooses. However, we would expect a multi-hospital system's single governing body to carefully consider the unique needs of the patient populations served by each of its member hospitals and their medical staffs when determining the number and composition of medical staff members to be appointed to the governing body. We recognize that physicians may be in a minority position on a hospital governing body even with this new requirement. That said, we believe that a physician who specifically represents medical staff members will hold some measure of enhanced standing within the governing body.

Comment: We received numerous comments opposing our proposal for a single governing body. Many of these comments came from State and national physician associations as well as from a number of community hospitals. In particular, comments opposing a single governing body expressed concern that such a structure would further weaken governing boards' understanding of the daily operations and medical staff affairs of each hospital and thereby lead to a reduction in both the quality of care and patient safety protections. One community health network reported that it had seen ''remote management'' lead to waste of resources in the healthcare delivery system.

Some commenters expressed particular concern about the implications that a single governing body would have in a hospital system comprised of diverse institutions. For example, commenters stated that a

single hospital system can encompass remote, rural areas as well as urban and suburban areas, and may also include specialty hospitals, such as a pediatric hospital. The commenters suggested that, if hospital systems like these moved to governance by a single, overarching governing body, a single body would not be able to properly address the needs of each separate hospital, particularly the needs of any hospital especially different from others in the system.

Some commenters suggested that a single governing body would be more appropriate to large hospital systems with similar hospital members and that CMS should pare back its proposal by only making the single body option available in certain cases, to be limited by geography or specialty.

A number of commenters opposed our proposal on the grounds that it could prove problematic for non-profit hospitals in light of the new requirements for these hospitals that are included in section 9007(a) of the Affordable Care Act (ACA). The commenters pointed out that this section of ACA revised section 501(r) of the Internal Revenue Code (26 U.S.C.A. § 501(r)) to require a non-profit hospital to establish and maintain their tax-exempt status by, among other things, conducting a community health needs assessment every three years. They stated that a non-profit hospital would not be able to conduct this required assessment through its own governing body (which they see as ''the natural convener of this activity in conjunction with the medical staff'') since they believe that our proposed governing body requirement, if finalized, may cause the hospital to lose its own governing body and be under the governance of a multi-hospital system's single governing body. The commenters also cited the requirements at § 501(c)(3) of the Internal Revenue Code regarding the tax-exempt status of non-profit hospitals and they stated that in order to meet the requirements of this section, a hospital must demonstrate that it provides a community benefit, which is defined by Internal Revenue Service (IRS) guidance as ''based on part on whether a wide range of members of the community have a seat on the governance board.'' The commenters stated that they believe ''CMS' proposal to allow a single governing body for a multi-hospital system that is divorced from the very community it is meant to represent'' would prevent these non-profit hospitals from meeting not only this IRS threshold for tax exemption, but also other State-specific requirements for tax-exempt status.

Response: We appreciate the concerns of the commenters. We do not believe that a multi-hospital system's governing body can properly function without its gathering information and input from the administrative and medical staff of each member hospital, or from the local sub-boards if the system utilizes this model for hospital governance. We note that the regulations, as finalized here, are intended to provide multi-hospital systems with an option, but not a requirement, to use a single governing body. In those instances where a system believes that its interests are best served by using a single governing body, under the new CMS regulations, that system will have the flexibility to do so, just as another multi-hospital system will have the flexibility to continue following the current requirement for a separate governing body for each hospital in its system if it determines that course would best serve its interests.

Comment: Several commenters asked CMS for clarity as to how a single governing body would operate within a multi-hospital system spanning different States.

Response: We would expect multi-hospital systems to follow the laws, regulations, and local ordinances of the States in which each member hospital operates. A hospital system's adoption of a single governing body, as permitted under this revised federal regulation, would not in any way preempt any relevant State requirements. Hospitals must continue to comply with all applicable State and local laws.

Comment: We also received a number of comments that asked how the new option for a single governing body would be implemented. One commenter asked how this would work for a multi-hospital system composed of more than one corporate entity. Another commenter asked whether survey decisions at each member hospital would be independent and whether this would impact the status of separately licensed, separately participating member hospitals in the system. Another commenter inquired about the integration of CAHs within a multi-hospital system, asking whether the proposal would allow for a system with both CAHs and hospitals to have one governing body or for systems with differing payment structures. Finally, we were asked to clarify between the CMS governance standard at § 482.12 and the requirements pertaining to co-located hospitals.

Response: We note that permitting a single governing body for multiple hospitals in a system does not relieve each separately certified hospital from the obligation to separately demonstrate its compliance with all of the hospital CoPs. Each separately certified hospital will continue to be separately, independently assessed for its compliance, through either State Survey Agency or approved national accreditation program surveys. Several of the commenters' statements suggested that there may have been some confusion around this point.

We offer hospital facilities considerable flexibility regarding how and whether they choose to participate in the Medicare program. Based on the geographic and other institutional limitations set out in our ''provider-based'' regulation at § 413.65, which addresses provider-based status for hospital facilities in multiple locations, hospital governing bodies make business decisions about how they want to participate in Medicare, and they indicate on their Medicare enrollment application the choices they have made. It is not uncommon to find multiple hospital campuses with one owner located in the same general geographic area enrolled in Medicare as one hospital. It also is not uncommon to see a hospital system choosing to enroll its various facilities as separate hospitals, even where their geographic proximity would permit them to be enrolled as one hospital. We are aware that various factors enter into consideration when governing bodies make these business decisions. For example, some governing bodies prefer to enroll various campuses as separate hospitals, out of a concern that problems at one hospital's campus might jeopardize the Medicare participation of the other campuses if they were a multi-campus hospital covered under one Medicare provider agreement. In other cases, a governing body may see the benefits of integrating medical and nursing staff of multiple campuses into one integrated hospital. In still other cases, the deciding factor might be the implications for Medicare reimbursement of graduate medical education, the ease of adding satellite locations, etc. We defer to the governing bodies of hospitals to weigh the pertinent factors, the permissible options, and to make business decisions in their best interests when applying to participate in Medicare.

Our hospital certification decisions and issuance of a provider agreement and CMS Certification Number (CCN) follow from these business decisions by a hospital's governing body. We often certify as one ''hospital'' entities whose locations are identified on the application as one primary location and one or more ''provider-based'' satellite locations, and issue one provider agreement to that hospital. Once so

certified, the resulting ''hospital'' must then separately demonstrate its compliance with the hospital CoPs, independent of any other facility. While a system consisting of multiple, separately certified hospitals with a single governing body may promote similar, or even identical, compliance policies across its separately certified member hospitals, it must make clear which hospitals the policies apply to, and each separately certified hospital is accountable for implementing the applicable policies, including securing the policy approvals of its separate medical staff where required under the regulations. As an example, we could envision a hospital system with a single governing body establishing a uniform approach to developing hospital quality assessment and performance improvement (QAPI) programs. The system might even choose to measure some common quality indicators and pursue similar performance improvement activities and projects across its member hospitals. However, each member hospital would be responsible for maintaining and making available to us evidence of its hospital-specific QAPI program; presentation of only system-level information would not be acceptable.

With respect to the commenter's statement about separate licensure, we are unclear as to what clarification the commenter is seeking, but we note that § 413.65(d)(1) addresses State licensure requirements in order for facilities to be provider-based to a hospital's main campus. Those regulations provide for flexibility where separate licenses are required under State law.

A CAH must be separately evaluated for its compliance with the CAH CoPs found in 42 CFR Part 485, Subpart F. It would not be possible to evaluate the CAH's compliance as part of an evaluation of a hospital's compliance. However, this does not preclude a multi-hospital system's single governing body from also serving as the CAH's governing body, so long as the governing body clearly identifies the policies and decisions that are applicable to the CAH.

We recognize the importance of these inquiries and will address these in more detail in forthcoming interpretive guidance (IG) after the publication of this final rule.

2. Patient's Rights (§ 482.13)

Section 482.13(g) requires hospitals to report deaths associated with the use of seclusion or restraint. We proposed to modify the reporting requirements for hospitals when the circumstances of a patient's death involve only the use of soft two-point wrist restraints and no use of seclusion. At § 482.13(g)(2), we proposed that hospitals would be required to report to CMS the type of deaths described here (those involving soft two-point wrist restraints and no use of seclusion) by having hospital staff record the information about the death into a log or other system. At § 482.13(g)(4), we proposed that each entry in the record must be made no later than seven days after the date of death of the patient and that the record must include the patient's name, date of birth, date of death, attending physician, primary diagnosis(es), and medical record number. We also proposed that hospitals must make this information available to CMS in either written or electronic form immediately upon request.

For deaths involving all other types of restraints and all forms of seclusion, we noted that we would retain the current, more extensive death reporting requirements to CMS by telephone no later than the close of business on the next business day following knowledge of the patient's death. In addition to reporting the deaths by telephone, we proposed to revise § 482.13(g)(1) to provide additional reporting options, which would include the use of facsimile and electronic reporting.

Comment: Many commenters favored the proposal to modify the reporting requirements for hospitals when the circumstances of a patient's death involve only the use of soft two-point wrist restraints. The favorable comments included those received from individual clinical professionals, hospitals and hospital associations, large healthcare systems, and several nursing groups. Several other commenters agreed with the revisions but recommended that the required logs be made publicly available.

Response: We appreciate the comments supporting the proposed change and the comments that suggested we add additional requirements and oversight. Changing the current reporting requirement to one that requires hospital staff to enter information into a log or other system those patient deaths that involve the use of only soft two-point wrist restraints will reduce unnecessary burden without negatively impacting patient safety. We believe the change will represent a welcome reduction in burden for hospitals and their staff, particularly in settings with a large number of patients in intensive care.

We disagree with adding new requirements for hospitals to publicize the details from the log (or other system). The log will contain protected health information from the patient's medical record, such as the patient's name, date of birth, and primary diagnosis, all of which are protected by the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule found at 45 CFR part 160 and part 164, subparts A and E. To further clarify that the method of reporting these deaths will be a hospital's maintenance of a log (or other system), to which a hospital must make an entry no later than seven days after an applicable patient's death, we are adding the word ''internal'' preceding ''log or other system'' in this final rule. We believe that this will clarify and emphasize that the log, or system that a hospital chooses to utilize for its reporting of these types of deaths, is one that will be maintained internally by the hospital and that CMS is not requiring public release of information about such deaths nor are we requiring hospitals to submit the information in the internal log (or other system) to CMS. However, in this final rule, hospitals will be required to make the information contained in the internal log or other system immediately available to CMS upon request as was initially proposed.

As discussed below, it is also important to remember that not all deaths of patients who die while in restraints, or shortly after their removal, are associated with the use of restraints. This is especially true in the context of soft two-point wrist restraints, which we note are often applied to acutely ill and medically unstable patients, prior to their eventual death, in order to prevent inadvertent patient removal of life-sustaining devices such as central lines and endotracheal tubes. The use of restraints in these cases is incidental to the patient's death and is not the cause of that death. Therefore, we do not believe that making public the information in the internal log (or other system) would contribute to ongoing quality improvement efforts.

Comment: Some commenters wanted CMS to require hospitals to make the data available to protection and advocacy (P&A) agencies and to report the deaths to P&As as well as to CMS using a log or other system, as set forth at proposed § 482.13(g)(4). A few commenters called for CMS to require hospitals to provide P&As access to the hospitals' logs specifically in accordance with applicable federal and State laws. Some commenters further requested that CMS create an explicit reference in § 482.13 to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, particularly with respect to the role of P&A agencies and their access to

information concerning the deaths of disabled individuals.

Many commenters urged CMS to continue working to prevent future deaths by improving the data collection and analysis of restraint- and seclusion-related deaths, including those reported using the log or other system.

Response: We believe that data collection and analysis will be greatly improved by making changes to the way hospitals report data to CMS, and, at this time, we do not believe that expanding the requirements beyond what we have proposed would improve patient safety.

We are always looking for ways to improve and to increase the efficiency of communication that already occurs between CMS and P&As. We believe that the current, extensive reporting requirements may have impeded data collection and analysis. Adjusting the reporting requirements for a significant subset of restraint-related deaths, where only soft, two-point wrist restraints were used, will help to streamline data collection and sharpen our analytical focus.

Finally, we decline the commenters' request for an explicit reference to the Developmental Disabilities Assistance and Bill of Rights Act, as we believe such a reference is inappropriate in § 482.13. We note that the Conditions of Participation at § 482.11(a) already requires compliance with applicable Federal laws related to health and safety of patients, and we expect hospitals to ensure that any such requirements are met. However, as a practical matter, we must stress that CMS does not enforce other agencies' laws or rules, as would be the case with the above-referenced statute. CMS would only cite the facility for noncompliance with the aforementioned CoP at § 482.11 if the agency having jurisdiction makes a final determination that there was a violation.

Comment: Some commenters requested that CMS expand the proposed reporting requirements at § 482.13(g)(4)(ii) by requiring hospitals to also record the length of time the patient was kept in the restraints as well as the reasons for and consequences of the restraint use.

Response: We are requiring that hospitals document the patient's primary diagnoses along with the medical record number and other details. We believe that the data recorded in the internal logs will be sufficiently rich to conduct analysis of deaths where only soft, two-point wrist restraints were used. We do not believe that additional descriptions around the use of the restraints are necessary at this time. As we have stated elsewhere in this discussion and in our proposed rule, we are not aware of any research—or even any anecdotal information—suggesting a cause-and-effect relationship between the use of soft, two-point wrist restraints and patient deaths.

Comment: Some commenters suggested flexibility in reporting the deaths involving soft two-point restraints. They recommended that we allow for fax and electronic reporting of soft two-point restraint deaths.

Response: We proposed that hospitals must maintain a log or other system of deaths involving only soft two-point restraints that can be made available to CMS immediately upon request, and that the required information about these deaths must be entered into the log no later than seven days after the date of the death of the patient. The words ''log or other system'' at § 482.13(g)(2) were chosen to create flexibility, such that a hospital could adopt a written or electronic means of tracking these deaths. However, since we did not propose to require hospitals to submit these reports to CMS, except upon request, we wish to clarify that routine faxing and electronic reporting of the deaths at § 482.13(g)(2) directly to CMS is not necessary. Finally, we would note that the regulatory text now adds significant flexibility to the reporting options at § 482.13(g)(1) for all other deaths, permitting such reports to be made ''by telephone, facsimile, or electronically, as determined by CMS.''

Comment: One commenter recommended that we revise the overall requirement for death reporting in this rule. Two other commenters stated that the reporting requirements should be in accordance with State law. One commenter stated that reporting all deaths of patients who were restrained does not produce an accurate number of deaths caused by restraints. The commenter also noted that some patients may be near death when they are put into restraints and recommended that we clarify in the final rule that these individuals should not be included in the reporting requirement.

Response: The requirements for reporting deaths of persons who were placed in restraints and/or seclusion were established by section 3207 of the Children's Health Act of 2000 (Pub. L. 106–310, codified as section 592 of the Public Health Service Act (42 U.S.C.A. 290ii–1). Eliminating all reporting for this class of restraint deaths and relying on State law would be contrary to federal law, which requires hospitals and many other categories of healthcare facilities to report all restraint-related deaths. As stated in the proposed rule, we believe that a regulation requiring hospital staff to record information regarding the patient death into a log or other system (and which is made available to CMS immediately upon request) is entirely appropriate for these types of patient deaths and that it will satisfy this requirement for reporting deaths involving soft two-point restraints.

Regarding which restraint deaths that should be reported, we agree that not all deaths that occur while a patient is restrained are proximately caused by the restraints themselves, and we have proposed these revisions so as to reflect this fact (revising the reporting requirements for soft two-point restraints). In proposing this revision, we looked at all death reporting that is required of Medicare-participating hospitals. For deaths involving all other types of restraints and all forms of seclusion, we are retaining the current reporting requirements. We proposed to add flexibility to those requirements by allowing the reports to be faxed or submitted electronically.

However, as we reviewed the public comments regarding these proposed revisions, it became apparent to us that our proposed language might still cause some confusion regarding which restraint deaths truly must be reported to CMS through the ongoing submission of data and which restraint deaths can be reported by recording the information in an internal log or other system that the hospital would make immediately available to CMS upon request. We came to the conclusion that the proposed regulatory language was still not sufficiently clear. We learned that, due to our use of the phrase ''report to CMS'' in proposed § 482.13(g)(2), many hospitals assumed that they would still be required to report the information through submission of data to CMS for those deaths related to soft, two-point wrist restraints. This was not our intention and does not achieve our purpose of reducing unnecessary regulatory burden. Therefore, in this final rule we have revised the proposed language to delete the phrase, ''report to CMS,'' and now will require that for those deaths related only to soft, two-point wrist restraints the hospital staff must record the information regarding the patient's death in an internal log or other system. We are finalizing as proposed the requirement that this information must be entered no later than seven days after the death and that the information in the internal log or other system must be made available to CMS immediately upon request in either written or

electronic form. We are also finalizing the requirement that each entry must document the patient's name, date of birth, date of death, name of attending physician or other licensed independent practitioner who is responsible for the care of the patient as specified under § 482.12(c), medical record number, and primary diagnosis(es).

Additionally, and in order to maintain consistency with these changes, we are revising the regulatory language proposed at § 482.13(g)(3). The language finalized here revises paragraph (g)(3) to contain two separate provisions and will now require that hospital staff must document in the patient's medical record the date and time the death was: (1) Reported to CMS for deaths described in paragraph (g)(1) or (2) recorded in the internal log or other system for deaths described in paragraph (g)(2).

Comment: Some commenters recommended that we have a common reporting system. They stated that all deaths should be reported consistently, in the same manner and within the same timeframe, by the close of the following business day. They stated that having two separate reporting mechanisms would be confusing and would upset the existing, well-established uniform reporting protocols.

Some commenters quoted our responses in the 2006 final rule on Patient's Rights where we said ''a uniform definition of restraint across care settings is a good approach, adds clarity, and avoids confusion * * * This definition renders unnecessary the otherwise impossible task of naming each device and practices that can inhibit a patient's movement'' (71 FR 71388). These commenters suggested the CMS was disrupting this uniformity with the new revisions contained in this final rule.

Another commenter suggested that the new requirement for an internal log or other system would be more burdensome than the present requirements for reporting the death to CMS by telephone. The commenter wondered whether the new requirements would mean the maintenance of a separate log by an assigned individual to research the patient's medical records to obtain all the necessary information. Another commenter asked whether the new requirement for an internal log would include hospital databases where reports could be generated and sent to CMS.

Response: We believe that the commenters have taken the responses to comments in the 2006 final rule out of the context in which they were discussed, that is, a uniform definition of restraint. For the sake of clarity, we note that we have not made a change to the definition of ''restraint.'' We still maintain that ''a uniform definition of restraint across care settings'' is the best approach and we are not changing that in this rule. What we are finalizing is a change to the reporting requirements and not to the definition of restraint. We have received extensive feedback from those who would be implementing the new reporting requirements, and this feedback has largely been favorable.

We believe the new requirements will relieve some burden on hospitals and their resources. We already expect hospitals to be tracking the details of deaths where the patient had been restrained by soft, two-point wrist restraints. Under the new requirements, this information will no longer need to be reported to CMS by telephone no later than the close of business the next business day following knowledge of the patient's death.

As suggested by one commenter, the requirements for the internal log or other system could be satisfied by the maintenance of a database where reports could quickly be generated if requested by CMS.

Comment: One commenter asked why a death that could be related to soft wrist restraints calls for less accountability and why a hospital could take a week to report the death.

Response: Hospitals remain accountable for the appropriate medical treatment of their patients and for all deaths that occur in their facilities. Not all circumstances involving restraints and associated deaths are the same. As discussed in the proposed rule, critically ill patients are often restrained in soft two-point restraints to prevent them from removing life-saving tubes and lines. And as we have stated elsewhere in this discussion and in our proposed rule, we are not aware of any research—or even any anecdotal information—suggesting a cause-and-effect relationship between the use of soft, two-point wrist restraints and patient deaths. Since such deaths are incidental to the use of these types of restraint, we believe that the revised reporting requirements that we are finalizing here are appropriate to the goal of ensuring hospital accountability for patient safety without continuing to impose undue regulatory burden in these instances.

Regarding the 7-day timeframe for documenting the entry about this type of patient death that we are finalizing in this rule, this modification affects only that segment of patient deaths where no seclusion is used and the only restraints used are soft, two-point wrist restraints. Even though this rule will allow for this timeframe, which we believe is entirely appropriate for those deaths where the use of restraints is incidental and not the cause of the patient's death, we do not expect a hospital to take the full seven days to document the entry on each of these deaths into its internal log or other system. Since the provision requires a hospital to provide the information in its internal log or other system to CMS immediately upon request, we would expect a hospital to enter the information as soon as possible in order to ensure that it has the most up-to-date information on these patient deaths in its system. However, to continue to require hospitals to report the deaths of these patients by the end of the next business day requires a significant amount of effort, and does not improve patient safety. Therefore, we are finalizing the 7-day timeframe requirement for documenting the entry in the log or other system as proposed.

Comment: One commenter recommended that we require hospitals to retain the death reporting log for at least six years.

Response: We disagree with requiring hospitals to retain the internal log for a minimum of six years, which, we note, is longer than the current requirements for medical records. However, State law may require longer periods of record retention for patient medical records or documents.

Comment: Several commenters stated that having a time frame longer than 24 hours to submit information may be more effective at reducing burden than having two separate methods and timeframes. Still other commenters stated that having a longer timeframe to submit a report will not decrease burden.

Response: We disagree with both comments. We believe that the proposed revisions to the death reporting requirement will provide flexibility to eliminate burden while ensuring patient safety. And we point out that the provision we are finalizing does not require the submission of information for the deaths related to soft, two-point wrist restraints only; the revised provision requires only the recording of information about these types of deaths in an internal log or other system.

Comment: A commenter asked CMS to consider setting minimum timeframes for both the renewal of a restraint order and the monitoring of those patients in restraints who are non-violent or non-self destructive. The commenter suggested that undefined timeframes could exacerbate situations already

lacking in the practice of re-evaluations for continued restraint. The commenter also suggested that the absence of set timeframes contributes to problems concerning quality of care and patient autonomy and harms altruistic efforts, generally. The commenter stated that extended periods of restraint and seclusion pose a serious safety issue for non-violent or non-self-destructive patients, including those in vulnerable populations, and advocated for greater standardization in the guidelines.

Response: These comments are outside the scope of this rule. While we thank the commenter for his or her opinions on this matter, we have not seen any evidence that such requirements for these types of orders improve patient safety. We believe that establishing arbitrary minimum timeframes for the renewal of orders for both restraints and subsequent monitoring of non-violent, non-self destructive patients could impede a hospital's flexibility in establishing its own policies and procedures for these orders, based on what the hospital knows would best meet the needs of its specific patient populations. Additionally, timeframe requirements could also increase provider burden in this area if the CMS timeframes are more restrictive than a hospital's current practice.

Comment: One commenter requested that CMS make a clarifying statement regarding the requirements at § 482.13(e)(5) that would identify which practitioners may order restraint or seclusion. The commenter noted that the current requirements use the term ''licensed independent practitioner'' and that this has been interpreted by many to mean that a physician assistant may not order restraint and/or seclusion. The commenter expressed disagreement with these interpretations and suggested instead that, where permitted by State law, a physician could delegate the ordering of such measures to a physician assistant. The commenter requested that CMS provide a clarifying statement that (1) PAs are authorized to order restraint and seclusion and (2) are subject to training requirements.

Response: The commenter is correct in pointing out that the current requirements use the term ''licensed independent practitioner.'' According to the State Operations Manual (SOM), the IGs for § 482.13(e)(5) state, ''For the purpose of ordering restraint or seclusion, an LIP is any practitioner permitted by State law and hospital policy as having the authority to independently order restraints or seclusion for patients.'' Therefore, if an individual PA was authorized by State law and hospital policy to independently order restraints or seclusion for patients, then that PA could do so within the hospital. However, since PAs have traditionally defined themselves as ''physician-dependent'' practitioners (as opposed to APRNs, who see themselves as independent practitioners), it is unlikely that a PA would be authorized by State law and hospital policy to ''independently'' order restraints or seclusions for patients as would be likely for licensed independent practitioners such as physicians, APRNs, and clinical psychologists. The supervising physician-PA team concept (and PA practice dependence on the supervising physician) is supported by the American Academy of Physician Assistants' description of the PA profession: ''Physician assistants are health professionals licensed or, in the case of those employed by the federal government, credentialed to practice medicine with physician supervision'' (American Academy of Physician Assistants. (2009–2010). Policy Manual. Alexandria, VA.). Moreover, a PA would not be allowed to order restraints or seclusion if the only authority to do so was delegated by a physician since this physician-delegated authority would establish that the PA was not independently authorized by State law and hospital policy, which we stated is a prerequisite for this type of order.

PAs (and RNs) are subject to the training requirements in this section, in addition to any special requirements specified by hospital policy associated with the one-hour face-to-face evaluation of a patient who is restrained or secluded for the management of violent or self-destructive behavior that jeopardizes the immediate physical safety of the patient, a staff member, or others.

Comment: One commenter inquired whether a ''geri chair'' is considered a restraint that would require reporting according to the revised requirements.

Response: The only reporting change we proposed concerns those deaths where no seclusion has been used and the only restraints used were soft two-point wrist restraints, as set forth at § 482.13(g)(2). Per current IG for § 482.13(e)(1)(i)(A), found in the SOM (*http://cms.hhs.gov/manuals/Downloads/som107ap_a_hospitals.pdf*), a geri chair or a recliner could meet the definition of restraint only if the patient cannot easily remove the restraint appliance and get out of the chair on his or her own.

Comment: One commenter inquired whether certain new types of restraints would be considered to fall within the ''soft'' two-point wrist restraint subset. The commenter described the material as made of nylon and a foam type of material, rather than the more commonly used cotton and wool materials, and that Velcro would be used to fasten them. The commenter also asked why CMS did not explicitly mention soft restraints which were applied to the ankles rather than a patient's wrists.

Response: We would not expect hospitals to change their reporting method for deaths involving any restraints that could be described as hard and rigid, such as leather restraints.

CMS has specifically revised the reporting requirements for soft two-point restraints that are used only on the wrists and not those that were applied to a patient's ankles or elsewhere on the body.

We wish to stress that the restraints we are setting out for documenting in an internal log are those typically used in critical care settings, such as intensive care units, where such restraints are medically necessary. Soft two-point wrist restraints are commonly used to prevent patients from removing medically necessary devices and equipment such as central lines, endotracheal tubes, and nasogastric tubes.

Comment: One commenter referenced a 2006 report, ''Hospital Reporting of Deaths Related to Restraint and Seclusion,'' published by the DHHS Office of Inspector General which found communications lapses among CMS, the Food and Drug Administration (FDA)—which monitors deaths associated with a medical device, Protection and Advocacy Agencies (P&As), and State survey agencies working on behalf of CMS. The commenter expressed concern about the OIG's findings, including its documenting of significant underreporting to CMS by hospitals of restraint- or seclusion-related deaths, as well as delays in reporting. The commenter inquired whether reporting delays had diminished since the report's publication.

Response: We have limited data, but we believe that the current reporting requirements may actually exacerbate hospital underreporting or untimely reporting of deaths associated with restraint or seclusion. A review of data collected on deaths reported in May and in December of 2007 indicated that only 13.5 percent of all types of hospitals nationally had submitted any reports during those two months. Between 2008 and 2010 our Regional Offices entered into our survey and certification

database a sampling of reports, taking reports from two or three months in each of the years. We analyzed the data and found results consistent with a pattern of underreporting. At least for IPPS hospitals, which provide short-term acute care hospital services, and where soft wrist restraints are often used in critical care settings when patients are sedated and restrained for their own safety in order to preclude patient removal of items such as endotrachial tubes and central lines, we would have expected every such hospital to have had one or more cases per month of a patient who died while two-point soft wrist restraints were in use, or shortly thereafter. In fact, we received at least one report from only 41 percent of all IPPS and psychiatric hospitals during the sampled periods between 2008 and the present. Underreporting has proven to be an ongoing challenge under the current rule.

We would also note that, since the great majority of death reports that hospitals do submit involve two-point soft wrist restraints only, most of the reports submitted to us are reviewed and filed without any further action, since we do not believe in such cases that the use of the two-point soft wrist restraint contributed to the patient's death. In such cases we believe it would not be an effective use of our limited survey resources to conduct an on-site investigation as a follow-up to a death report where only soft two-point wrist restraints had been used and where there was no evidence that the death was caused by the restraints used. It is not surprising that many hospitals might fail to perceive a linkage between the use of a two-point soft wrist restraint and a patient's death, and therefore the need to report such deaths to us as a death associated with the use of restraint or seclusion. We believe the revised reporting requirement will enhance patient safety by only requiring the prompt submission to us of a more narrow range of patient deaths where the likelihood of causation by the use of restraint or seclusion is greater. We also believe we will be able to address underreporting more effectively under the revised rule. We also believe the new regulatory requirement will better focus hospitals' attention and corrective efforts in these riskier areas.

Comment: A commenter remarked that, in proposing the changes to reporting by hospitals, CMS did not discuss the data from deaths related to other types of restraints or seclusion.

Response: We agree with the commenter's apparent suggestion that more study may be necessary to evaluate the impact from other types of restraints or seclusion. As in the drafting of this proposal, CMS has pursued a conservative, cautious approach before finalizing the new requirements. In the proposal, we stated at the onset that, ''CMS is not aware of any research—or even any anecdotal information—suggesting a cause-and-effect relationship between the use of soft, two-point wrist restraints and patient deaths.'' As discussed above, in the context of the 2006 OIG report, ''Hospital Reporting of Deaths Related to Restraint and Seclusion,'' CMS has found this subset of restraint-related deaths to represent a substantial percentage of reported deaths to CMS. We do not believe there is a causal relationship between the use of soft two-point wrist restraints and patient deaths. Moreover, no public comments were submitted that provided any evidence or research to the contrary. We believe the new reporting requirements will allow CMS to focus more closely on data from deaths related to other types of restraints or seclusion where there is a greater likelihood of finding harm due to the restraints or seclusion.

Comment: A commenter suggested that CMS should add language limiting its proposed change in the reporting requirements to the use of 2-point soft wrist restraints ''in intensive and critical care units'' and ''to prevent patients from removing medically necessary devices and equipment restraints.''

Response: We believe that the revised reporting requirements are appropriate and that the commenter's suggested additions could be problematic. We agree that soft two-point wrist restraints are generally used in intensive and critical care units and that they are used to prevent patients from removing medically necessary devices and equipment restraints. However, we would not expect hospitals to limit the use of such restraints to intensive and critical care units alone.

Comment: A commenter suggested that CMS change its proposed language to be more inclusive of non-physician providers. The commenter recommended that § 482.13 (g)(4)(ii) be re-worded to read: Each entry must document the patient's name, date of birth, date of death, attending physician ''or other clinician's'' name, medical record number, and primary diagnoses.

Response: We appreciate the commenter's suggestion. We agree that the proposed regulatory text does not take into consideration that patients who are not Medicare patients may be under the care of a non-physician practitioner or licensed independent practitioner, as that term is used here, if allowed under State law and hospital policy. Therefore, we are making a change to the regulatory text at § 482.13(g)(4)(ii) so that it will now read, ''name of attending physician or other licensed independent practitioner who is responsible for the care of the patient as specified under § 481.12(c).'' This will make the regulatory text here consistent with other provisions in this section. For Medicare patients, the requirements of § 482.12(c) will still apply.

3. Medical Staff (§ 482.22)

The CMS CoP on ''Medical staff,'' at § 482.22, concerns the organization and accountability of the hospital medical staff. We proposed three revisions to the Medical staff CoP.

First, we proposed to redesignate § 482.22(a)(2) as § 482.22(a)(5) and revise it by adding language to clarify that a hospital may grant privileges to both physicians and non-physicians to practice within their State's scope-of-practice law, regardless of whether they are also appointed to the hospital's medical staff. That is, technical membership in a hospital's medical staff would not be a prerequisite for a hospital's governing body to grant practice privileges to practitioners. Second, we also proposed to require that those physicians and non-physicians, that have been granted practice privileges within their scope of practice, but without appointment to the medical staff, are subject to the requirements contained within this section.

The third area in which we are proposing changes concerns the more direct responsibilities for the organization and accountability of the medical staff. These requirements are set forth at § 482.22(b)(3). Presently, the hospital may assign these management tasks to either an individual doctor of medicine or osteopathy or, when permitted by the State in which the hospital is located, a doctor of dental surgery or dental medicine. We proposed to allow a hospital the option of also assigning the leadership of the medical staff to a doctor of podiatric medicine when permitted by the State law of the State in which the hospital is located.

Comment: Overall, the majority of comments were overwhelmingly supportive of the proposed changes to the Medical staff CoP at § 482.22(a) that would broaden the concept of ''medical staff'' to include other practitioners who are granted hospital privileges to practice in the hospital in accordance with State law, not only those who are actually appointed to sit on the medical staff. However, a significant number of

commenters, while supportive of the proposed changes, recommended that CMS go further with its revisions in this area. Specifically, they would like to see the requirements finalized with these additional revisions incorporated into the regulatory text:

- Medical staffs must be representative of all types of health professionals who have privileges, including Advanced Practice Registered Nurses (APRNs) and Certified Nurse Midwives/Certified Midwives (CNMs/CMs), and who provide services to a hospital's patients, and as they are authorized to provide services under State law and to the extent of their full scope of practice;
- Non-physician members of the medical staff must be accorded the same rights and protections as physician members, including full voting privileges, membership on committees, ability to appeal, and due process;
- The credentialing and privileging process and the selection process for medical staff membership must be transparent and follow established criteria;
- Each application for privileges must be completely reviewed and a determination made within a 60-day period; and
- The applicant must be notified of the determination in writing with an explanation of the determination.

One commenter asked for the ''specific inclusion of registered dieticians as non-physician practitioners included and affected by the proposed regulation.'' Another commenter voiced support for the proposal to allow hospitals to grant privileges to non-physicians, regardless of whether they are also appointed to the hospital's medical staff, but believed that expressly limiting the non-physician practitioner's scope of practice to what is allowed by the State in which the hospital is located (as we have proposed here) has the potential to greatly limit the value to be gained from that practitioner. The commenter stated further that it is well documented that more than half of the States have implemented regulations and restrictions that impede the full realization of the potential of APRNs, and that the quality of care by APRNs does not vary by State. The commenter affirmed that APRN care is of the same quality as that provided by physicians for the same services, and that there is no clinical reason for these variations in State scopes of practice. Finally, this commenter urged CMS to establish a standard that recognizes non-physician practitioners should be privileged to practice to the full extent of their professional education and capabilities by deleting the reference to State licensing in the proposed requirements. The commenter believes that this would be a way to break down unwarranted barriers to full utilization of APRNs and other non-physician practitioners in hospitals and that such a change in the final rule would be consistent with recommendations in *The Future of Nursing: Leading Change, Advancing Health* (Institute of Medicine, October 2010). It should be noted here that many of the other commenters who asked for CMS to go further in the revisions to the medical staff requirements also cited this IOM report. The IOM report includes a recommendation specific to CMS, which urges that we amend or clarify our requirements to ensure that advanced practice registered nurses are eligible for clinical privileges, admitting privileges, and membership on medical staff.

Conversely, we also received a significant number of comments from those who were adamantly opposed to the proposed changes. A majority of the dissenting opinions took the form of comments expressing serious concerns about allowing non-physician practitioners to obtain hospital privileges without becoming members of the medical staff. These commenters continued by stating that, ''allowing some providers to circumvent medical staff oversight will detrimentally impact patient safety and quality afforded to Medicare beneficiaries and all patients.''

Many of the comments opposed to the proposed changes specifically focused on the proposal to allow physicians to be granted hospital practice privileges without requiring them to be appointed to the medical staff. The commenters stated that this proposed change would allow a hospital to exclude certain physicians from the medical staff, would effectively divide a hospital's physicians into two groups (those on the medical staff and those who are not), and would undermine what the commenters see as the medical staff's chief function: self-governance. The commenters maintain that appointment to the medical staff provides a physician with a voice in the governance of the medical staff and patient care, including the specific needs of that physician's patient population. Further, the commenters stated that the medical staff appointment ''engenders a mutual responsibility for the activities and work of the medical staff—such as quality improvement—promoting a mutual objective to oversee and protect the health and safety of patients.'' The commenters believe that this mutual objective of the medical staff is responsible for both professional standards and patient care.

These same commenters believe that the proposed changes would allow hospitals to circumvent the protections that the medical staff bylaws provide for physicians (for example, judicial enforcement of any procedural rights contained in the bylaws). The commenters state that the changes ''could allow hospitals to avoid lawsuits by physicians who would otherwise be protected by the contractual relationship created by virtue of their appointment to the medical staff.'' In other words, the commenters believe that the protections afforded to physicians by the medical staff bylaws are only available to those physicians who are appointed to the medical staff and that merely being granted clinical privileges to practice is not enough to guarantee these protections.

The commenters also voiced concern over what they saw in the proposed rule as an opportunity for hospitals to privilege physicians outside the authority of the medical staff. In their comments, they state that they are opposed to our proposal to allow a governing body to grant privileges in accordance with ''hospital policies and procedures,'' and not upon the recommendations of the medical staff ''in accordance with medical staff bylaws, rules, and regulations,'' as is currently required in the regulations. They believe that, if allowed, this could have a negative impact on peer review of physicians in hospitals. The commenters expressed concern that those who are privileged but not appointed to the medical staff would not have the same due process protections of peer review accorded to members of the medical staff members. Commenters questioned whether these physicians would then be subject to a hospital-driven review process that is dictated only by a hospital's administration without any medical staff input or with input from only a few hospital-selected medical staff members. They also are concerned that a privileging process that is allowed to be un-tethered from the medical staff could lead to various fraudulent practices by hospitals to which the commenters are opposed. Examples cited by commenters include the practice of ''economic credentialing,'' which the commenters described as the use of economic criteria (for example, potential to generate the most revenue for the hospital based on increased referrals) unrelated to the quality of care or professional competence to determine a practitioner's qualifications for privileges, and ''horse trading,''

which they described as a practice whereby two or more hospitals informally agree on the privileging status of applicants based on the hospitals' mutual interests. The commenters requested clarification from CMS on all of these points and urged us to ensure that the proposed requirements would retain the authority of the medical staff, in accordance with its bylaws, rules, and regulations, to make medical staff appointment and privileging recommendations and that these changes would not hinder or obstruct medical staff peer review efforts. The commenters also encouraged CMS to look at the proposed regulatory language with regard to medical staff oversight of non-medical staff practitioners. They pointed out that there is no specific mention in the rule of the applicability of the medical staff bylaws and oversight to these types of practitioners, both physicians and non-physicians alike.

With regard to the discussion of non-physician practitioners and medical staff privileges in the proposed rule, these same commenters objected to what they saw as ''CMS's explicit endorsement of the replacement of physicians with non-physician practitioners throughout the rule.'' They commented that they believe that CMS's stated intent of the revisions to the medical staff CoP was to replace physicians with non-physicians, and this would be ''contrary to the purpose of the CoPs, namely, to provide a safe hospital setting.'' While the commenters recognized the value that non-physician practitioners provide to the healthcare team, they maintained that physicians are the practitioners who are best qualified to lead that team, particularly in a hospital setting where patients are treated for complex and critical illnesses and injuries. They further objected to what they saw in the proposed rule as CMS' explicit encouragement of the expansion of scope of practice laws by States. The commenters pointed out that this conflicts with the express regulatory language of the proposed rule, which defers to existing State scope of practice laws, and they cautioned that any expansion of these laws should be based on a review of the evidence and on the training and education of non-physician practitioners to determine if such expansions are truly in the best interests of patient health and safety.

Finally, the commenters urged CMS to consider their assertion that medical staff appointment and privileges are not ''either/or'' propositions. They pointed out that the American Medical Association (AMA) has long given its members guidance on medical staff categories of membership and cite the following examples: ''Active,'' ''affiliate,'' ''administrative,'' ''call coverage,'' ''telemedicine,'' and ''temporary'' (*Evolving Relationship between Hospitals and Medical Staff.* Brian M. Peters, Esq. (2001). AHLA Seminar Materials. Post & Schell, PC). They stated that while these categories ''differ in their level of responsibility and oversight,'' the categories do ''share the comity of membership in the medical staff, which we believe engenders a shared accountability.'' While the commenters noted that CMS mentions medical staff categories in the preamble, they point out that most medical staffs already employ categories and these are specified in the medical staff bylaws. Again, the commenters urged CMS to remove its proposed requirement at § 482.22 that would allow for the exclusion of some physicians from both the participation in, and the protections, of the medical staff.

Response: We appreciate the support for the proposed changes. We also thank the commenters for their recommendations to make additional revisions to the medical staff requirements that would allow APRNs and other non-physician practitioners to practice to the full extent of their education and training. We have also noted the recommendations of the IOM report regarding our requirements and the eligibility of APRNs for hospital privileges and medical staff membership.

Upon review of our proposed medical staff requirements and the public comments received, we realized that we might not have achieved what we originally intended with these changes, that is, to provide hospitals with the flexibility they would need to explore new approaches to care giving by allowing them the ability to increase the numbers and types of practitioners who could be granted hospital privileges to treat and care for patients. As we proposed in these revisions, any regulatory limits on these privileges would be imposed by the State licensing and scope-of-practice laws of the State in which the hospital is located. We sought to relieve regulatory burden by clarifying and revising the current requirements so that hospitals would still be allowed to appoint non-physician practitioners to their medical staffs, but that medical staff membership would not be a prerequisite to being granted privileges in the hospital, regardless of whether a practitioner was a physician or a non-physician. Based on the public comments received, we are revising our proposed Medical staff requirements in this final rule to better address the many valid issues that were raised by both those who supported this section of the proposed rule and those who opposed it.

While we agree with the IOM report's recommendation that we amend our requirements to ensure that advanced practice registered nurses are eligible for hospital privileges and membership on medical staff, we respectfully disagree with the commenters' suggestions that we need to add additional requirements that would guarantee both non-physician practitioner representation on the medical staff as well as specific rights for those non-physician practitioners. In addition, we also disagree with the recommendations offered in the comments that we add very specific and highly prescriptive requirements pertaining to a hospital's credentialing and privileging process. The current requirements already provide for a transparent process based on established criteria. Although the current requirements provide a level of specific guidance to hospitals and their medical staffs regarding the privileging and medical staff appointment process, we do not believe that there is sufficient evidence to indicate that a hospital medical staff and, subsequently, patient health and safety would benefit from the addition of more rigid and prescriptive provisions, such as the commenters' specific recommendations to require a 60-day timeframe for a hospital to review and determine privileges for an individual practitioner applicant, or to require that the hospital notify the practitioner applicant in writing with an explanation of its determination.

We also disagree with the one commenter's recommendation that we specifically include registered dieticians in the category of non-physician practitioners affected by this rule. We assume that the commenter means that hospitals should be required to recognize registered dieticians as members of their medical staffs. We point out that the final rule does not specifically name any category of non-physician practitioner in the regulatory text. While we frequently mentioned APRNs and PAs in our discussions regarding the composition of the medical staff in both the proposed and final rules, we have done this only because these categories of non-physician practitioners have scopes of practice within the hospital setting that are often second only to physicians in terms of how broad those scopes of practice are. For this reason, these categories of non-physician practitioners seem the most logical and

appropriate choices of categories eligible for appointment to a hospital's medical staff. The current requirements and the revisions contained in this rule are written to allow a hospital's governing body the greatest flexibility in determining which categories of non-physician practitioners that it chooses to be eligible for appointment to the medical staff. Once the hospital's governing body determines which categories are eligible for appointment, the new requirements in this final rule will ensure that the medical staff examines the credentials of all eligible candidates and that it makes its recommendations for medical staff appointments to the governing body in accordance with State law, including scope-of-practice laws, and the medical staff bylaws, rules, and regulations. The rule is intended to encourage hospitals to be inclusive when they determine which categories of non-physician practitioners will be eligible for appointment to their medical staff. Under the new requirements, an individual hospital would be allowed to include registered dieticians as a category of non-physician practitioners eligible for medical staff appointment as long as their inclusion is in accordance with the laws of the State in which the hospital is located.

We also respectfully disagree with the comments recommending that we use our rulemaking authority to recognize non-physician practitioner professional education and capabilities in our requirements by removing our deference to State licensing and scope of practice laws. As we stated in a recent rule addressing credentialing and privileging and telemedicine services, ''CMS recognizes that practitioner licensure laws and regulations have traditionally been, and continue to be, the provenance [sic] of individual States, and we are not seeking to pre-empt State authority in this matter. We believe that the proposed requirements regarding State licensure leave room for the laws that exist today as well as any changes to these laws that may occur in the future, including any increase in the number of States that decide to engage in compacts, privilege to practice or reciprocity agreements, endorsements, and other arrangements regarding practitioner licensure (76 FR 25557).'' We would also note that generally, federal agencies do not issue rules preempting State law unless Congress explicitly or implicitly requires such preemption. Therefore, we will continue to defer to individual State practitioner licensing and scope of practice laws with regard to hospital privileges and medical staff appointments.

Finally, we do not agree with commenters' assertion that our goal is to ''replace physicians with non-physicians.'' Our overall intent in revising the proposed requirements in this final rule continues to be what we initially expressed in the proposed rule, namely, to provide the flexibility that hospitals need under federal law to maximize their medical staff opportunities for all practitioners, particularly for non-physician practitioners, but within the regulatory boundaries of their State licensing and scope-of-practice laws. We believe the greater the flexibility that hospitals, medical staffs, and individual physicians have to enlist the services of non-physician practitioners to carry out the patient care duties for which they are trained and licensed, the better the quality of care will be for patients. Therefore, in this final rule, we are both modifying the proposed changes to the Medical staff requirements as well as revising portions of the current requirements of this section in the following manner:

- Removing the proposed concept of physicians and other practitioners being privileged to practice without appointment to the medical staff;
- Removing the proposed regulatory language that the granting of privileges is done in accordance with ''hospital policies and procedures;''
- Aligning the new regulatory language at § 482.22 (a) with that currently found in the Governing body CoP (§ 482.12(a)(1)) regarding the governing body requirement to determine, in accordance with State law, the categories of practitioners who are eligible for medical staff appointment;
- Revising existing § 482.22(a)(2) to require the medical staff to examine the credentials of all eligible candidates and make recommendations for medical staff membership to the governing body in accordance with State law, including scope of practice laws, and with medical staff bylaws, rules, and regulations; and
- Revising existing § 482.22(a)(2) to require that a candidate recommended by the medical staff and appointed by the governing body be subject to all medical staff bylaws, rules, and regulations in addition to the requirements in this section.

We believe that these changes would not only satisfy the recommendations of the IOM report, but would also directly address the issues raised by commenters who opposed our proposed revisions. The regulatory language that we are finalizing here emphasizes the collaborative nature that must exist between the medical staff and the governing body of a hospital. It is a system of checks and balances between the governing body and the medical staff (and, to a certain degree, also between an individual practitioner and the hospital's medical staff and governing body). Each has its own areas of authority. The medical staff has oversight of all practitioners practicing as part of the medical staff through processes such as peer review and re-privileging. The governing body has the authority to establish the categories of practitioners (regardless of the terms used to describe those categories) who are eligible for privileges and medical staff appointment, but must rely on the medical staff to apply the criteria for privileging and appointment to those eligible candidates and to make their recommendations before the governing body makes a final decision to appoint or not appoint a practitioner to the medical staff. With the changes contained in this final rule, we are ensuring that these areas of authority remain intact.

The changes also leave room for a hospital or a governing body, after considering the recommendations of its medical staff, to appoint non-physician practitioners to the medical staff and to grant them privileges that are in alignment with their professional education and training to the full extent allowed under State licensing and scope-of-practice laws. We encourage medical staff and hospitals to take advantage of the expertise and skills of these non-physician practitioners when making recommendations and appointments to the medical staff. We agree with commenters that an appointment to the medical staff engenders a sense of mutual responsibility for the activities and work of the medical staff for physicians; however, we believe that these sentiments are also engaged when non-physician practitioners are appointed members of a hospital's medical staff. We encourage physicians and hospitals to enlist qualified non-physician practitioners to fully assist them in taking on the work of overseeing and protecting the health and safety of patients. This applies not only to the ''work'' of the medical staff—such as quality innovation and improvement, best practices application, and establishment of professional standards—but also to the everyday duties of caring for patients. As many of the commenters expressed, we also believe that an interdisciplinary team

approach to patient care is the best model for patients. However, we also agree that physicians, owing to their training and expertise, must be the leaders in overall care delivery for hospital patients. The changes that we are making to the requirements clarify and affirm these precepts. However, this should not be construed to limit the authority of a physician to delegate tasks to other qualified healthcare personnel or to limit the authority of a non-physician practitioner to be responsible for the care of an individual patient, or patients, as allowed in accordance with State laws, medical staff bylaws, and hospital policies.

Comment: A significant number of comments were supportive of the proposed changes to the Medical staff CoP at § 482.22(b) that would expand the list of physicians who would be eligible to assume direct leadership responsibilities for the organization and accountability of the medical staff to include doctors of podiatric medicine (DPMs), when permitted by the State law of the State in which the hospital is located. This proposal would permit a DPM to fill this role, in addition to the categories of physicians that are allowed to assume this leadership position under the current requirements: an individual doctor of medicine or osteopathy or, when permitted by the State law of the State in which the hospital is located, a doctor of dental surgery or dental medicine. Many of these commenters cited the similarities in education, training, and experience that DPMs share with their allopathic and osteopathic colleagues as reasons for their support of this proposed change to the medical staff leadership requirements.

One commenter expressed support for the proposal to include DPMs as eligible leaders of the medical staff and recommended that CMS extend this provision to other non-physician practitioners. However, the commenter pointed out that the non-physician practitioners eligible to fill the medical staff leadership role in a hospital should be limited to APRNs. The commenter recommended that PAs should be excluded from eligibility for the medical staff leadership role in hospitals because they believe that PAs lack the level of education, training, and experience that APRNs possess.

There were also a significant number of commenters who opposed this proposed change. These commenters expressed concern over the precedent that this sets and maintained that practitioners who are not medical doctors or doctors of osteopathy should not be authorized to hold leadership positions on the medical staff of a hospital. The commenters also believe that in many hospitals, ''a 'Chief Medical Officer,' someone hired by the hospital who is not a physician, is appointed to serve in a leadership position that would otherwise be held by a member of the medical staff.'' They stated that they believe our proposal to include DPMs could result in more of this type of activity and asked that we carefully consider the intended results of our proposed change to this provision.

Response: We appreciate the comments that supported the proposed change. We also thank the commenters who expressed an opinion that was in opposition to our proposed revisions to this provision of the Medical Staff CoP.

However, we do not see a connection between our proposal to include DPMs as potential candidates for medical staff leadership in any hospital where they are members of the medical staff and the alleged practice to which the commenters referred. Nor do we believe that the commenters opposing this proposal have provided any evidence that would lead us to believe that DPMs are not qualified to lead the medical staff of a hospital and that to do so would place the health and safety of patients at risk. Section 1861(r) of the Act includes DPMs under the definition of physician and nothing in the statute precludes a DPM from leading a medical staff if the medical staff selects one for this position and the governing body approves of the medical staff's selection. As we stated in the preamble of the proposed rule, we believe that DPMs possess the education, training, and experience that makes them qualified to hold such a leadership position if the hospital and its medical staff chooses to exercise this option. In addition, while we recognize the education, training, and experience that non-physician practitioners bring to the care of hospital patients, we disagree with the commenter who recommended that APRNs be included in the list of eligible medical staff leaders, since this category of practitioner does not meet the statutory definition of physician. However, as we have noted above, we continue to encourage and support the inclusion of APRNs, PAs, and other non-physician practitioners on hospital medical staffs, as we believe they can assist physicians with the oversight and improvement of patient care. Therefore, we are finalizing this requirement as proposed.

4. Nursing Services (§ 482.23)

We proposed to revise the hospital nursing service requirements at § 482.23 (b)(4), ''Nursing services,'' which currently requires a hospital to ensure that the nursing staff develop, and keep current, a nursing care plan for each patient. We proposed that for those hospitals that use an interdisciplinary plan of care in providing patient care, the care plan for nursing services may be developed and kept current as part of the hospital's overall interdisciplinary care plan.

We proposed to revise the current Nursing services CoP at § 482.23(c) by adding new provisions that would allow for drugs and biologicals to be prepared and administered on the orders of practitioners other than those specified under § 482.12(c). We also proposed further revision to § 482.23(c) to add a new provision allowing orders for drugs and biologicals to be documented and signed by practitioners other than those specified under § 482.12(c). We proposed to allow for these two revisions only if such practitioners were acting in accordance with State law, including scope-of-practice laws, and only if the hospital had granted them privileges to do so.

Within this section of the Nursing services CoP, we also proposed changes that would allow hospitals to use standing orders. At § 482.23(c)(1)(ii), we proposed to allow for the preparation and administration of drugs and biologicals on the orders contained within pre-printed and electronic standing orders, order sets, and protocols for patient orders, but only if such orders meet the requirements of § 482.24(c)(3), as discussed below.

We also proposed to eliminate the requirement, currently at § 482.23(c)(3), that non-physicians must have special training in administering blood transfusions and intravenous medications.

At § 482.23(c)(4) we proposed that those who administer blood transfusions and intravenous medications do so in accordance with State law and approved medical staff policies and procedures. We proposed to retain § 482.23(c)(4) and redesignate it at § 482.23(c)(5), without any content change.

We also proposed additional revisions at § 482.23(c)(6) that would allow hospitals the flexibility to develop and implement policies and procedures for a patient and his or her caregivers/support persons to self-administer specific medications (non-controlled drugs and biologicals). We proposed requirements that a hospital would have to meet if it chooses to implement such a policy.

Nursing Services 482.23(b)(4)—Use of an Interdisciplinary Plan of Care

Comment: A majority of commenters supported the revisions to this provision that would allow for the incorporation of the nursing care plan into the larger interdisciplinary care plan. A few commenters asked that we clarify what would be required regarding documentation of the interdisciplinary plan.

Several commenters recommended that CMS add a requirement that all hospitals implement a hospital-wide staffing plan that would establish an appropriate number of registered nurses on each unit to meet the needs of the patients and the expectations of those units. They stated that the plan should take into account factors present on each unit during each shift, such as: the number of patients and the level and variability of intensity of care; the level of education, training, and experience of RNs providing direct patient care; and non-patient care-related duties that nurses oversee.

Response: We appreciate the comments supporting the rule as well as the suggestions for additional staffing requirements. The required documentation for the interdisciplinary care plan should follow the current documentation policies that hospitals are using to document the services provided by other disciplines to patients, such as services provided by physical therapists, occupational therapists, speech-language pathologists, and others. Documentation should follow the standards of practice for those disciplines in addition to any specific requirements that a hospital might want to establish. The documentation must also comply with the requirements of the CoP at § 482.24, Medical records services.

Regarding the recommendations for additional staffing requirements, the regulation already requires the hospital to have adequate numbers of nurses to provide nursing care as needed, and makes it the responsibility of the director of nursing services to determine the types and number of nursing personnel and staff necessary to provide nursing care for all areas of the hospital. Therefore, we do not see the need to require any additional or more prescriptive regulations to address the nursing issues expressed by the commenters.

Comment: One commenter stated that the Nursing Care Plan should not be merged with the service notes and treatment plans of other professionals for reasons of patient safety, transparency, authority and accountability to professional practice standards. The commenter believes that entries made by an RN should not be replaced with entries made by other disciplines. Another commenter stated that the interdisciplinary care plan should be the responsibility of nurses, who are better trained and positioned to ensure that the plan is patient-centered and well-coordinated between disciplines. Another commenter recommended that we change 482.23(b)(4) to ensure that the nursing staff provides evidence in the medical record that the unique and changing needs of the patient are considered and met. They stated that this medical record documentation can be part of a nursing care plan, an interdisciplinary care plan, or a clinical pathway, or through other methods approved by the hospital.

Response: While we understand to a certain degree the concerns expressed regarding the care plan, we do not understand the one commenter's concern that nursing entries would be replaced by entries made by other disciplines. The provision does not require a hospital to replace its nursing care plan with an interdisciplinary care plan nor does it require (or even permit) nursing entries to be replaced by entries made by another discipline. We proposed that the nursing care plan be permitted to be part of an interdisciplinary care plan based on hospital policy. The hospital is responsible for ensuring that the nursing staff develops and keeps current a nursing care plan for each patient and the hospital can determine if the nursing care plan is a part of a larger, coordinated interdisciplinary care plan. As proposed, the requirement was an option intended to provide flexibility for hospitals that believed patient care plans should reflect coordination of care by the various disciplines providing services to patients.

Additionally, we disagree with changing the regulation by adding language that requires nurses to provide evidence in the medical records regarding how the needs of patients are met. In addition to the current requirement that an RN must supervise the nursing staff and evaluate the nursing care for each patient, the hospital must ensure that the nursing staff develops, and keeps current, a nursing care plan for each patient even if it is part of a larger, coordinated interdisciplinary care plan. We believe that the current requirements adequately ensure that the unique needs of each patient are addressed.

Comment: A few commenters recommended that we require hospitals to conduct, no less than annually, an evaluation of the staffing plans based upon an assessment of patient outcome data that is nursing sensitive and that hospital staffing plans be made available to the public. The commenters also recommended that a perioperative RN should be present in each operating room acting as a circulator throughout the duration of each surgical procedure.

Response: We agree with the commenters that hospitals should evaluate their nurse staffing plans and ensure that the appropriate staff is available to provide quality health care to all patients. We believe that it is implicit in the requirement for the director of nursing to determine the types and numbers of nursing personnel necessary that the director of nursing would periodically re-evaluate staffing plans to ensure that the nursing care needs of patients are met.

Comment: One commenter recommended that the interdisciplinary team should include the patient/patient advocate/power of attorney in addition to the traditional healthcare team of providers to participate in the plan of care.

Response: The regulations at 42 CFR 482.13 establish the right of the patient, or the patient's representative, as applicable, to participate in the development and implementation of his or her plan of care and to be informed of the patient's healthcare status and to make informed decisions about his or her care. We believe it would be redundant to also include these rights in the regulatory text related to the nursing or interdisciplinary plan of care.

Nursing Services 482.23(c)(1)(i)—Drugs and Biologicals May Be Prepared and Administered on the Orders of Other Practitioners (in Accordance With State Law and Scope of Practice Laws)

Nursing Services 482.23(c)(1)(ii)—Drugs and Biologicals May Be Prepared and Administered on the Orders Contained Within Pre-Printed and Electronic Standing Orders, Order Sets, and Protocols for Patient Orders

Nursing Services 482.23(c)(3)(iii)—Orders for Drugs and Biological May Be Documented and Signed by Other Practitioners

Comment: A significant number of commenters supported the proposed changes that would allow drugs and biologicals to be prepared and administered on the orders of other practitioners not specified under § 482.12(c) if the practitioners are acting in accordance with State law, including scope-of-practice laws, and if the

hospital has granted them the privileges to write orders.

Commenters were also very supportive of the inclusion and allowance for standing orders in the proposed revisions to the Nursing services requirements. We also received comments specifically supporting the use of standing orders to encourage immunizations, notwithstanding the regulations at § 482.23(c)(3), which allow for nurse-initiated administration of influenza and pneumococcal polysaccharide vaccines per physician-approved hospital policy after an assessment of contraindications. Commenters were enthusiastic about the positive effect that they believed the use of standing orders would have for the broader patient population in general and for hospital infection control efforts specifically in terms of a possible increase in the immunization rate.

Similarly, there was extensive support for the proposed revisions to allow for ''other practitioners not specified under § 482.12(c)'' to document and sign orders for drugs and biologicals, provided that such practitioners meet the provisions discussed above. Many commenters stated that they believe the changes will allow other qualified practitioners the flexibility to address the immediate needs of patients without delay and that it will increase efficiency and the quality of patient care at the same time. One commenter stated that the changes will ''lessen the impact of the current shortage of general practitioner MDs, thereby allowing patients fuller access to care'' by allowing other qualified practitioners the ''ability to write orders and to practice to the full extent of their scope of practice and State law.''

Response: We thank the commenters for their support of the proposed revisions to these provisions in the Nursing services CoP. We agree that the changes will help to eliminate unnecessary delays in treatment, improve access to care for hospital patients, and improve immunization rates for the broader patient population. We appreciate the support from commenters on the proposed standing orders provisions contained in this section and will discuss the comments on these changes in the Medical record services section that follows this section. However, we should point out that the changes finalized here and in the Medical record services section regarding the use of orders (including pre-printed and electronic standing orders, orders sets, and protocols) do not allow for the use of nurse-initiated orders (beyond, or in addition to, those currently allowed for influenza and pneumococcal vaccination) without an authenticated physician or practitioner order. We should also note that while the provisions finalized here will allow for a qualified non-physician practitioner to write orders and to practice to the full extent of his or her State scope of practice, some insurers, including Medicare, may only pay for the services ordered by a physician or for the services ordered incident to a physician's services.

Comment: Several commenters took exception to the fact that the proposed language in these provisions does not defer to medical staff bylaws, rules, and regulations. Other commenters also expressed serious concerns about what they categorized as ''the proposal to expand the types of practitioners who are able to administer drugs and biologics, particularly as [such proposal] relates to anesthesia and pain management.'' The commenters believe that expanding the number of non-physician providers able to administer certain drugs, such as opioids, would only exacerbate the problem of prescription drug overdoses. They urge CMS to withdraw the proposal on the grounds that ''non-physician providers may not have sufficient education or training in the proper prescribing of opioids, including patient selection and risk assessment.''

Response: We thank the commenters for noting our failure to properly defer to medical staff bylaws, rules, and regulations with regard to this issue and we agree that, in addition to our deference to State laws and hospital policies, the provisions must also defer to the bylaws, rules, and regulations of the hospital's medical staff. Therefore, we are revising the proposed requirements to include this reference in this final rule.

Regarding the comments that expressed concern over non-physician providers ''administering'' certain medications related to anesthesia and pain management, such as opioids, we believe that the commenters may have been confused over the language of the proposed requirements. We point out that the requirements that we are finalizing in this rule are with regard to allowing drugs and biologicals to be prepared and administered on the orders of other practitioners not specified under § 482.12(c) only if such practitioners are acting in accordance with State law, including scope-of-practice laws, and medical staff bylaws, rules, and regulations. However, the commenters also mentioned the prescribing of opioids by practitioners other than physicians and believe that these practitioners may lack the education and training to adequately and safely prescribe (or order) these types of drugs for patients. We respectfully disagree and maintain that if these practitioners, in ordering drugs and biologicals, are acting in accordance with the State laws (including scope-of-practice laws) of the State in which the hospital is located, and if the hospital, through its policies, and the medical staff, through its bylaws, rules, and regulations, authorize them to do so, then they have been determined competent to order these medications.

Nursing Services 482.23(c)(3)—Administration of Blood Transfusion and Intravenous Medications (in Accordance With State Law and Approved Policies and Procedures) by Trained Non-Physician Practitioners

Comment: Many commenters agreed with the deletion of the requirement that non-physicians have special training in administering blood transfusions and IV medications. However, several commenters stated that, given the immediate and significant risk to a patient if these procedures are done incorrectly, the only personnel permitted to do them should be an RN, APRN, PA, or physician. They also argued that this personnel requirement should be added to the regulatory language. Another commenter stated that we should clarify in the final rule that this revision includes all categories of APRNs (CRNAs, CNMs, CNSs, and NPs) who are acting in accordance with State law and hospital policy.

Response: We appreciate all of the comments supporting the proposed change. However, we want to clarify that only the non-physician personnel who have received training in administering blood transfusions and intravenous medications, in accordance with State law and approved medical staff policies and procedures, will be allowed to provide these services. We disagree with the suggestion that we specify the exact practitioner-types who are qualified to provide these services because we believe that these defined criteria will prevent unqualified personnel from administering blood transfusions and IV medications.

Comment: A few commenters opposed our eliminating the requirement that non-physicians have special training in administering blood transfusions. One commenter stated that while nurses may receive training in administering intravenous medication in nursing school, the training is often not comprehensive. Generic training on IV drug administration may not give individuals the appropriate awareness

of difficulties with administering special medications intravenously. Since intravenous drugs typically pose greater risks than orally administered drugs and they are typically used in patients who are ill, this change could have an adverse effect on patient safety. One commenter recommended that CMS allow registered nurses to explain and receive informed consent for blood transfusions. They stated that most facilities already use RNs to discuss the risks and benefits of blood transfusion with a patient. They also recommended that RNs be allowed to document a patient's informed consent without requiring the services of a physician because the current practice is cumbersome and causes undue delay in treatment.

Response: We respectfully disagree with the commenters. We proposed that blood transfusions and intravenous medications be administered in accordance with State law and approved medical staff policies and procedures. The majority of commenters stated that this training is standard practice and does not need to be prescribed in these regulations. Regarding the recommendation that CMS allow registered nurses to explain and obtain informed consent for a blood transfusions, the current requirements do not preclude nurses from performing this task. Informed consent is discussed in three locations in the CMS hospital CoPs: § 482.13(b)(2) pertaining to patients' rights; § 482.24(c)(2)(v), pertaining to medical records services; and § 482.51(b)(2), pertaining to surgical services. The corresponding guidelines to these three provisions contain extensive discussions regarding what constitutes a properly executed informed consent form, as well as information on what additional information might also be contained in a well-designed informed consent form. Hospitals must establish their own policies regarding informed consent, including which procedures require informed consent and who may obtain the informed consent.

Nursing Services 482.23(c)(6)—Patient Self-Administration of Both Hospital-Issued Medications and the Patient's Own Medications Brought Into the Hospital

Comment: The majority of comments received were in support of this revision that would allow a patient (or his or her caregiver/support person where appropriate) to self-administer both hospital-issued medications and his or her own medications brought into the hospital. However, many commenters advised that patient self-administration would only be successful if the hospital had a process in place to evaluate each patient to determine if self-administration was appropriate for that particular patient. One commenter stated that ''used properly and with the right patients, self-administration can be an extraordinarily helpful tool for teaching self-care as a patient and his or her family begin the transition back home,'' and further emphasized allowing for some flexibility in the implementation of this process so that nurses, physicians, and other practitioners would be fully able to exercise their clinical judgment when deciding which patients were appropriate for self-administration of medications. Many commenters believed that this type of medication regimen reinforcement prior to discharge could help to reduce and prevent costly patient readmissions secondary to medication errors and non-compliance.

A number of commenters expressed their belief that patient self-administration of medications would actively engage the patient in his or her plan of care and could serve to keep the patient more fully involved in the treatment process, which could in turn reduce the length of stay for the patient and subsequently prevent the patient's readmission.

Response: We thank the commenters for their support of these revisions. We agree with the commenters who stated that a hospital program for patient self-administration of medications could be extremely beneficial for the appropriate patients if the proper precautions were taken in designing and implementing such a program. With regard to the comments that pointed out that teaching patient adherence to the proper medication regimen prior to discharge could have a positive impact on reducing hospital patient lengths of stay and readmission, we also agree, and encourage hospitals considering adoption of a medication self-administration policy to look to the medical literature for examples of best practices and their use in successful patient self-medication programs.

Comment: Several commenters opposed the proposal allowing for patient self-administration of medications. Some of these commenters expressed serious concerns about the proposal and focused on those aspects of the revisions related to the nursing education of patients and the subsequent nursing oversight of patients self-administering medications as well as the nursing documentation of patient self-administration. The commenters were concerned that these aspects of the policy would place undue burden on a nurse's already limited time for patient care. Commenters questioned how nurses would document patient self-administration in the patient's medical record if they did not administer or witness the administration of the medication.

A few commenters stated that they opposed the proposed revisions because of their concerns about medication safety, including the proper storage and security of medications, especially controlled substances; the time needed for hospital pharmacists to identify and label medications brought from home; control over which medications (and the dosages) the patient is taking; maintenance of needed supply of medications brought from home and procedures in event of shortage; administration of medications not approved for use in hospital; and quality and integrity of medications brought from home, including issues with expired medications brought from home. One commenter stated that we should clarify that a patient should not be allowed to bring their own drugs, except in rare and unavoidable circumstances. Other commenters stated that the proposed requirements were naïve and that they were clearly not developed by clinical professionals. These commenters also believe that these requirements would endanger the safety of the most vulnerable hospital populations: the elderly and the chronically ill. They pointed out that medication errors and compliance with medication regimens are often the cause for hospital admissions and readmissions.

Response: We appreciate the concerns that commenters have expressed and we have made some revisions to certain areas of the proposed requirements that we believe will address some of these concerns. Specifically, we have revised § 482.23(c)(6)(i)(D), § 482.23(c)(6)(i)(E), § 482.23(c)(6)(ii)(D), and § 482.23(c)(6)(ii)(E) in this final rule by now requiring the hospital to have policies and procedures in place to address the security of the medication(s) for each patient and to document the administration of each medication, as reported by the patient (or the patient's caregiver/support person where appropriate), in the patient's medical record for both hospital-issued medications and those brought from home. We believe that these changes will clarify the questions that we received through the comments regarding the security of specific medications as well as the procedures for documenting the self-administration

of medications when a nurse does not witness it.

We believe that the security of a patient's self-administered medications is extremely important, but it is an issue that does not lend itself well to a one-size-fits-all requirement similar to the one we originally proposed that would require a hospital to have policies and procedures in place to ensure the security of the medication(s) of each patient. We are aware that there are Federal and State laws, including the current Pharmaceutical services CoP at § 482.25, that require a higher level of security for certain medications (for example, controlled substances). We expect hospitals to comply with these already-established requirements and laws and we do not expect hospitals to include these medications and other similar medications and drugs as part of a patient self-administration program. Indeed, a hospital may find that there are other medications that it believes should be excluded from patient self-administration due to concerns over its own capacity to address the security of these medications for patients. A hospital may choose to have a policy where it maintains a list of medications that it excludes from self-administration entirely; to have a policy that addresses the security of a particular medication on a patient-by-patient basis; or to establish a policy that is a combination of both these approaches to medication security.

Hospitals are also free to establish different levels of patient self-administration (e.g., with or without a nurse present to supervise the self-administration) that could be determined either by the practitioner issuing the order to permit self-administration of specific medications or by the nurse after he or she conducts the assessment of the patient (or caregiver/support person) to determine his or her capacity for self-administration of the specific medications ordered. We would expect a nurse to exercise his or her clinical judgment and to inform the practitioner responsible for the care of the patient about any reservations the nurse might have regarding an individual patient's (or caregiver's/support person's) capacity to safely self-administer medications. We would also expect that a nurse would document the assessment of a patient's capacity to self-administer medications, highlighting the affirmative or negative findings along with any discussions that the nurse might have with the practitioner responsible for the care of the patient regarding the patient's capacity to self-administer.

Regarding documentation of self-administered medications, we believe our original proposed requirement for documentation was too rigid and introduced the possibility that a nurse would have to document un-witnessed patient self-administration of a medication in the same manner he/she would if he/she had witnessed it or had administered the medication to a patient himself/herself. That is why we are finalizing our revisions to the proposed requirements in this rule that will allow for a nurse to document the administration of the medication as reported by the patient (or the patient's caregiver/support person where appropriate). We believe that this represents a more realistic approach to documentation that does not require a nurse to document an action by the patient that she did not witness. Instead, the nurse now will have the option in these cases of documenting the patient's attestation of the medication self-administration.

Regarding the commenters' other concerns (which were largely focused on self-administration of medications brought from home), we note that this requirement will be an optional method for the administration of medications and that hospitals will still have the flexibility to prohibit patient self-administration of medications in any form. A hospital must determine for itself, through its medical staff and its nursing and pharmacy leadership, and in consultation with legal counsel and risk management, whether it believes that it can establish a medication self-administration program that will be safe as well as beneficial for patients. Studies indicate that a well-designed and implemented medication self-administration program can be both safe and beneficial for patients. In addition to presenting their own 2006 study in the Journal of Clinical Nursing (Grantham G, McMillan V, Dunn SV, Gassner L–A, Woodcock P (2006) Patient self-medication—a change in hospital practice. J Clin Nurs Aug;15(8): 962–970) Grantham et al. reviewed the literature for previous studies of hospital patient self-administration programs. These studies generally found that effective self-administration programs are associated with high levels of patient satisfaction as well as with increases in patients' knowledge, self-esteem, and independence. The authors also noted in their review of the literature that there is ''some evidence to suggest that patients who self-administer medications in hospital have fewer medication errors and medication-related problems postdischarge.'' Regarding the results of their own study, Grantham et al concluded that their program ''achieved high levels of nursing and patient satisfaction, contributed to efficient patient discharge and was safe.''

Should a hospital choose to establish such a program, we would expect it to comply with all of the requirements finalized here as well as with other existing laws and regulations pertaining to medications and their administration to patients.

Additional Comments Received Beyond the Scope of This Rulemaking

Comment: A commenter suggested that CMS should extend Part B coverage to all vaccines recommended by the CDC's Advisory Committee on Immunization Practices.

Response: We appreciate this comment, however no such changes will be made to this provision. This comment is outside the scope of this section and outside of the proposed rule.

5. Medical Record Services (§ 482.24)

The current requirements, at § 482.24(c)(1)(i), specify that all orders, including verbal orders, must be dated, timed, and authenticated promptly by the ordering practitioner. Current regulations also include an exception to this requirement at § 482.24(c)(1)(ii), which allows for the 5 year period following January 26, 2007, all orders, including verbal orders, to be dated, timed, and authenticated by the ordering practitioner or another practitioner who is responsible for the care of the patient as specified under § 482.12(c) and who is authorized to write orders by hospital policy in accordance with State law. This requirement has now expired and is no longer in effect. Additionally, § 482.24(c)(1)(iii) establishes that all verbal orders must be authenticated based upon Federal and State law; in the absence of a State law designating a specific timeframe for the authentication of verbal orders, this provision then specifies that all verbal orders must be authenticated within 48 hours.

We proposed to consolidate three existing provisions into one new provision at § 482.24(c)(2). Specifically, we would remove existing paragraphs (c)(1)(i) through (c)(1)(iii) and add a new § 482.24(c)(2). Existing paragraph (c)(2) would be redesignated as (c)(3). This new provision would retain the requirement that all orders, including verbal orders, must be dated, timed, and authenticated promptly by the ordering practitioner, but would add the

exception currently contained at § 482.24(c)(1)(ii) by allowing for authentication by either the ordering practitioner or ''another practitioner who is responsible for the care of the patient as specified under § 482.12(c) and authorized to write orders by hospital policy in accordance with State law.'' We also proposed to remove the sunset provision and the 48-hour timeframe requirement for authentication of orders and instead defer to hospital policy and State law for establishment of any timeframe. We noted that if there was no State law establishing such a timeframe, then a hospital would be allowed to establish their own timeframe for authentication of orders, including verbal orders.

We proposed changes to the Medical records services CoP that would allow hospitals to use standing orders as long as certain provisions were met. We proposed new provisions to § 482.24(c)(3) that would allow a hospital to use pre-printed and electronic standing orders, order sets, and protocols for patient orders only if the hospital: (1) Established that such orders and protocols had been reviewed and approved by the medical staff in consultation with the hospital's nursing and pharmacy leadership; (2) demonstrated that such orders and protocols are consistent with nationally recognized and evidence-based guidelines; (3) ensured that the periodic and regular review of such orders and protocols was conducted by the medical staff, in consultation with the hospital's nursing and pharmacy leadership, to determine the continuing usefulness and safety of the orders and protocols; and (4) ensured that such orders and protocols were dated, timed, and authenticated promptly in the patient's medical record by the ordering practitioner or another practitioner responsible for the care of the patient as specified under § 482.12(c) and authorized to write orders by hospital policy in accordance with State law.

Comment: Concerning proposed § 482.24(c)(3)(i) and (iii), some commenters recommended removing the language, ''in consultation with the hospital's'' after ''staff'' so that the sections would read, ''medical staff, the hospital's nursing and pharmacy leadership.'' Nursing and pharmacy leadership would then be full partners in both approving pre-printed and electronic standing orders, order sets, and protocols for patient orders and ensuring there is a periodic and regular review of these orders. One commenter pointed out that these types of orders are often multi-disciplinary and comprehensive and patients would benefit from a more broad-based development and implementation of these orders and protocols.

Response: We agree that the nursing and pharmacy leadership of a hospital should be full partners in approving pre-printed and electronic standing orders, order sets, and protocols and in ensuring that these orders are periodically reviewed to determine the continuing usefulness and safety of the orders and protocols. Therefore, in this final rule, we have removed the language, ''in consultation with'' and added, ''and,'' after ''medical staff.'' Thus, the language in both §§ 482.24(c)(3)(i) and (iii) reads, ''medical staff, and the hospital's nursing and pharmacy leadership.''

Comment: We received some comments that requested further guidance or clarification concerning the proposed changes in this section. One commenter noted that the proposed requirements related to verbal orders and standing orders did not address residents. The commenter requested that CMS use IGs to thoroughly consider issues related to residents and ensure that the requirements do not become an impediment to the residents' education. The commenter also requested that the interpretative guidelines address certain specific issues.

Response: CMS will develop IG documents after the publication of this final rule to assist hospitals, surveyor, and the public in implementing this final rule. In developing that guidance, we will consider the commenters' recommendations.

Comment: We received one comment requesting that we remove the word, ''promptly,'' in § 482.24(c)(2) and replace it solely by reference to timeframes established by hospital policy.

Response: We do not agree with the commenter. With the removal of the 48-hour requirement for the authentication of orders from the hospital CoPs, the timeframe for authenticating orders would be determined by hospital policy in accordance with State law. However, we believe that quality patient care requires that authentication of orders should be done in a timely manner. Hence, we have left the word ''promptly'' in this provision.

Authentication of Orders by ''Other Practitioners''

Comment: We received numerous comments on our proposal at § 482.24(c)(2) that would allow other practitioners who were responsible for the care of a patient as specified in § 482.12(c) and authorized to write orders by hospital policy in accordance with State law to authenticate an ordering practitioner's orders, including verbal orders, beyond the sunset date of the current regulation. Some of the commenters noted that the requirement to have the ordering physician authenticate the order was overly burdensome to hospitals, doctors, and the nursing staff and did not result in any benefit for patient safety. They indicated that this change would give hospitals more flexibility so that they could focus on efficient, safe, high quality and patient-centered care. Some commenters noted that it was particularly important in certain cases, such as situations where there are residents who rotate between multiple institutions, restrictions on duty hours, and in situations where practitioners practice in rural areas.

Response: We thank the commenters for their support for the proposed changes to this section.

Comment: We received one comment that expressed concerns over the qualifications of the practitioners who would have authority to authenticate orders. A national organization of pediatricians stated that, in the case of pediatric patients, only a practitioner credentialed in pediatric care should authenticate orders.

Response: We understand the commenter's concerns. However, authentication of an ordering practitioner's orders must be ''by hospital policy and in accordance with State law.'' Hospitals may chose to restrict which practitioners it would authorize to authenticate another practitioner's orders. For example, as with the commenter's example, a hospital could choose to restrict authentication of orders for pediatric patients to practitioners who are privileged to provide pediatric care. We are confident that hospitals will address these issues in their policies.

Comment: We received several comments, including comments from advanced practice registered nurses (APRNs), national associations for both registered nurses and APRNs, and a medical center that suggested that limiting the practitioners who could authenticate an ordering practitioner's order to practitioners listed in § 482.12(c) would exclude APRNs and other non-physician practitioners. Some of these commenters noted that health care is increasingly provided by interdisciplinary teams and that the previous limitation created an undue burden. Some commenters stated that since APRNs and other practitioners were allowed to order drugs and biologicals if they had been granted hospital privileges to do so and they

were acting in accordance with State laws, including scope-of-practice laws, then those practitioners should be allowed to authenticate orders. The commenters recommended either deleting the reference to § 482.12(c), adding APRNs and other advanced practitioners to the list in § 482.12(c), or explicitly stating the APRNs could authenticate orders for other practitioners.

Response: We agree with the commenters that APRNs and other non-physician practitioners should have the authority to authenticate orders. Regarding the reference to § 482.12(c), we must note that this paragraph applies only to Medicare patients and is based on the statutory language at subsections 1861(e) and (r) of the Social Security Act. Even with regard to Medicare patients, the language at § 482.12(c) does not entirely exclude APRNs and other non-physician practitioners from authenticating orders. Section 482.12(c)(1)(i) states that, ''This provision is not to be construed to limit the authority of a doctor of medicine or osteopathy to delegate tasks to other qualified health care personnel to the extent recognized under State law or a State's regulatory mechanism.'' If State law and a hospital's policy allow PAs and APRNs to authenticate orders, a physician could delegate that authority to them with regard to Medicare patients.

However, in analyzing these comments and in preparing our responses to them, we came to the conclusion that this reference to § 482.12(c) was inappropriately inserted into this section of the CoPs, most likely when revisions to this section were finalized in the November 27, 2006 rule (71 FR 68694). Since § 482.12(c) is still statutorily required with regard to practitioners and the responsibilities for the admission and care of Medicare patients, we have not made any changes to § 482.12(c) as the commenters recommended. However, we do believe that the removal of the reference to § 482.12(c) is warranted in that the requirements discussed here apply to all patients and not Medicare patients exclusively. Therefore, in this final rule, we are revising this provision to delete the reference to § 482.12(c) and to require that all orders must be authenticated promptly by the ordering practitioner or by another practitioner who is responsible for the care of the patient only if such a practitioner is acting in accordance with State law, including scope-of-practice laws, hospital policies, and medical staff bylaws, rules, and regulations. We point out that we are taking the opportunity to also revise the language pertaining to State law, hospital policies, and medical staff bylaws, rules, and regulations in order to make it consistent with the changes we have made elsewhere in this rule that were based on comments received and which are consistent with industry practice.

Comment: We received a comment from a medical society that supported the easing of the timeframe for authentication of verbal orders; however, the commenters had concerns with the proposal to allow authentication of verbal orders by other practitioners. They were concerned about how orders could be interpreted and how this could affect patient care. They recommended that CMS not finalize the proposal to permit the authentication of orders by other practitioners.

Response: We disagree with the commenter. The commenter did not offer any evidence that having one practitioner authenticate the orders of another practitioner would have a negative impact on patient care. In fact, most of the commenters for this proposed change indicated that they thought it would not only reduce the burden to hospitals, practitioners, and nurses, but would also improve patient care.

Comment: We received one comment from a hospital association that stated the changes proposed to verbal order authentication provision could result in the unintended shift of liability to the hospital and hospital personnel receiving verbal orders and away from the physician/practitioner who bears ultimate responsibility for ensuring the medical necessity of the order. They stated that some States do not have specific timeframes for authentication. Some States defer to Federal regulations, and some State provisions contain ambiguous terms such as ''in a manner consistent with good medical practice'' or ''before billed.''

Response: Issues surrounding a hospital's tort liability concerning verbal orders authentication are State law matters and beyond the scope of this rule. Moreover, a hospital is free to adopt a more stringent policy than that required under the regulations, should it believe it is prudent to do so.

Comment: We received one comment in which the commenter supported expanding the eligibility of qualified practitioners to authenticate verbal orders. However, they asked for clarification regarding the CMS definition of ''another practitioner who is responsible for the patient.'' They noted that the definition of ''responsible'' could have practice implications for multiple providers and could increase costs by adding unnecessary physician supervision.

Response: CMS will develop IGs after the publication of this final rule to assist with the implementation of this final rule for providers, surveyors, and the public. We will consider the commenter's request in developing those guidelines. In addition, we believe that hospitals would address which practitioners would be deemed ''responsible for the patient'' in their policies.

Elimination of the 48-Hour Requirement for Authenticating Orders

Comment: We received several comments and most were supportive of the proposal to eliminate the requirement for an ordering practitioner to date, time, and authenticate orders within 48 hours.

Response: We would like to thank the commenters for their support of our proposal. We have finalized this section as proposed.

Comment: We received a few comments that expressed concern about possible errors. One commenter questioned who would catch any errors in orders if the ordering practitioner did not authenticate the order within 48 hours. Some commenters were concerned about whether the individual receiving the order would accurately interpret the order and the impact that could have on patient care. Another commenter stated the 48-hour requirement did nothing for patient safety and the issue really was whether the nursing staff immediately read back and verified the verbal order with the practitioner. One of these commenters recommended not finalizing the language that would permit other practitioners to authenticate orders.

Response: We agree with the commenters that the possibility of errors associated with verbal orders is an important issue, and that is why we continue to believe that hospitals should make efforts to minimize the use of verbal orders. We also agree with the commenter that it is expected that the standard practice would be for the person taking the order to read the order back to the practitioner to ensure that they have correctly understood it. In addition, this final rule does not mandate that a hospital allow other practitioners to authenticate an ordering practitioner's orders. Other practitioners can only authenticate orders if, among other requirements, it is in accordance with hospital policy and State law. Therefore, we disagree with the commenter that recommends not finalizing this provision. Thus, we have

not made any changes to the language in proposed § 482.24 to add any additional requirements for verbal orders.

Comment: A hospital association questioned why CMS and physicians continue to support time periods for other types of physician documentation (for example, history and physicals, anesthesia evaluations, review of restraint orders) but do not support the timeframes for verbal orders. The commenter gave the following reasons why CMS should reconsider the proposed policy of removing a defined timeframe for authentication: (1) Accountability of the prescribing physician/practitioner for medical necessity; (2) to validate that hospital staff received, transcribed and performed orders appropriately; and (3) to document that the physician/practitioner reviewed the patient's medical record entries, findings and other related documents when making medical decisions.

Response: We believe that the hospital CoPs should ensure that patients receive high quality care, while avoiding unreasonably burdensome requirements for hospitals. In the case of the requirement for an ordering practitioner to authenticate orders within 48 hours, the majority of commenters noted that the requirement was overly burdensome to hospitals, physicians, and nurses without providing any commensurate increase in patient safety/quality of care. In addition, we do not believe that having another practitioner authenticate an order for another practitioner would negatively affect a patient's care. The ordering practitioner, as well as the practitioner who authenticates the order, must be responsible for the patient's care. As other comments noted, interdisciplinary teams increasingly provide health care. All of the practitioners should be communicating and working together in their care of the patient. Therefore, we have finalized the removal of the requirement for authentication of orders by the ordering physician within 48 hours as proposed.

Standing Orders

Comment: We received numerous comments that were supportive of expanding the use of pre-printed and electronic standing orders, order sets, and protocols. Commenters noted that the use of standing orders contributes to patient safety and quality of care by providing evidence-based medicine and standardization. They indicated that using these types of orders would allow for faster implementation of care for patients. There would be less waste and procedural burden. Physicians would be able to spend more of their time on directly providing care to patients. Standing orders also allow other providers to take on additional tasks and simplify administrative processes.

Response: We thank the commenters for their support for the proposed change in this section. We have finalized this section as proposed.

Comment: We received a few comments that requested the development of further guidance on standing orders. A few commenters specifically wanted further guidance, especially for pediatric patients, vaccinations, and emergency department patients. One commenter noted that our proposed revisions did not address how the presence of resident physicians would affect the use of standing orders and requested that CMS address the use of standing orders as related to residents in the IGs. One commenter requested very specific issues be addressed in the IGs. A few commenters also requested that we provide definitions for ''pre-printed, standing orders, order sets, and protocols.'' They stated that we need to clarify the meaning of these terms if they are not used synonymously.

Response: Although we will develop further IGs after the publication of this final rule for hospitals, surveyors, and the public to implement this final rule, there is no basis in the regulations for our requiring hospitals to develop differential policies that specifically address pediatric or emergency department patients or particular types of drugs, with the exception of pneumonia and influenza vaccinations.

We are unclear what assertion the commenter is attempting to convey when the commenter refers to ''how the presence of resident physicians would affect the use of standing orders.'' Since the commenter did not explain this statement further, we can only assume that he or she meant to state that the presence of residents in a hospital would somehow affect whether a hospital might or might not use standing orders. With regard to resident programs and resident practice in hospitals, the IGs, in two separate instances, already discuss various aspects of resident practice in hospitals, though neither discussion addresses the use of standing orders by residents. Even though the IGs do not specifically address the use of standing orders by residents, we believe that it is useful to note where the current IGs do address other aspects of resident practice because these guidelines might be applicable to the comment as best we can discern it.

In the context of the requirements for patient restraint and seclusion orders (contained in the Patients' rights CoP at § 482.13(e)(5)), the use of standing orders by residents would be determined and authorized by a hospital's medical staff and residency program faculty as they see appropriate for the care of hospital patients and in accordance with any State laws governing the practice of residents in hospitals.

Regarding the commenters' requests for definitions of the various terms that we use in the provisions pertaining to standing orders, we refer the commenters to the proposed rule (76 FR 65895), which contains an extensive discussion of pre-printed and electronic standing orders, order sets, and protocols within both the Nursing services section and the Medical records services section of the preamble. Within the proposed rule, we also cite CMS S&C–09–10, which provides additional guidance on the use of standing orders. Over the last several years, our research into the issue of standing orders, including our discussions with hospital stakeholders, has led us to conclude that there is no standard definition for standing orders in the hospital community at large. Therefore, we chose to establish the criteria by which a hospital may establish standing orders, whether those orders are conveyed in printed or electronic form, in orders sets, or as protocols. Since agreement on what is meant by the term, ''standing orders'' does not exist, hospitals must focus on their compliance with the requirements finalized here, as they establish policies and procedures to create and use these types of orders.

Comment: We received a comment in which one commenter strongly disagreed with expanding the use of standing orders. The commenter believed that using standing orders would place the hospital staff in a position of having carried out orders from pre-printed orders, standing orders, order sets and protocols in good faith without an order from a physician, and that the absence of a physician order would potentially place the hospital and its staff in a legally compromising situation.

Response: The legal liability a hospital or hospital personnel could experience from using standing orders is beyond the scope of this final rule. However, hospitals and other healthcare institutions for many years have used standing orders. In addition, standing orders and protocols must meet all of the requirements at § 482.24(c)(3) of this final rule. Those requirements include authentication by either the ordering

practitioner or another practitioner responsible for the patient's care acting in accordance with State law, including scope-of-practice laws, hospital policies, and medical staff bylaws, rules, and regulations (§ 482.24(c)(3)(iv)). First and foremost, there must be an initiating order (by a practitioner authorized to give such an order) for specific pre-printed or electronic standing orders, order sets, or protocols to be used for a particular patient. As we stated in the preamble to the proposed rule (76 FR 65896), hospital standing order policies and procedures ''should address well-defined clinical scenarios for the use of such orders'' and that CMS would expect that these same policies and procedures would also address the process by which a standing order is ''initiated by authorized staff.'' Within this same section of the proposed rule, we also stated, ''under no circumstances should a hospital use standing orders [pre-printed or electronic standing orders, order sets, and protocols] in a manner that requires any staff not authorized to write patient orders to make clinical decisions outside of their scope of practice in order to initiate such orders.'' In addition, the final rule allows hospitals the use of standing orders; it does not mandate their use. Therefore, hospitals concerned about potential legal liability associated with standing orders are not obligated to permit their use. It should also be noted that while standing orders may be used as prescribed under the provisions finalized here, hospitals should be aware that some insurers, including Medicare, might not pay for the services provided because of these orders.

Comment: We received a few comments that expressed concern about how the proposed language, ''authenticated promptly in the patient's medical record,'' could be interpreted. The commenters stated that they believed our intent was to ensure that the standing order or protocol appears in the patient's record. However, they stated that this language could be interpreted as requiring that each individual patient must have his or her own standing order for drugs and/or biologicals. They suggested that this interpretation would actually increase the burden on nurses.

Response: We appreciate the commenters concern about how some individuals could interpret the language in § 482.24(c)(3)(iv). The medical record is expected to include the standing order that was used for the patient, in order to fully and accurately document the care provided. In the case of an electronic health record or a pre-printed order set, it should not prove unduly burdensome to incorporate the standing order into the patient's record. Requiring a separate, subsequent authentication, which simply makes reference to the included order as the subject of authentication, also should not prove burdensome for practitioners. Both the current requirements and standards of practice regarding medical records dictate that any patient order given by a practitioner authorized to do so automatically becomes a required part of the patient's medical record and must be documented to reflect this, regardless of whether it is contained in pre-printed or electronic standing orders, order sets, or protocols, or whether it is a written or verbal order.

6. Infection Control (§ 482.42)

We proposed to eliminate the current provision at § 482.42(a)(2), which requires the infection control officer or officers to maintain a log of incidents related to infections and communicable diseases. We proposed to replace this provision with the requirement that the infection control officer or officers develop a system for identifying, reporting, investigating, and controlling infections and communicable diseases of patients and personnel.

Comment: Nearly all comments received stated that the present requirement for a separate infection control log is redundant and unnecessary, given advances in technology and surveillance systems. Many commenters also suggested that complying with the requirement for a separate infection control log merely diverts scarce resources from other efforts. Several comments noted that the proposed changes were both appropriate and timely. Several also expressed appreciation to CMS for the proposed change.

Response: We thank commenters for their support of our proposal. We agree with the commenters and will finalize our proposed change to remove the log. We recognize that infection control surveillance systems have made substantial advances since the time when this CoP was first implemented. We agree with commenters that technological advances have made the need for a separate infection log obsolete. CMS believes the revised rule presents hospitals with an important opportunity to reduce operating costs and promote patient safety goals.

Comment: One commenter specifically remarked that modern surveillance methodologies are targeted, in real time, and based on the epidemiology of the area being monitored. The commenter stressed that eliminating the requirement for a separate log will allow Infection Preventionists (IPs) and Hospital Epidemiologists (HEs) to better focus their efforts on useful data that will drive timely decisions to keep patients and staff safe. Similarly, several commenters suggested that the change would lead to better and more efficient collection of relevant data that can be used to enhance staff and patient safety in more rapid fashion.

Response: We recognize that modern surveillance systems include advanced infection detection, data collection and analysis, monitoring, and evaluation of preventive interventions. These modern systems and practices are consistent with the requirements retained at § 482.42(a).

We are aware that many hospitals use automated surveillance technology (AST) or ''data mining'' for identification and control of hospital-acquired infections (HAI) and implementation of evidence-based infection control practices. We believe that the algorithmic analysis of electronic health data offers much promise, and we are encouraged by the emerging data. (Halpin H, Shortell SM, Milstein A, Vanneman M (2011). Hospital adoption of automated surveillance technology and the implementation of infection prevention and control programs. *Am J Infect Control*, May;39(4):270–6.) and (Klompas M, Yokoe DS (2009). Automated surveillance of health care-associated infections. *Clin Infect Dis.* May 1;48(9):1268–75.).

We believe that eliminating the burden of having to maintain a separate log will provide hospitals with flexibility and free up time and resources that could otherwise contribute to patient safety efforts.

Comment: One commenter supportive of the proposed change noted it would not alter the current workflow.

Response: We thank the commenter for this feedback. This confirms our understanding that eliminating the requirement for a separate infection control log will not negatively disrupt hospital practices.

Comment: One commenter stressed the importance of recognizing the contributions and abilities of hospitals' infection control officers, noting that the vast majority of the officers are registered nurses who take their roles very seriously and have a very high level of professionalism and vigilance.

Response: We recognize the important contributions to infection control made by registered nurses and all health professionals. Indeed, success depends on each and every person involved in patient care, as so well portrayed in the

training video ''Partnering to Heal'' (HHS. ''Partnering to Heal.'' Accessed 12 January 2012 <*http://www.hhs.gov/ash/initiatives/hai/training/*>).

Comment: Some commenters expressed support for requirements allowing a hospital's infection control officer(s) to develop a system for identifying, reporting, investigating and controlling infections and communicable diseases of patients and personnel. A few commenters remarked upon the importance of a hospital's being able to design its own systems, tailoring them to its unique physical environment, resources, services and patient population.

Response: We agree. Apart from proposing to remove the requirement for a log at § 482.42(a)(2) and to adjust the formatting and numbering of the ''Organization and policies'' standard, we are leaving the remainder of this standard unchanged. We continue to believe that infection prevention and control efforts must be hospital-wide initiatives that take into account each institution's unique circumstances.

Comment: One commenter inquired into the evidentiary basis for or our proposal to eliminate the requirement for a log.

Response: We follow the medical literature on infection prevention and control closely, including research on surveillance. As noted above, we are aware of emerging technologies, such as automated surveillance technology (AST), and of the progress that is being made in surveillance and infection prevention and control practices, generally.

Both our understanding of this larger body of research and our own observations contributed to our conclusion that advances in infection control surveillance systems have made the need for a separate infection control log obsolete and to our proposal to eliminate the requirement for a separate infection control log. We also gave consideration to complaints from stakeholders that the log requirement is too prescriptive and burdensome.

In deciding to finalize our proposal to eliminate the log requirement, we would also note the universal support for this proposal from several major infection control groups, such as the Infectious Diseases Society of America (IDSA), the Association for Professionals in Infection Control and Epidemiology (APIC), and the Society for Healthcare Epidemiology of America (SHEA).

Comment: One commenter appeared to view our proposal to remove the requirement for a separate infection control log as a larger change to retool CMS reporting standards overall. The commenter speculated that our proposed changes would lead to the manipulation of data, make side by side comparisons nearly impossible and reduce transparency in recording and reporting.

Response: We do not agree that the removal of an outdated requirement for a separate infection control log would necessitate any additional changes to a hospital's infection control program. Our proposal to remove the separate log requirement is a single, targeted change to the infection control standard at 42 CFR 482.42(a).

We note that we have retained all other requirements at § 482.42, including the requirements at § 482.42(a) which require an infection control officer or officers to develop a system for identifying, reporting, investigating, and controlling infections and communicable diseases of patients and personnel.

To clarify further, our proposed rule introduced changes to Part 482 regarding CoPs for Hospitals. In a separate effort, CMS continues to employ hospital quality measures and continues its ''Hospital Compare'' initiative. See *http://hospitalcompare.hhs.gov/*. Neither the proposed rule nor this final rule touches upon this or any other effort by CMS.

Comment: One commenter stated that our requirements should be expanded and improved rather than be eliminated.

Response: We wish to clarify that we are not lowering our standards. As explained above, we believe that eliminating the requirement for a separate infection control log merely removes a redundancy that, in the modern context, adds cost but no value. We are mindful that healthcare-associated infections continue to be a major concern and are among the leading causes of death in the United States, accounting for an estimated 1.7 million infections and 99,000 associated deaths in 2002 (Klevens RM, Edwards J, Richards C, Horan T, Gaynes R, Pollock D, Cardo D. Estimating Health Care-Associated Infections and Deaths in U.S. Hospitals, 2002. *Public Health Reports* 2007; 122:160–166.).

We would like to bring your attention to our efforts through the Partnership for Patients program, which was launched in the spring of 2011 with the twin goals of keeping patients from getting injured or sicker and helping patients heal without complication. (HHS. ''Partnership for Patients'' <*http://www.healthcare.gov/compare/partnership-for-patients/index.html*>).

We agree with the commenter that there might be room for improvement in the regulatory context. We may consider in future rulemaking further changes that would include an increased emphasis on infection control and prevention; further integration of infection control programs with the hospital's QAPI program; better alignment of a hospital's infection control efforts with nationally recognized guidelines; and a heightened role and accountability for a hospital's governing body in infection control program implementation and oversight.

Comment: One commenter suggested that CMS should also require protocols and staffing for antimicrobial stewardship as an integral component of infection control programs.

The commenter stated that the issue of antibiotic resistance has reached a critical point, as bacteria are becoming increasingly resistant to available antibiotics, and new drugs are not being developed at a pace necessary to address growing unmet medical needs.

The commenter also shared its forecast that the costs of including antimicrobial stewardship within the CoP related to infection control should be more than offset by savings generated. The commenter supported its statement by reference to a CDC summary of health economic research focused on employing antimicrobial stewardship programs with results showing significant cost savings. (CDC Impact of Antibiotic Stewardship Program Interventions on Costs. Retrieved Nov. 3, 2011 from *http://www.cdc.gov/getsmart/healthcare/support-efforts/asp-int-costs.html*).

Finally, the commenter suggested that, in a time where critical drug shortages have become increasingly more common, an effective antimicrobial stewardship program would promote efficient administration of appropriate therapies. In the FDA report on Drug Shortages released in October of this year, (FDA. ''A Review of FDA's Approach to Medical Product Shortages'' Accessed 12 January 2012 <*www.fda.gov/DrugShortageReport*>), antibiotics were the second largest therapeutic drug class to experience shortages, second only to oncology agents. The commenter suggested that by eliminating the inappropriate use and reducing the over-prescribing of antimicrobial agents, stewardship programs will preserve critical therapies that are in short supply.

Response: We thank the commenter for these suggestions. We agree that antimicrobial stewardship efforts are an important development in the context of infection control. We have not included any antimicrobial stewardship requirements in the present final rule. Such requirements were not proposed

and thus cannot be included at this juncture. However, we will consider these suggestions in future rulemaking.

7. Outpatient Services (§ 482.54)

Under the CoPs, the provision of outpatient services is an optional hospital service. However, if a hospital provides outpatient services, the services must meet the needs of patients according to acceptable standards of practice as required at § 482.54. The current provision at § 482.54(b)(1) also requires the hospital to assign an individual to be responsible for outpatient services.

We proposed revisions to this CoP that would allow hospitals greater flexibility in determining the management structure of outpatient services that would be tailored to the scope and complexity of the services offered by an individual hospital.

We proposed to change the existing provision at § 482.54(b) by revising the provision at § 482.54(b)(1) to allow hospitals to assign one or more individuals to be responsible for outpatient services. We also proposed to revise the current provision at § 482.54(b)(2), which currently requires a hospital to have appropriate professional and nonprofessional personnel available at each location where outpatient services are offered, by proposing to add a measure of flexibility such that hospitals would make their personnel decisions based on the scope and complexity of outpatient services offered.

Comment: We received numerous comments offering support for our proposal to remove the requirement for hospitals to have a single director of outpatient services. Many commenters noted that the change would be appropriate, given the complexities of modern hospital ambulatory care systems, in which technologies are changing and hospitals are increasing their outpatient service offerings. Many commenters stressed that the proposed change would free up limited resources, and characterized the current requirement as a costly and unnecessary administrative burden.

Some commenters also remarked that the change would help hospitals better ensure that individuals with the best expertise will direct each particular kind of care provided. Some also commented that the change would improve integration of their outpatient services with inpatient care while providing greater clarity to the management structure.

Response: We agree with the commenters that these changes will align the hospital CoPs with the current needs and practices of hospitals, and we are finalizing this change as proposed. We believe that removing the requirement for a single director of outpatient services will allow hospitals to better utilize their resources, particularly their staffing resources, and align them with the array of services they wish to offer.

Comment: Many commenters also expressly offered their support for the proposed regulatory language for hospitals to have ''appropriate professional and non-professional employees at each location where outpatient services are offered'' and to base this on ''the scope and complexity'' of the services.

Response: We are pleased to have received favorable feedback regarding this language. We will finalize this provision as proposed.

Comment: We received a comment seeking clarification about a statement in the proposed rule that ''hospitals have determined that it is in the best interests of patient safety and management practices to appoint more than one individual to oversee the various services offered and also to fully integrate their outpatient services with inpatient services.'' This commenter sought clarification as to whether the statement encompassed outpatient services provided by critical access hospitals and other community partners. The commenter expressed strong support for continuity of care and for having agreements in place to manage outpatient services and ensure good communication with a patient's medical home.

Response: We wish to clarify that the change to remove the requirement for hospitals to have a single director of outpatient services applies only to hospitals; it does not apply to critical access hospitals (CAHs), which do not have a comparable requirement for a single outpatient services director under the CAH conditions of participation. We agree that strong coordination with a patient's medical home would facilitate the provision of high quality, patient-centered care.

Comment: One commenter requested clarification between the CMS regulations at § 482.54 regarding Outpatient services and the regulations at § 482.12(c) regarding the care of patients. This commenter noted that if MD/DOs are required to see every patient, regardless of the medical reason for the appointment, then patients would be forced to wait for an available appointment when instead they could be seen and effectively treated within the scope-of-practice laws by a non-physician practitioner who is under a supervisory agreement with an MD/DO. The commenter also requested examples of ways in which a hospital would demonstrate evidence of a physician's involvement.

Response: We wish to clarify that the CMS requirements at § 482.12(c)(1) pertain only to Medicare patients. It should be noted that even with regard to Medicare patients, the requirement does not prohibit a patient from being treated by a non-physician practitioner who is a member of the medical staff and who is acting in accordance with his or her State scope of practice as allowed by medical staff bylaws, rules, and regulations and by hospital policy. Section 482.12(c)(1)(i) also contains language that states, ''This provision is not to be construed to limit the authority of a doctor of medicine or osteopathy to delegate tasks to other qualified health care personnel to the extent recognized under State law or a State's regulatory mechanism.''

With regard to the commenter's request for examples of ways in which evidence of a physician's involvement would be demonstrated, the evidence of a physician's involvement in the care of a Medicare patient must be found in the patient's medical record. Examples of medical record documentation that support a specific physician's involvement in the care of a Medicare patient include, but are not limited to: the physician's name listed as the attending physician or physician of record; orders, progress notes, or H&Ps/updates authenticated by the physician; and any other documentation that could reasonably support a specific physician's involvement in the care of the patient.

8. Transplant Center Process Requirements—Organ Recovery and Receipt (§ 482.92)

The transplant center rule at § 482.92(a) and the Organ Procurement Organizations (OPO) rule at § 486.344(d)(2)(ii) and § 486.344(e) set forth requirements regarding blood type and other data verification, as well as documentation procedures.

We proposed to amend the existing regulations governing transplant centers by removing the provision at § 482.92(a) which requires the transplant team to verify blood type before organ recovery. We proposed to redesignate paragraphs (b) and (c) as (a) and (b), respectively. This would eliminate the requirement for a separate blood type and other vital data verification by a recovery team sent by a transplant center to recover an organ(s), if the intended recipient is known before organ recovery.

Comment: All of the comments were supportive of this requirement's removal. The commenters indicated that this requirement was redundant with the requirements in the OPO Conditions for Coverage (CfCs), unnecessary, and would not impact patient safety. They also indicated that the requirement was difficult to monitor and that the intended recipient could change before the organ was actually transplanted.

Response: We agree with the commenters that § 482.92(a) is redundant with the OPO CfCs. Section 486.344(d)(2)(ii) requires OPOs to compare the blood type of the donor with the blood type of the intended recipient prior to organ recovery, if the identity of the intended recipient is known. We will delete the current § 482.92(a) and redesignate the remaining subsections as (a) and (b). Thus, we have finalized the section as proposed.

Comment: One commenter did state that while they supported the removal of this requirement, multiple checks of blood type were required in light of recent medical errors concerning organ transplantation.

Response: We also agree with the commenter that multiple blood type checks are necessary to avoid errors in the transplantation of organs. In addition to the requirement for OPOs to check the blood type of the donor and the intended recipient as described above, transplant surgeons and another licensed health care professional must verify that the donor's blood type and other vital data are compatible with the intended recipient after the organ arrives at the transplant center (current § 482.92(b) and new § 482.92(a)). Thus, after removal of § 482.92(a), there are two mandatory checks to ensure that the blood type and other vital date of the donor and the intended recipient are compatible. This must be done for both deceased and living donors (§ 482.92(a) and (b)—as redesignated in the final rule).

Additional Comments Received Beyond the Scope of This Rulemaking

Comment: We received one comment suggesting that CMS clarify the outcome measures in the hospital CoPs for transplant centers. That commenter indicated that while the final rule for those requirements incorporated risk adjustment with regard to outcome requirements used to approve and re-approve transplant centers, they stated that the nature of the risk adjustment may not be fully appreciated. They believed that concerns related to the regulatory burden of these outcome requirements, while perhaps unwarranted, might be contributing to an unintended consequence of a sound public policy, namely a seemingly high organ discard rate.

Response: We appreciate the comment and the comment's concern. However, this comment is outside the scope of the proposed rule. Therefore, we not made any changes to the provision based on this comment.

9. Definitions (§ 485.602) and Provision of Services (§ 485.635)

The current CoP at § 485.602 and § 485.635(b) require CAHs to furnish certain types of services directly rather than through contracts or under arrangements. Specifically, the CoP at § 485.635(b) requires CAH staff to provide, as direct services, (1) diagnostic and therapeutic services that are commonly furnished in a physician's office or at another entry point into the health care system; (2) laboratory services; (3) radiology services; and (4) emergency procedures.

We proposed to eliminate the requirement at § 485.635(b) that CAH staff must provide certain services directly and proposed to change the heading of the standard, ''Direct services,'' to ''Patient services.'' We also proposed to revise the language in paragraphs § 485.635(b)(1) through (b)(4), ''that the CAH staff furnishes as direct services.'' We also proposed to eliminate the definition of ''Direct Services'' at § 485.602 since it will no longer be applicable.

We noted that the governing body, or the person principally responsible for the operation of the CAH under § 485.627(b)(2), would continue to be responsible for all services furnished by the CAH whether or not they are furnished directly, under arrangements, or under agreements.

Comment: The majority of commenters supported the proposed change, stating that it will allow CAHs more flexibility in meeting the needs of their communities with limited resources. This change will better enable CAHs to address staffing challenges, provide high-quality care to their patients, and provide CAH patients better access to care. A few commenters stated that allowing CAHs the flexibility in providing these services for their community while still maintaining responsibility and oversight for the services can generate cost savings that could be reallocated to other areas, such as quality improvement and patient safety.

One commenter expressed concerns that having non-employed providers may delay care and would urge caution in this area.

Response: We appreciate the comments supporting the rule and the comment that expressed concern regarding any potential delay in care. As stated by the majority of commenters, we believe that this change will enable CAHs to address staffing issues and to provide better access to quality health care. However, with this revision to provide CAHs with the flexibility to contract or arrange for patient services, we expect CAHs to ensure that they provide services that would facilitate timely diagnosis and treatment of their patients, as envisioned by the statute. We expect that delivering timely services will be best achieved by providing CAH services on-site at the CAH as much as possible, whether through CAH employees or through a contract or arrangement. At a minimum, we expect the services listed under § 485.635(b) to be offered by the CAH on-site.

Comment: Several commenters stated that this change will provide for greater partnerships with other local providers. One commenter stated that if CAHs are allowed to contract for services provided, CMS should state that a high preference is for CAHs to contract with other federally funded and designated programs like Federally Qualified health Centers (FQHCs), FQHC Look-Alikes, Rural Health Clinics (RHCs), and the health departments. One commenter stated that a CAH that sought to expand outpatient services should have to validate that there was a community need for the services it planned to deliver and submit a letter of support from all essential community providers validating that collaborative partnership with essential community providers had been developed and would be maintained. The commenter also stated that any CAH that sought to expand outpatient services should submit data annually to CMS regarding the cost, utilization, and outcomes of patient services delivered and that CMS should make this data available to the general public on an annual basis.

Response: We do not have the authority under Federal law to require CAHs to enter into contracts or arrangements for patient care services rather than provide them directly, or to require them to give preference in their contractual arrangements with certain types of Medicare-participating suppliers, such as FQHCs or RHCs. We also see no valid reason related to quality of care or patient safety for CAHs to have to bear the burden of justifying the need for additional outpatient services before the CAH may offer them. With respect to CAHs collecting and submitting data to us for

us to make public on their outpatient services, we already have in progress the development of measures of outpatient quality of care for publication on our Hospital Compare Web site, and are examining ways to include CAHs in future reporting. We agree with the commenters that removal of the requirement for certain services to be direct services will provide for greater partnerships with other local providers and suppliers, and we believe that CAHs will appropriately utilize the services of all providers and suppliers in their communities.

Comment: One commenter suggested that we eliminate the reference to ''direct services'' from the CAH standard at § 485.623(a), which states that the CAH is constructed to ensure access and to provide adequate space for the provision of direct services.

Response: Since we have proposed to eliminate the requirement that CAHs must provide services directly with CAH staff, and we have removed the definition for direct services at § 485.602, we agree with the commenter that we should remove the reference to ''direct services'' at § 485.623(a). We will also make a similar change to remove the reference to direct services at § 485.635(a)(3)(i), which requires the CAH's policies to describe all services the CAH furnishes directly and through agreement or arrangement.

Additional Comments Received Beyond the Scope of This Rulemaking

Comment: While we did not propose a change to this provision, some commenters requested reconsideration and revision of the requirement that CAH patient care policies and procedures be reviewed annually. They stated that policy review is extremely time consuming and requested that a biennial review, or longer which would be preferable.

Response: We appreciate the comments. However, this comment is outside the scope of the proposed rule and no changes will be made to this provision. We may consider these comments when undertaking future rulemaking.

B. Clarifying Changes

10. Pharmaceutical Services (§ 482.25) and Infection Control (§ 482.42)

In both § 482.25(b)(6) and § 482.42(b)(1) we proposed to replace the term ''quality assurance program'' with the more current term ''quality assessment and performance improvement program'' to clarify that we expect drug errors, adverse reactions, and incompatibilities to be addressed in a hospital's QAPI program, as required at § 482.21.

Comment: We received a few comments agreeing with the technical changes to replace the quality assurance term with the more current term ''quality assessment and performance improvement program.''

Response: We appreciate the support for these technical changes and will finalize the rule as proposed.

Additional Comments Received Beyond the Scope of CMS–3244

Comment: Several commenters recommended that we change the requirement to state that the professional responsible for the patient or who ordered the medications should also receive the report regarding pharmaceutical drug error, adverse event, or incompatibility issues. They stated that this would facilitate timely reporting to a Certified Nurse Midwife caring for a patient during labor and delivery, or to a nurse practitioner or physician assistant caring for a patient in the emergency room. Another commenter stated that the pharmacy department should be included in the development of criteria for pharmacist privileging decisions. One commenter questioned the timeframe for immediately reporting to the attending physician.

Response: We appreciate the comments. However, these comments are outside the scope of the proposed rule and no changes will be made to this provision. We may consider these comments when undertaking future rulemaking.

Comment: One commenter stated that we need to clarify changes to the quality assessment and performance improvement CoP.

Response: We did not propose to make any changes to the quality assessment and performance improvement CoP at § 482.21. We only proposed to make conforming changes to the pharmaceutical services CoP by replacing the term ''quality assurance program'' with the current term ''quality assessment and performance improvement (QAPI) program'' that is under the QAPI program CoP.

11. Personnel Qualifications (§ 485.604)

Many of the former EACH/RPCH CoPs were adopted for the new CAH program (see 62 FR 46008, August 29, 1997), including the definition for clinical nurse specialist. In this rulemaking, we proposed to revise the definition of a *clinical nurse specialist* (CNS) at § 485.604(a) to reflect the definition in the statute at § 1861(aa)(5)(B). Specifically, we proposed to change the definition at § 485.604(a) to state that a clinical nurse specialist is a registered nurse licensed to practice nursing in the State in which the clinical nurse specialist services are performed, that holds an advanced degree in a defined clinical area of nursing from an accredited educational institution.

Comment: A majority of commenters supported the proposed change. However, most of these commenters recommended that we include in the definition that the CNS be a registered nurse with a nursing degree at the master's or doctoral level from an accredited educational institution and authorized to practice based on State nurse licensing laws and regulations. They stated that this change will allow a CNS to practice in either the State in which they live or the State in which they provide services. Commenters also noted that not all advanced clinical degree nursing programs include the phrase ''CNS'' in their degree titles. Boards of Nursing in 38 States have determined the educational and practice requirements for individual programs prior to granting the title to work as a clinical nurse specialist in their States. The commenters stated that adding the language regarding State nurse licensing laws and regulations allows the State Boards of Nursing to determine whether the nurses' educational program is congruent with a CNS education. A few commenters stated that it is critical that language in the final regulation provide recognition of all existing CNSs, and in particular, those who practice in the area of mental health. One commenter recommended that we require CNSs to be certified by a national organization. However, the commenter also stated that they recognize the need to allow flexibility for States that do not yet require certification as a requirement for CNS practice and, at this time, it would be unfair to require that all CNSs be certified.

Response: We appreciate all of the comments supporting the proposed definition change as well as the suggestions for improving it. We will change the definition at § 485.604(a) to state that the term ''clinical nurse specialist'' is a registered nurse and is licensed to practice nursing in the State in which the clinical nurse specialist services are performed in accordance with State nurse licensing laws and regulations; and holds a master's or doctoral level degree in a defined clinical area of nursing from an accredited educational institution. Adding the phrase ''in accordance with State nurse licensing laws and regulations'' will ensure that an existing CNS will continue to be evaluated based

on their State licensing laws and regulations. We agree with the commenter that it would be unfair to require national certification for CNSs and we will not require such certification. We believe that requiring CNSs to have a graduate level education and to be authorized to practice based on State nurse licensing laws and regulations reflect the statutory definition of a CNS.

12. Surgical Services (§ 485.639)

The current surgical services CoP at § 485.639 was promulgated in 1995 (60 FR 45814, September, 1, 1995) to ensure adequate health and safety protection for patients. The provision of surgical services is not a required CAH service under the Act at section 1820(c); therefore, we proposed to change the introductory text before this CoP to clarify that surgical services are optional services for CAHs. We proposed to add the conditional clause, ''If a CAH provides surgical services,'' at the beginning of the introductory text. Also, to reflect the organizational structure CoP at § 485.627, we proposed to include the phrase, ''or responsible individual.'' The proposed technical change to the CoP introductory text is as follows:

''*If a CAH provides surgical services,* surgical procedures must be performed in a safe manner by qualified practitioners who have been granted clinical privileges by the governing body of the CAH or *responsible individual* in accordance with the designation requirements under paragraph (a) of this section.''

Comment: The majority of commenters supported the change clarifying the language regarding surgical services as an optional service. One commenter asked whether this rule change could lead to certain CAHs eliminating surgical services without giving thought to an alternative source for such services.

Response: We would like to clarify that this is not a substantive change in the regulation. CAHs are currently not required to provide surgical services. We proposed to revise the introductory statement to the CoP to clarify that CAHs are not required to provide surgical services. However, if a CAH provides surgical services, the CAH must comply with the surgical services CoP at § 485.639. Current CAHs should already be aware that this is an optional service and we do not believe that providing this clarifying language will result in a CAH eliminating their surgical services. In fact, we believe that clarifying the regulations that surgical services are optional will assist small rural hospitals that may be considering whether to seek CAH status. Therefore, we will finalize our proposed technical change.

Additional Comments Received Beyond the Scope of This Rulemaking

Comment: A few commenters stated that CMS should consider modification to the provisions at § 485.639, Anesthesia services, and require supervision of CRNAs to be consistent with State licensure requirements and elimination of the opt-out provision at § 485.639(e). Another commenter stated that CMS should reevaluate the physician supervision for CRNAs in CAHs and hospitals. There should be ongoing research regarding the need for the existing supervision requirements in the CoPs.

Response: We appreciate the comments. However, this comment is outside the scope of the proposed rule and no changes will be made to this provision.

C. Other Options Considered

In the proposed rule (76 FR 65891), we discussed alternative options for revisions that we considered, but did not propose. We also solicited comments and suggestions on additional reforms that would reduce burden on hospitals. Below are our responses to public comments on those alternatives, as well as a summary of additional recommendations submitted by commenters. See the October 24, 2011 proposed rule (76 FR 65891) for a detailed discussion of the other options we considered.

Medical Staff (§ 482.22)

In the proposed rule (76 FR 65899) we stated that we had considered changes to the Medical staff CoP at § 482.22 that would allow a multi-hospital system the option of having a single organized medical staff responsible for the quality of medical care provided to patients by all the hospitals in the system. We also considered, based on stakeholder feedback, revising the overall organizational structure of the CoPs to condense current requirements for departmental leadership responsibilities into a single, non-specific CoP that would allow hospitals to appoint hospital leaders based on hospital-established qualifications and needs specific to each hospital. We received many comments on these considerations, and responses to comments received for this section can be found below.

Comment: A number of commenters responded to our solicitation of comments on whether we needed to revise the Medical staff CoP at § 482.22 to further clarify that each hospital must have its own medical staff within a multi-hospital system, and there may not be a single medical staff for all of the hospitals within the system.

However, many of the comments reflected some confusion over our discussion of this issue. Some commenters interpreted our discussion as a proposal to allow a single medical staff for a multi-hospital system. In the proposed rule, we stated, ''We do not believe that the current CoP language implies that we require a single and separate medical staff for each hospital within a multi-hospital system'' (76 FR 65899). We stated this in order to point out the current language's potential ambiguity, not to propose a change in our interpretation of it. We continue to interpret the current CoP to require that each hospital, regardless of whether it is a part of a multi-hospital system, have a single and separate medical staff, as a matter of CMS policy.

Nevertheless, a number of comments supported a revision to the current requirement to allow for a single medical staff for hospitals in a multi-hospital system. Some commenters stated that it would be more efficient and save on resources for hospitals, particularly with regard to practitioner credentialing and privileging. Many commenters pointed to the potential for patient safety initiatives and quality of care improvements across multiple hospitals within a system if these programs were developed and overseen by a single medical staff. A few commenters expressed support for the idea only if it applied to smaller hospital systems confined to a more limited geographic area where many of the medical staff would be located close enough to be privileged at all of the hospitals in the system. These commenters were generally opposed to a single medical staff for large hospital systems that spanned multiple States.

A significant number of comments expressed opposition to the concept of a single medical staff responsible for the oversight of practitioners and the quality of patient care at multiple hospitals within a system. These commenters stated that such a proposal would undermine the fundamental idea behind a medical staff: self-governance. The commenters explained the concept of medical staff self-governance as one in which the medical staff is familiar with the practitioners whom it governs and is comprised of, understands the unique needs of the hospital in which the practitioners work, and ''can nimbly respond to health and safety issues that arise with respect to those patients and that hospital.'' The commenters pointed

out that medical staff self-governance is required by a hospital accrediting organization and is also mandated by some States and they questioned whether self-governance requirements would be met if a multi-hospital system was allowed to have a single medical staff overseeing an unlimited number of hospitals spread out over a wide geographic area and ''without the meaningful input of the physicians at each member hospital.'' Commenters further cited the negative impact that such a proposed change would have on peer review whereby the single medical staff at the headquarter hospital of the system (for example, a large urban tertiary care center) would review practitioners at a member hospital (for example, a rural hospital or a pediatric hospital) without having any first-hand knowledge or experience with the member hospital, its patient population, and its particular medical care needs. Finally, they pointed to the potential for conflict with current State peer review laws and regulations that such a change might create.

Response: We appreciate all of the comments received on this issue and apologize for any confusion that may have been caused by the ambiguous statement in the preamble to the proposed rule. We continue to agree with the commenters who opposed any changes to the current requirement that might allow for a single medical staff to oversee all hospitals within a multi-hospital system. We believe that the concerns of the commenters are valid, particularly with regard to medical staff self-governance, peer review, and accountability for patient care, and agree with the commenters that such a change in current requirements and interpretation could negatively impact the health and safety of patients. Therefore, as we previously stated in the preamble discussion of the proposed rule, we are retaining the current Medical staff requirement without revision and maintain our historical position that each hospital, even those in a multi-hospital systems, must have its own medical staff with the authority and responsibility for the quality of patient care provided in that hospital.

Comment: Some commenters supported keeping the hospital CoPs at the service/departmental level. Commenters suggested that the current departmental structure of the CoPs leads to a more fragmented and uncoordinated approach to delivering care; therefore, by arranging quality and safety requirements into systems of care, hospital staff would be likely to work as a team in developing care processes and systems that meet the requirements. Therefore, commenters urged CMS to move to a more system based approach for organizing the hospital CoPs. Other commenters suggested that CMS allow flexibility in organizational structure and requirements. Other commenters believed an organizational structure of the CoPs, reflecting areas of service, would be the most efficient; and in line with today's clinical management philosophy. The structure would enable the hospitals to improve care delivery and the quality and safety of patient care. Some commenters supported revising the overall organizational structure of the CoPs to condense regulations for departmental leadership into a single non-specific regulation. One commenter supported elimination of current specialty-department-specific leadership requirements into a single, non-specific CoP.

Response: We appreciate commenters' suggestions. These comments were outside the scope of this final rule, and we may consider these suggestions in future notice-and-comment rulemaking.

Medical Record Services (§ 482.24)

In the proposed rule (76 FR 65899), we considered modifying the current § 482.24(c)(2) to clarify the intent of the rule in situations where a patient has received a medical history and physical examination (H&P) by either a non-hospital practitioner or a practitioner with hospital privileges prior to the patient's hospital visit. We did not believe that the regulation should be amended, and specifically sought public comment on this issue. The following are responses to public comments received.

Comment: Several commenters supported our decision to not amend the current history and physical examination (H&P) provision, or its associated IG, contained under the Medical record services CoP at § 482.24(c)(2). Commenters stated that the language at § 482.24(c)(2) is clear and that it needs no further explanation. Other commenters agreed that it is appropriate to defer to the clinical judgment of the hospital staff to determine the extent of the necessary update.

Response: We appreciate the support of commenters on this issue and we agree that this provision does not need any further regulatory clarification. As we stated following our explanation of this provision and its IG in the proposed rule, we do not believe that the regulation should be amended.

Comment: Some commenters were concerned with what they saw as a rigid interpretation of the H&P requirement and stated that it causes unnecessary burden by not clarifying that H&Ps conducted within the 24 hours prior to an admission or registration are not necessary and that they should be left to the discretion of the clinician. One commenter recommended that CMS clarify its parameters for the timeframe related to an H&P update (for example, the value of performing updates to H&Ps that are completed shortly before a scheduled procedure requiring anesthesia services). In addition, it was suggested by a commenter that some surveyors continue to confuse the timeframe requirements for H&Ps with those for the pre-anesthesia evaluation. Another commenter suggested that CMS clarify this requirement to specify what constitutes an update of H&P to ensure that hospitals are complying appropriately with this requirement.

One commenter noted that the current H&P requirement allows only physicians to conduct H&Ps, which could result in delays in diagnosis and treatment in areas where there are not enough physicians. The commenter recommends that § 482.24 be modified to include PAs and APRNs. Another commenter was concerned that the wording of the current requirements may not fully recognize the ability of nurse practitioners to perform both the initial H&P and the subsequent reassessment of the patient after admission or registration, provided that the nurse practitioner is credentialed and privileged to perform these patient evaluations. Therefore, the commenter continued, future regulations and IGs should specifically clarify the authority of nurse practitioners to perform these evaluations. Another commenter stated that permitting an out-of-hospital H&P by a non-physician to substitute as the basis for hospital admission and treatment, instead of an H&P by a physician on the hospital medical staff, would create an unacceptable danger to patients since these non-physicians would be exempt from medical staff credentialing, privileging, and peer review. The commenter further stated that non-physicians often lack the education, training, experience, or licensure to perform a proper H&P for patients who are seriously ill. Another commenter stated that the following interpretation of this regulation needs to be clearly communicated to all: That a current H&P can be included in the patient's medical record if performed within 30 days prior to hospital admission; these H&Ps may be performed by any licensed independent practitioner (including Doctors of Podiatric Medicine) who is or is not a member of the medical staff, provided

that this does not substitute for proper clinical judgment related to updating the patient's status; and that, after the patient is admitted, all necessary H&Ps must be performed by a properly privileged and credentialed member of the medical staff as needed. One commenter stated there was confusion over the H&P update in that some physicians feel this rule compels them to do a full H&P (the commenter stated that this was the advice given by legal counsel), especially if the first one was not done by them.

One commenter supported the review of H&Ps conducted within the 30 days prior to hospitalization; however, the commenter encouraged CMS to allow organizations flexibility in documenting that review and that CMS should not prescribe the specific language or method to be used to indicate that the patient was re-examined and the results are noted (for example, ''the H&P was reviewed, the patient was examined, and 'no change' has occurred since the H&P was completed''). Another commenter was in agreement with the language of the H&P requirement, but noted if an update exam is needed it should be required by hospital policy rather than by CMS regulations. Some commenters noted that there is inconsistent application of H&P requirements by CMS and TJC. One commenter suggested that it would be very helpful if CMS would allow hospitals to address H&P requirements in the medical staff rules and regulations or policies.

Response: While we appreciate the various dissenting comments and opinions that we received on the H&P requirements, we must point out that many of these comments contained inaccuracies regarding both the requirements and the IGs. As such, the comments do not offer constructive criticism or evidence of a compelling need to revise the H&P requirements or the H&P IGs.

The intent behind this requirement has always rested firmly on the basic purpose of an H&P (and a subsequent update to an H&P)—that is, to determine whether there is anything in the patient's overall condition that would affect the planned course of the patient's treatment, such as an allergy to a medication that must be avoided, or a co-morbidity that requires certain additional interventions to reduce risk to the patient. To question ''the value of performing updates to H&Ps that are completed shortly before a scheduled procedure requiring anesthesia services'' is to question the value of performing an H&P in the first place. A patient's condition can change day to day, moment to moment. The update requirement ensures that any change in a patient's condition is noted and taken into consideration prior to a practitioner beginning a procedure or starting a treatment plan that may be affected by such a change. The H&P and its update give the practitioner as much information about the patient as he or she chooses to seek prior to beginning treatment. As written, the requirements and IGs allow the practitioner performing the update to exercise his or her independent clinical judgment with regard to how minimal, how focused, or how extensive the update to the H&P should be for a particular patient (71 FR 68676; *http://www.cms.gov/manuals/downloads/som107ap_a_hospitals.pdf*).

With regard to the comment that the requirements limit the performance of the H&P and its update to physicians, the requirements (under the Medical staff bylaws provisions at §§ 482.22(c)(5)(i)–(ii)) have always been explicit that other qualified licensed individuals may perform these evaluations. Other qualified licensed individuals are those licensed practitioners (such as APRNs and PAs) who are permitted by their State scope of practice laws or regulations to conduct a history and physical examination (and any updates to it), and who are also formally authorized by the hospital to conduct an H&P and its updates. Therefore, we do not agree that we need to clarify that these types of practitioners can perform these duties.

Conversely, there was the comment that posited the idea that allowing these types of practitioners to perform H&Ps and updates poses an ''unacceptable danger to patients'' since these nonphysician practitioners ''often lack the education, training, experience, or licensure to perform a proper H&P for patients who are seriously ill.'' The commenter also stated that non-physician practitioners who perform H&Ps prior to admission (for example, as part of a primary care practice) and who are not on the medical staff would be exempt from medical staff credentialing, privileging, and peer review. While the fact that non-medical staff APRNs and PAs are exempt from medical staff peer review is certainly true (and, for that matter, so it would also be for non-medical staff physicians), it cannot be assumed that the quality of the H&Ps would be any less than those performed by medical staff APRNs, PAs, and physicians. However, the practitioner responsible for the care of the patient always has the option to perform a new H&P if he or she feels that the H&P done prior to admission or registration by the patient's primary practitioner is less than adequate.

Finally, the language in the IGs regarding what a practitioner might write in the medical record for a patient requiring an update to his or her H&P, but having no changes in his or her condition, is not intended to be prescriptive. It is provided as merely an example.

Physical Environment (§ 482.41)

Currently, hospitals are required to meet the standards of the 2000 edition of the Life Safety Code (LSC). In the proposed rule (76 FR 65899–65900), we noted the 2012 LSC edition was expected for release in fall 2011, and based on the 2012 edition's content we would decide whether it or another more recent edition was appropriate for incorporation into regulations for hospitals and other affected providers and suppliers. We also noted any regulatory changes would be addressed through separate notice-and-comment rulemaking; and asked the public for their comments in regard to LSC (76 FR 65900). The 2012 LSC has been subsequently released since the publication of this proposed rule.

Comment: Many commenters recommended the adoption of the Life Safety Code (LSC) (2012 edition) in Physical environment § 482.41. Many commenters also suggested that CMS could ensure continued relevance of its LSC requirements by mandating that hospitals comply with the most current LSC requirements, rather than reference a specific edition of the LSC as it has previously done. A few commenters urged CMS to adopt the 2009 edition of the LSC. One commenter suggested CMS adopt the version of the LSC that the State Fire Marshal is using for that particular State. One commenter stated at the time CMS considers updating the LSC, that both the 2009 International Building Code and International Fire Code be considered as an allowable means of meeting the fire and life safety requirements at § 482.41. A few commenters noted that currently multiple authorities have jurisdiction over hospitals and may use different versions of the LSC, which creates substantial burden on hospitals and confusion in the field. Some commenters also recommended that the Health Care Facilities Code (National Fire Protection Association (NFPA) 99–2012) should also be adopted. One commenter asked whether a fire alarm system installed in 2000 would have to be in compliance with the maintenance, inspection, and testing rules of the 2000 or the 2012 edition of the NFPA 72.

Response: We appreciate commenters' suggestions regarding the LSC regulations set out under our ''Physical environment'' CoP at § 482.41. Suggestions received were outside the scope of this final rule and will be considered through separate notice-and-comment rulemaking in a LSC omnibus rule, targeted for publication in the near future.

Public Comments Regarding Possible Areas for Future Rulemaking

The proposed rule (76 FR 65904) solicited any additional public comments on the hospital CoPs which were beyond that of the proposed provisions. Many commenters provided public comments that were outside the scope of this final rule, and below is a summary of responses to those public comments received.

Interpretive Guidelines (IGs)

One commenter suggested that CMS should provide easy access to up-to-date hospital CoPs and IGs on the CMS Web site (instead of rewriting hospital CoPs in another format), and support a more robust search engine for users. Other commenters suggested that CMS revise the way in which it develops changes to IGs to allow for meaningful stakeholder and subject matter expert input, making the process more transparent. Other commenters suggested that accrediting bodies should have an opportunity to review and provide comment on new and modified IGs before they are released in a Survey and Certification Director's letter. Another commenter suggested that the IGs should be reviewed annually, at a minimum, to allow for meaningful input. Commenters believed there should be a complete review of the CoP's IGs, as they are believed to have become overly wordy, burdensome, and subject to inconsistent interpretation (for example, the new IG on anesthesia includes analgesia which goes beyond the limits of the regulation, etc.). One commenter suggested that there is a need for the IGs to be very explicit regarding processes for credentialing and privileging non-licensed independent practitioners. In addition, commenters encouraged CMS to conduct more robust training for State survey personnel to ensure consistent interpretations of the IGs during surveys.

Immediate Jeopardy

Commenters urged that CMS further define immediate jeopardy, as well as the process in place to apply immediate jeopardy to value-based purchasing. Additionally, commenters suggested that CMS should explain the process in place to guarantee that consistent standards, across the nation, will be used to evaluate situations in which immediate jeopardy is suspected.

Privacy Standards

Commenters noted the comprehensive HIPAA standards, not the general CoP provisions, provide the appropriate basis for protecting the privacy and security of patient medical information without inhibiting the coordination of patient care. Commenters further recommended that CMS eliminate the CoP obligations for medical records confidentiality for providers, and instead rely on the Office of Civil Right's interpretation, oversight and enforcement of the compliance obligations under the HIPAA privacy and security standards.

Nuclear Medicine

One commenter suggested modifications to Nuclear medicine at § 482.53(b)(1) to remove the word ''direct'' to reflect the delegation authority of the authorized user. Additionally, the commenter suggested the IGs regarding § 482.53(b)(1) should be enhanced focusing on the term ''authorized user'' (for example, CMS to allow the authorized user be given the authority, as noted and consistent with the Nuclear Regulatory Commission guidelines, to delegate specific tasks, as they are best suited for determining tasks that supervised individuals can perform and the degree of supervision required; further the authorized user should put policies in place to clarify the specific tasks delegated and the supervision and certification necessary for each), certification of uniform competencies, radiopharmaceutical preparation qualifications, relevant practice standards, and certification assessments rather than layering staff. One commenter suggested that the Nuclear medicine CoP and IGs be updated in the future rulemaking.

Radiologic Services

Commenters suggested that patient-directed care is not adequately recognized in the CoPs, and that CMS should amend Radiologic services at § 482.26(b)(4) to be consistent with State law for those services permitted to be self-referred by hospital patients.

Special Provisions Applying to Psychiatric Hospitals

One commenter suggested that CMS review the CoP at § 482.60, Special provisions applying to psychiatric hospitals. Specifically, the commenter suggested modifications to the current provisions at § 482.61(b) stating more flexibility for professional judgment regarding the breadth and depth of assessments should be allowed through the development of hospital-specific policies rather than requirements of CoPs; § 482.61(c) stating there are other ways to assure that patients are receiving appropriate treatment modalities with sufficient frequency and intensity to justify inpatient treatment than are currently required by the CoPs; and § 482.62(a) suggesting that the provision of interdisciplinary treatment can be accomplished in many ways and that hospitals should be encouraged to provide that treatment in the most flexible and efficient way possible, based on individual patient needs and hospital policy.

Emergency Services

One commenter suggested telemedicine modifications to § 482.55(b)(2), Emergency services, to add ''available in-person or by video conferencing.'' The commenter also suggested incorporating a new provision to allow hospitals to provide access for stroke care through telemedicine at § 482.55 to state ''there must be adequate medical personnel, available in-person or by video conferencing, qualified in ischemic stroke diagnosis to order appropriate treatment including timely thrombolytic therapy where appropriate.''

Intensive and Critical Care Services

One commenter suggested adding a new CoP at § 482.58 for intensive and critical care services, to be modeled on the emergency services provision at § 482.55.

Discharge Planning

One commenter recommended revisions at § 482.43(b)(3), Discharge planning, that would include the patient's risk of readmission for the diagnosis by adding text that states ''patient's readmission for related care and * * *''.

Regulations Governing Graduate Medical Education

One commenter believed the rules lead to additional cost and make it more difficult to administer responsive, quality graduate medical education programs, especially in regards to integrated healthcare systems.

Regulations Governing Quality Measurement

One commenter stated that over the years there has been a proliferation of quality measures across provider types; therefore, this commenter suggested that CMS consider a periodic review of all

measures to ensure that there is as little administrative burden as possible, that the measures are compatible from entity to entity, and that the measures move the program in the same direction rather than splinter providers' focus.

Electronic Health Records (EHRs)

Commenters suggested CMS consider how to incorporate EHRs into the CoPs and IGs.

Payment

Several commenters urged CMS to reevaluate payment. A few commenters stated they did not understand the rationale for CMS to impose stricter supervision regulations under the Outpatient Prospective Payment System (OPPS) rule, in that direct supervision is not a requirement for inpatient services when the patient is presumably more acutely ill, so to impose director supervision for outpatient therapeutic services is not clinically sensible.

Future Rulemaking Affecting CoPs

One commenter recommended that CMS provide guidance about how future rulemakings affecting CoPs or other programs will increasingly seek to incentivize evidence-based care processes that integrate patients and families into care decision-making and clinical workflow.

Response: Thank you for the suggestions. These comments were outside the scope of this final rule, and we may consider these suggestions in future notice-and-comment rulemaking and/or through the IGs.

Food and Dietetic Services

Comment: One commenter suggested CMS consider revising the requirement for a paper-based therapeutic diet manual, in Food and dietetic services § 482.28, and allow organizations a more contemporary approach for staying current with nutritional guidelines (for example, that facilities should be allowed the flexibility to utilize knowledge-based information in a variety of forms as a means of staying current, as opposed to utilizing a hard-copy manual, which does not allow organizations to keep up with rapid changes in the field.).

Response: Currently, the CoP at § 482.28(b)(3) does not specifically require a ''paper-based'' therapeutic diet manual. The current CoP at § 482.28(b)(3) states, ''A current therapeutic diet manual approved by the dietitian and medical staff must be readily available to all medical, nursing, and food service personnel.'' We will take this comment into consideration for future rulemaking.

III. Provisions of the Final Rule

In this final rule, we are adopting the provisions of the October 24, 2011 proposed rule (76 FR 65891) with the following revisions, which will apply to hospitals and CAHs, based on public comments:

Governing Body (§ 482.12)

- In response to public comments, we are revising the introductory text to add a requirement at § 482.12 that the governing body must include a member, or members, of the hospital's medical staff.

Patient's Rights (§ 482.13)

- We are revising paragraph (g)(2) to delete the phrase, ''report to CMS,'' and to clarify that for those deaths related only to soft, two-point wrist restraints the hospital staff must record the information regarding the patient's death in an internal log or other system.
- We are revising paragraph (g)(2) and (g)(4) to clarify that the log is internal to the hospital.
- We are revising paragraph (g)(3) to specify that ''The staff must document in the patient's medical record the date and time the death was: (i) Reported to CMS for deaths described in paragraph (g)(1); or (ii) Recorded in the internal log or other system for deaths described in paragraph (g)(2).''
- We are revising paragraph (g)(4)(ii) to specify that each entry must document the patient's name, date of birth, date of death, ''name of attending physician or other licensed independent practitioner who is responsible for the care of the patient as specified under § 482.12(c),'' medical record number, and primary diagnosis(es).

Medical Staff (§ 482.22)

- Remove proposed paragraph (a)(5).
- Revising paragraph (a) to change the title of the standard from ''Composition of medical staff'' to ''Eligibility and process for appointment to medical staff,'' and require that the medical staff must include doctors of medicine or osteopathy, but may also include other categories of non-physician practitioners determined as eligible for appointment by the governing body in accordance with State law, including scope-of-practice laws.
- Revise paragraph (a)(2) to require that the medical staff must examine the credentials of ''all'' eligible candidates and then make recommendations on medical staff membership to the governing body, and require that a candidate who has been recommended by the medical staff and appointed by the governing body be subject to all medical staff bylaws, rules, and regulations, in addition to the requirements contained in § 482.22.

Nursing Services (§ 482.23)

- Revise paragraph (c)(1)(i) to clarify that drugs and biologicals may be prepared and administered on the orders of other practitioners not specified under § 482.12(c) only if such practitioners are acting in accordance with State law, including scope- of-practice laws, ''hospital policies, and medical staff bylaws, rules, and regulations.''
- Revise paragraph (c)(3)(iii) to clarify that orders for drugs and biologicals may be documented and signed by other practitioners not specified under § 482.12(c) only if such practitioners are acting in accordance with State law, including scope- of- practice laws, ''hospital policies, and medical staff bylaws, rules, and regulations.''
- Revise paragraphs (c)(6)(i)(A) and (c)(6)(ii)(A) to change ''assure'' to ''ensure.''
- Revise paragraphs (c)(6)(i)(D) and (c)(6)(ii)(D) to clarify that the hospital must have policies and procedures in place to ''address'' the security of the medication(s) for each patient and to document the administration of each medication.
- Revise paragraphs (c)(6)(i)(E) and (c)(6)(ii)(E) to provide that the hospital must document the administration of medication ''as reported by the patient (or the patient's caregiver/support person where appropriate), in the patient's medical record.''

Medical Record Services (§ 482.24)

- Revise paragraphs (c)(2) and (c)(3)(iv) to remove the reference to § 482.12(c) and to clarify that all orders, including verbal orders and standing orders, must be dated, timed, and authenticated promptly by the ordering practitioner or by another practitioner who is responsible for the care of the patient ''only if such a practitioner is acting in accordance with State law, including scope-of-practice laws, hospital policies, and medical staff bylaws, rules, and regulations.''
- Revise paragraphs (c)(3)(i) and (c)(3)(iii) by removing proposed language ''in consultation with.''

CAHs

- We have removed the definition for direct services at § 485.602, we have removed the reference to ''direct services'' at §§ 485.623(a) and 485.635(a)(3)(i).
- In § 485.604(a), we revised the definition to provide that a clinical nurse specialist is a registered nurse and is licensed to practice nursing in the

State in which the clinical nurse specialist services are performed, ''in accordance with State nurse licensing laws and regulations;'' and holds ''a master's or doctoral level'' degree in a defined clinical area of nursing from an accredited educational institution.

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs). Responses to comments received for this section can be found below in the Regulatory Impacts section (V).

According to CMS, there are about 4,900 hospitals (not including CAHs) that are certified by Medicare. We will use those figures to determine the burden for this rule. In addition, throughout this section, we estimate costs based on average hourly wages for different healthcare providers and attorneys. Unless indicated otherwise, we obtained these average hourly wages from the United States Bureau of Labor Statistics' ''May 2010 National Occupational Employment and Wage Estimates United States'' (*www.bls.gov/oes/current/oes_nat.htm accessed on September 28, 2011*). We also added 30 percent to the indicated average hourly wage to compensate for overhead and fringe benefits.

A. ICRs Regarding Condition of Participation: Patient's Rights (§ 482.13)

Section 482.13(g) removes the current requirement for hospitals to notify CMS by telephone no later than the close of business the next business day following knowledge of a patient's death for patients who die when no seclusion has been used and the only restraints used on the patient were soft, non-rigid, cloth-like materials, which were applied exclusively to the patient's wrist(s). This requirement includes patients who died within 24 hours of having been removed from these types of restraints. In those cases, the hospital must report to CMS by recording in a log or other system the information required at § 482.13(g)(2)(i) and (ii). We noted this change only for deaths where the patient died while either in soft two-point wrist(s) restraints or within 24 hours of having been removed from soft two-point wrist(s) restraints provided that: (a) There is no reason to believe the death was caused by those restraints, (b) that those were the only restraints used, and (c) that no seclusion was used.

We believe that we previously underestimated the burden and costs associated with the current reporting requirement. After discussions with other CMS staff, we now believe that this reporting would be done by a nurse rather than a clerical person and that there are substantially more deaths that occurred to patients while they were in soft, non-rigid, cloth-like material, which were applied exclusively to a patient's wrist(s), or within 24 hours of being removed from this type of restraints.

We will be revising the current burden estimates for OMB control number 0938–0328 to reflect the burden estimated to be associated with the current regulations and would adjust for any burden reductions resulting from this provision once the current rule is finalized. For a more detailed discussion of estimated burden and cost savings, please see the Regulatory Impact Analysis section of this rule.

B. ICRs Regarding Condition of Participation: Nursing Services (§ 482.23)

The current hospital CoPs require that hospitals ensure that the nursing staff develops, and keeps current, a nursing care plan for each patient (42 CFR 482.23(b)(4)). Section 482.23(b)(4) allows those hospitals that have interdisciplinary care plans (ICPs) to have their nursing care plans developed and kept current as part of the hospital's ICPs. Based on our experience with hospitals, a nurse would develop and maintain the nursing care plan for each patient. The nurse would also be responsible for identifying the sections of each nursing care plan that needed to be integrated into the hospital's ICP and transferring that information into the ICP. Thus, allowing hospitals to include the nursing care plan in the ICP for each patient would save the nurse the time she or he is currently spending identifying and transferring information from the separate nursing care plan into the ICP and maintaining the separate nursing care plan.

In the currently approved OMB control number 0938–0328, we indicated that the creation and maintenance of a nursing care plan constituted a usual and customary business practice and did not assign a burden for this requirement in accordance with 5 CFR § 1320.3(b)(2). Since completing that package, we have reconsidered our estimate of that analysis. While we continue to believe that creating and maintaining a health care plan for each patient is a usual and customary practice for hospitals, we do not believe that is usual and customary for hospitals to develop and maintain a separate nursing care plan when they also develop and maintain an ICP.

We will be revising the current burden estimates for OMB control number 0938–0328 to reflect the burden estimated to be associated with the current regulations and would adjust for any burden reductions resulting from this provision once the current rule finalized. For a more detailed discussion of estimated burden and cost savings, please see the Regulatory Impact Analysis section of this rule.

C. ICRs Regarding Condition of Participation: Medical Record Services (§ 482.24)

In the currently approved OMB control number 0938–0328, we indicated that most of the patient-related activities, such as authentication of verbal orders and using standing orders, constituted a usual and customary business practice and did not assign a burden for this requirement in accordance with 5 CFR 1320.3(b)(2). However, we have reconsidered our analysis. We believe that the authentication of verbal orders should be governed by State law and not mandated by the Federal government. In addition, while writing orders is generally a usual and customary business practice in hospitals, hospitals can also choose how those orders will be conveyed. We believe that some hospitals are not currently using standing orders as often as they would choose to due to our CoPs. Therefore, by allowing authentication of verbal orders to be governed by State law and expanding the use of standing orders, we believe that this would result in a burden reduction.

We will be revising the current burden estimates for OMB control number 0938–0328 to reflect the burden estimated to be associated with the

current regulations and would adjust for any burden reductions resulting from this provision once the current rule is finalized. For a more detailed discussion of estimated burden and cost savings, please see the Regulatory Impact Analysis section of this rule.

D. ICRs Regarding Condition of Participation: Infection Control (§ 482.42)

The current hospital CoPs require that ''the infection control officer or officers must maintain a log of incidents related to infections and communicable disease'' (42 CFR 482.42(a)(2)). In this final rule, we are eliminating this requirement for keeping a dedicated log of incidents related to infections and communicable diseases, proposing instead to allow hospitals flexibility in their approach to the tracking and surveillance of infections.

In the currently approved OMB control number 0938–0328, we did not assign a burden for creating and maintaining this log. However, we have reconsidered our analysis. We believe there are many alternatives available that present an even greater opportunity to monitor and analyze infection control activities than keeping a log as currently required by the CoPs. In addition, we believe that the log is a format that hospitals are using only because of the CMS requirement and that they are producing data in this fashion in addition to the format they are using for their own purposes. Thus, while identifying and monitoring infections that patient have during hospitalization would be usual and customary for hospitals, we believe that requiring hospitals to keep a log rather than decide how they could best keep track of this information is burdensome for hospitals.

We will be revising the current burden estimates for OMB control number 0938–0328 to reflect the burden estimated to be associated with the current regulations and will adjust for any burden reductions resulting from this provision once the current rule is finalized. For a more detailed discussion of estimated burden and cost savings, please see the Regulatory Impact Analysis section of this rule.

E. ICRs Regarding Condition of Participation: Transplant Center Process Requirements—Organ Recovery and Receipt (§ 482.92)

In this final rule, we are removing § 482.92(a) entirely. The elimination of this section removes the burden on the part of transplant centers by eliminating a requirement to review and compare blood type and other vital data before organ recovery takes place.

In the currently approved OMB control number 0938–1069, we indicated that the verification by the transplant hospital recovery physician when the recipient was known constituted a usual and customary business practice and did not assign a burden for this requirement in accordance with 5 CFR 1320.3(b)(2). However, since that PRA package was approved by OMB, several members of the transplant community have repeatedly told CMS that this verification was unnecessary and burdensome because OPOs already perform this type of verification prior to organ recovery in accordance with § 486.344(d)(2)(ii). Therefore, we have reconsidered our estimate of the burden for this requirement.

We will be revising the current burden estimates for OMB control number 0938–0328 to reflect the burden estimated to be associated with the current regulations and would adjust for any burden reductions resulting from this provision once the current rule is finalized. For a more detailed discussion of estimated burden and cost savings, please see the Regulatory Impact Analysis section of this rule.

V. Regulatory Impacts

A. Regulatory Impact Analysis

1. Introduction

We have examined the impacts of this rulemaking as required by Executive Orders 12866 (September 1993) and 13563 (January 2011). Executive Orders 12866 and 13563 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, reducing costs, harmonizing rules, and promoting flexibility. A Regulatory Impact Analysis (RIA) must be prepared for rules with economically significant effects ($100 million or more in any one year). This final rule is an ''economically'' significant regulatory action under section 3(f)(1) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this final rule.

2. Statement of Need

In Executive Order 13563, the President recognized the importance of a streamlined, effective, efficient regulatory framework designed to promote economic growth, innovation, job-creation, and competitiveness. To achieve a more robust and effective regulatory framework, the President has directed each executive agency to establish a plan for ongoing retrospective review of existing significant regulations to identify those rules that can be eliminated as obsolete, unnecessary, burdensome, or counterproductive or that can be modified to be more effective, efficient, flexible, and streamlined. Consistent with this directive, CMS conducted a retrospective review of the CoPs it imposes on hospitals to remove or revise obsolete, unnecessary, or burdensome provisions. The goal of the retrospective review was to identify opportunities to reduce system costs by removing obsolete or burdensome requirements while maintaining patient care and outcomes.

CMS has not reviewed the entire set of CoPs for Hospitals in many years. These requirements have grown over time and, while often revised, have not been subject to a complete review. CMS staffs as well as CMS stakeholders, including TJC, the American Medical Association, the AHA, and many others, have identified problematic requirements over the years. Accordingly, we decided to conduct a retrospective review of the CoPs imposed on hospitals and to remove or revise obsolete, unnecessary, or burdensome provisions, and to increase regulatory flexibility while identifying and adding opportunities to improve patient care and outcomes. We analyzed all potential reforms and revisions of the CoPs for both the costs and the benefits that they would bring to hospitals and CAHs. Based on our analysis, we decided to pursue those regulatory revisions that would reflect the substantial advances made in healthcare delivery and that would benefit hospitals and CAHs through cost savings.

We received hundreds of substantive comments supporting our choice of provisions for reform, the specific reforms we proposed, and the general conclusions we had reached as to likely importance or magnitude of potential savings. Public comments and corresponding responses regarding the Collection of Information Requirements and the Regulatory Impacts section can be found below:

Comment: We received numerous comments regarding the paperwork or information collection requirement (ICR) section and the regulatory impact section from health care institutions and their national organizations, health care

providers and their national organizations, health care advocacy organizations, as well as others. Most of these commenters were supportive of our efforts to reduce burden from the hospital CoPs, especially those that did not contribute to quality patient care, and our estimates of the resulting savings. Many commenters, especially health care providers stated that removing these burdensome provisions would actually contribute to quality of care for patients, allow them more time for direct patient care, and to better utilize their resources.

Response: We would like to thank the commenters for their support of our efforts to reduce the burden from the hospital CoPs.

Comment: We received a few comments that questioned our estimate of 882,000 occurrences of patients who died while either in, or within 24 hours of being removed from, soft, wrist only restraints. One commenter noted that we did not account for the time that would be required to perform the log entries.

Response: We agree with the commenters. Since publication of the proposed rule, we have reviewed some new data and agree that the estimate of 882,000 occurrences is likely overstated. We have revised our estimate below. We did not account for the time it would take to complete a log entry in the proposed rule. We believe that hospitals would likely choose the most efficient manner in which to keep this log. For example, they may have a nurse complete these entries as a group or develop a process for transferring the information electronically to a log. We continue to believe that removing the requirement to report these deaths to CMS would result in the savings we estimated in the proposed rule, of approximately 15 minutes for each entry.

Comment: We received a few comments that questioned our estimate of $330 million in savings from the proposed revisions in § 482.22. Commenters indicated that they wanted further clarification, that they believed the estimate was in error, and questioned using the difference between a physician and non-physician's salary.

Response: We disagree with the commenters. In fact, we believe that the savings might be much greater. Our detailed estimate is located in the regulatory impact section (below). As we noted, we only estimated the savings for inpatient hospital stays. We did not estimate the savings for the approximately 620,000 annual outpatient visits. Therefore, we have not modified our estimate.

Very few of these comments provided any criticism of, and no comments offered technical information to improve, our estimates of potential savings. Accordingly, we have not changed our estimates of potential and likely savings. We plan to evaluate cost savings and other potential impacts in the future, including changes that might increase or decrease patient safety or health, based on actual changes implemented by hospitals and CAHs. It is important to understand that our estimates are necessarily uncertain because they depend largely on changes that hospitals and their medical staffs could decide to adopt or not adopt on a case-by-case basis. Some estimates also depend upon the future decisions by States to change their laws and regulations covering the scope of practice of non-physician practitioners.

Comment: A number of commenters noted that the ability of hospitals and CAHs to implement these reforms would depend upon our revising the current interpretative guidelines for the hospital and CAH CoPs.

Response: As we have discussed elsewhere in this rule, we will be issuing guidance on how hospitals and CAHs can implement the changes in this final rule shortly.

3. Summary of Impacts

These reductions in process and procedure requirements detailed in this final rule may allow hospitals and CAHs to redirect staff resources to areas of higher priority that they view as producing greater benefit to patients. They could also enhance hospitals' ability to flexibly deploy resources and reengineer internal processes. We present a summary of these cost-reducing changes in Table 2.

TABLE 1—SECTION-BY-SECTION SUMMARY OF COST SAVINGS TO HOSPITALS AND CAHS

[2012 Dollars; entries rounded to nearest $100K if under $50M and to nearest $10M if higher]

Regulatory area	Section	Annual savings ($K)	Five year savings ($K)
Patient's Rights—Death Notice Soft Restraints	482.13	$5,100	$25,500
Medical Staff	482.22	330,000	1,650,000
Nursing Services—Care Plan	482.23	110,000	550,000
Medical Record Services—Authentication	482.24	80,000	400,000
Medical Record Services—Standing Orders	482.24	90,000	450,000
Infection Control—eliminate log	482.42	6,600	33,000
Outpatient Services	482.54	300,000	1,500,000
Transplant Organ Recovery	482.92	200	1,000
CAH Provision of Services	485.635	15,800	79,000
Total		937,700	4,688,500

Some of these savings come simply from reductions in process requirements and reporting. The changes in the area of medical staffing and several other areas would allow hospitals more flexibility in hiring and staffing decisions, including use of part-time and contract staff, to provide patient services efficiently and effectively. Total national hospital spending is about nine hundred billion dollars a year and about half of this is spent on staff compensation (source: AHA Hospital Statistics). Thus, the potential magnitude of the efficiencies that could be achieved is very large.

Clearly, the amount of savings actually realized through these reforms will depend on the individual decisions of about 6,100 hospitals (including CAHs), over time. We cannot predict the extent or speed of these elective changes. Other factors, such as impending physician shortages and the growing use of other practitioners to perform many physician functions will play a role as will State decisions on laws delineating scope of practice.

Furthermore, for the requirements that we are modifying or deleting, we

are not aware of any information suggesting that these changes would create consequential risks for patients. In other words, we do not believe that any eliminated requirement in this final rule has saved lives in recent decades. In public comments, several commenters raised important questions regarding patient safety. We reviewed all of those comments with great care; however, in our review of these comments we could not identity a single comment that provided any empirical or scientific evidence, or even plausible arguments, that any proposed reform threatened patient safety. The mere possibility of harm, unsupported by evidence, does not justify retention of regulatory provisions that are based on mere supposition or hypothetical arguments. Under the standards of EO 12866 and EO 13563, a regulatory requirement must be justified by a showing of need. No comments we received demonstrated any need to retain the particular provisions we proposed to eliminate or reform.

4. Anticipated Impacts

There are about 4,900 hospitals and 1,200 CAHs that are certified by Medicare. According to CASPER (February 1, 2012), there are 6,180 hospitals. However, that number includes religious non-medical health care institutions (RNHCIs), which are not included in this rule, and critical access hospitals (CAHs), which are not included in the hospital provisions. In addition, according to CMS, there are about 107 CAHs with distinct part units (DPUs) that must comply with the hospital CoPs. Therefore, we have analyzed the hospital provision for 4,900 hospitals (6,180 total hospitals—18 RNHCIs—1,330 CAHs + 107 CAHs with DPUs = 4,939 or about 4,900 hospitals). For the CAHs, we analyzed the burden for 1,200 CAHs (1,330 CAHs –107 CAHs with DPUs that are analyzed with the hospitals = 1,223 or about 1,200 CAHs). Thus, in the final rule, we used these figures to estimate the potential impacts of this rule. In addition, we used the following average hourly wages for nurses and physicians respectively: $45 and $124 (BLS Wage Data by Area and Occupation, including both hourly wages and fringe benefits, at *http://www.bls.gov/bls/blswage.htm* and *http://www.bls.gov/ncs/ect/*). We received no comments suggesting a change in these hourly wage assumptions.

The analysis below overlaps with the Collection of Information Requirements section for many individual items. That section contains more technical and legal detail as appropriate under the Paperwork Reduction Act, but that is not normally necessary in a Regulatory Impact Analysis. Readers may wish to consult both sections on some topics.

Death Notices for Soft Restraints (Patient's Rights § 482.13)

In this final rule, we are removing the current requirement for hospitals to notify CMS by telephone no later than the close of business the next business day following knowledge of a patient's death for patients who die when no seclusion has been used and the only restraints used on the patient were soft, non-rigid, cloth-like materials, which were applied exclusively to the patient's wrists. Reporting for patients who died within 24 hours of having been removed from these types of restraints is also removed.

In the proposed rule, we estimated that full reporting of all such instances would result in 882,000 occurrences. This is much greater than the assumption that originally established this reporting requirement in the final rule (71 FR 71425). However, since the requirements have come into effect, we believe our initial estimate was low. In addition, we also received comments questioning the estimate of 882,000 occurrences. We conducted further research and have decided that our estimate in the proposed rule was overstated. Therefore, we have revised our savings estimate below.

In addition, the assumption in the 2006 final rule was that administrative support personnel would carry out these functions. Based on our experience with hospitals, this assumption is incorrect. A registered nurse would be the more appropriate staff member to make the call and to enter the information into a patient's medical record. The difference between the average hourly wage for a clerical person and a registered nurse ($18.88 per hour versus $45 per hour) would account for a significant discrepancy in estimated burden between the 2006 final rule and this proposed rule. Similar to the 2006 rule, we still estimate that it would take about fifteen minutes (or .25 hours) to comply with this requirement for each occurrence. The estimate of the time is also based on our experiences with hospitals as well as feedback from stakeholders that indicates that this estimate is reasonable.

According to the United States Agency for Healthcare Research and Quality (AHRQ), there were 757,841, or about 758,000, in-hospital deaths in 2009 (*http://hcupnet.ahrq.gov/HCUpnet.jsp* accessed February 10, 2010). There are many reasons for a patient to be physically restrained. According to Evans and FitzGerald, two of the most often cited reasons for restraining patients were treatment-related and for safety reasons (Evans, D. and FitzGerald, M, *Reasons for physically restraining patient and residents: a systematic review and content analysis*, International Journal of Nursing Studies 39 (2002), pp. 735–743). The treatment-related reasons include preventing patients from disturbing medical devices, such as endotracheal tubes, intravenous lines (IVs), nasogastric or feeding tubes, urinary catheters, wounds, dressings, and sutures (Evans and FitzGerald, p. 738). Patients might also be restrained for their own safety, such as when patients have impaired judgment or might harm themselves. We believe that many of the patients who die in the hospital are those who were seriously ill or injured and whose treatment likely involved medically necessary devices (such as endotracheal tubes and respirators due to post-operative respiratory failure) or those who may have suffered from impaired cognition and judgment due to their conditions. Thus, we believe that many of these patients may have been restrained at the time of, or within 24 hours of, their deaths so that medically necessary treatments could be carried out in the most safe and effective manner. Thus, we estimate that 60 percent of the 758,000 in-hospital deaths, or 454,800 deaths, would have been reported to CMS.

Similar to the 2006 rule, we still estimate that it would take about fifteen minutes (or .25 hours) to comply with this requirement for each occurrence. We are also basing this timesaving estimate on our experiences with hospitals as well as feedback from stakeholders that indicated that this estimate was reasonable. Therefore, we estimate that this reduction in burden would reduce each hospital's burden hours by about 23 hours (454,800 occurrences × .25 hours ÷ 4,900 = 23.20 or about 23 hours) each year valued at $45 for each hour for an average annual savings of $1,035 (23 hours × $45 hourly wage for a nurse = $1,035). Thus, we estimate that for all 4,900 hospitals this would result in a savings of about $5,116,500 (454,800 occurrences × $45 × .25 hours = $5,116,500 estimated savings).

Medical Staff (§ 482.22)

Our changes and clarifications regarding medical staff and privileging allow hospitals to substitute and rearrange actual delivery of care. In particular, use of Advanced Practice Nurse Practitioners (APRNs) and

Physician Assistants (PAs) in lieu of higher-paid physicians could provide immediate savings to hospitals. While we have no precise basis for calculating potential savings, we feel confident that our estimates reflect a reasonable approach to hospital cost savings. However, much will depend on the future staffing and management decisions that individual hospitals make. For example, the savings that we believe that hospitals will realize from the changes to the Medical staff CoP will depend on the extent to which hospitals take advantage of the regulatory flexibility that the new requirements afford. Those hospitals that view these changes as a means to be more inclusive of non-physician practitioners on their medical staffs would most likely reap the most benefits.

With that said, we also believe that an interdisciplinary team approach to patient care is the best model for hospital patients. Within this model, non-physician practitioners have proven themselves capable of handling many common patient complaints, initial patient work-up and follow-up, patient education and counseling, and the specific aspects of patient care for which they have been educated and trained. Physicians, as leaders of these teams due to their more extensive training and expertise, are then able to more fully turn their attention to more complicated patient problems. In this way, non-physician medical staff members allow physicians to more efficiently and effectively manage their time so that these physician leaders can focus on more medically complex patients. It is within this context of efficient and effective care delivery by physicians and non-physician practitioners working collaboratively that we have based our estimates. For purposes of this analysis, we have reached an estimate of $330 million in savings using the following assumptions, which are based on our experience with hospitals:

- All hospitals are able, under State scope-of-practice laws (that is, 4,900 hospitals), and one third of these are willing (that is, 1,617), to structure their medical staffs in this manner;
- There are on average 7,000 inpatient hospital stays per hospital per year (from AHA Hospital Statistics);
- The average hospital stay is about 5 days (per AHA statistics);
- On average, each patient receives approximately 75 minutes (1.25 hours) of a physician's time (for example, in-person visits/assessments, including patient and family education; review of patient lab and other diagnostic test results; documentation of orders, progress notes, and other entries in the medical record; performance of minor procedures; and discussion of the patient's condition with other staff) during an average 5-day stay;
- At a minimum, 33 percent of this physician per patient time would now be covered by non-physician practitioners (for example, APRNs and PAs); and
- There is an average salary difference of $71 an hour between physicians and these practitioners.

The resulting savings estimate of about $330 million annually (1,617 hospitals × 7,000 inpatient hospital stays × 1.25 hours of physician/non-physician practitioner time × $71 per hourly wage difference × 33 percent of physician time with patients covered by non-physician practitioners) could obviously be much higher or lower if any of the parameters above changed. Additionally, we have restricted our estimates to inpatient hospital stays and we did not include a discussion of the approximately 620,000,000 annual hospital outpatient visits (AHA Hospital Statistics) and the impact that these changes could have on staffing costs for hospitals in light of this number. Thus, many reasonable variations of our assumptions would lead to a similar magnitude of savings.

We received several comments criticizing this lack of precision in these estimates. One of these suggested additional consultation with stakeholders. We agree with those commenters that better estimates would be desirable. However, no commenters provided any information showing that there would be costs not accounted for in these estimates (for example, reductions in patient safety), or provided any information showing that these estimates were either too low or too high. Since these estimates depend overwhelmingly on future State decisions regarding non-physician practitioner practice limitations, and on the independent decisions of hospital governing boards and medical staffs, we have no basis for a revision in this final rule. We point out, however, that our initial savings estimates were quite conservative when viewed against the potential ability of medical staffs to economize by delegation to non-physician practitioners acting within the scope of the licenses already granted by many States.

The most obvious example of this potential ability to economize by delegation would be the surgeon who uses the services of available hospital APRNs and PAs to see and provide post-operative care and management of his or her patients, freeing the surgeon to focus on procedures and surgeries in the operating room. The surgeon still leads the team, but this model allows for both the surgeon and the APRN or PA to practice to the full extent of their training and experience and to effectively manage their time regarding patient care, ultimately benefitting each patient in the process. Some hospitals have already realized that having a dedicated APRN/PA service available to physicians can reduce overall costs by allowing for the more effective management and care of most patients during their hospital stay, from admission through discharge. In listening to stakeholders, we realized that the revisions to the Medical staff CoP that we have finalized here are necessary to ensure that all hospitals have the opportunities for potential savings and improved patient care that we believe are likely. With some significant exceptions discussed earlier in this preamble, mainly focused on anesthesiology or on medical governance received from physicians, we received overwhelming support for these proposals. All major non-physician stakeholder groups supported our reforms and the likely magnitude of savings.

Nursing Services Care Plan (§ 482.23)

The current hospital CoPs require that hospitals ensure that the nursing staff develops, and keeps current, a nursing care plan for each patient. In this final rule, we are allowing those hospitals that have interdisciplinary care plans (ICPs) to have their nursing care plans developed and kept current as part of the hospital's ICPs.

Based on our experience with hospitals, a nurse would develop and maintain the nursing care plan for each patient. The nurse would also be responsible for identifying the sections of each nursing care plan that needed to be integrated into the hospital's ICP and transferring that information into the ICP. Thus, allowing hospitals to include the nursing care plan in the ICP for each patient would save the nurse the time he or she is currently spending identifying and transferring information from the separate nursing care plan into the ICP and maintaining the separate nursing care plan. We believe that many hospitals have already developed methods for eliminating this time-wasting step, particularly those hospitals that have largely implemented an electronic health records system. Assuming that about 60 percent have done so, this reform would only affect

roughly 16 million patients (40 percent of 40 million admissions).

We estimate that allowing a hospital to use only the ICP would save the nurse an average of nine minutes or 0.15 hours and would affect 16,000,000 patients. Thus, this would result in a reduction of 2,400,000 burden hours valued at $45 per hour for a savings of $108,000,000. The comments we received by nursing groups and other expert reviewers strongly supported our policy change and these overall estimates, though without providing any empirical support for the precise savings we estimated.

Medical Record Services—Authentication and Standing Orders (§ 482.24)

In this final rule, we are revising the Medical Records CoP to eliminate the requirement for authentication of verbal orders within 48 hours if no State law specifying a timeframe exists. Since we believe that very few States have authentication timeframe requirements, we do not believe that the few States that may have such requirements would impact the potential savings we are estimating here. We also are making permanent the temporary provision (5-year sunset provision which expired in early 2012) that allows for orders to be authenticated by another practitioner who is responsible for the care of the patient and who, in accordance with hospital policy State law, is authorized to write orders.

We believe that this provision would result in a burden reduction. We would expect a registered nurse or compliance officer to be responsible for checking medical records and flagging orders needing authentication, particularly those verbal orders nearing the current 48-hr timeframe. Based on our experience with hospitals and feedback from stakeholders on this issue, we believe that hospitals will save one hour of a nurse's time every day for 365 burden hours for each hospital annually. For all 4,900 hospitals, this would result in a reduction of 1,788,500 burden hours, valued at $45 per hour for a savings of $80,482,500.

We are also adding new provisions to allow hospitals to use pre-printed and electronic standing orders, order sets, and protocols for patient orders if the hospital ensures that these orders: Have been reviewed and approved by the medical staff and nursing and pharmacy leadership; are consistent with nationally recognized guidelines; are reviewed periodically and regularly by medical staff and nursing and pharmacy leadership; and are dated, timed, and authenticated by a practitioner who is responsible for the care of the patient and who is authorized to write orders by hospital policy in accordance with State law. In addition, we proposed to allow for drugs and biologicals to be prepared and administered on the orders of other practitioners if they are acting in accordance with State law and scope of practice and the hospital has granted them the privileges to do so.

The use of standing orders, order sets, and protocols reduces a hospital's burden in several ways. Initially, it saves the physician or other practitioner the time it takes to write out the orders. It also saves the physician the time it would take to go back to the chart or call a nurse with a verbal order if the physician forgets a particular order. The nurses also save time when standing orders are used. The orders are more legible so there is less time interpreting and calling physicians for verification. Nurses also need to call physicians less frequently when there is a change in the patient's condition or they feel there needs to be a change in the care the patient is receiving. Patients also benefit from standing orders because there would be less delay in the delivery of needed care to a patient. Thus, we believe that expanding the use of standing orders would significantly reduce the hospital's burden.

Based on our experience with hospitals and on stakeholder feedback regarding the issue of standing orders, we estimate that these provisions would affect 13 million patients or roughly one-third of hospital admissions. We also estimate that using standing orders would result in a burden reduction of an average of 4 minutes or 0.07 hours for each of these patients. Thus, expanding the use of standing orders would result in a reduction of 700,000 burden hours valued at $124 per hour for a savings of $86,800,000. As discussed in the Information Collection section, comments overwhelmingly supported this reform and did not suggest specific changes in our estimates.

Outpatient Services (§ 482.54)

Allowing one or more individuals to be responsible for the supervision of outpatient services would permit large savings in this final rule. Under the existing CoP, only one person may direct outpatient services. Similar to our estimates for medical staff savings, what savings hospitals may realize would depend largely on their future decisions, and cannot be predicted with any precision. For purposes of estimation, we have developed an estimate that illustrates that potential. Based upon our experience with hospitals, we estimate that two-thirds of the hours eliminated would represent net savings, since existing directors obviously perform significant coordination functions that would have to be performed regardless of how the work is organized. To be more specific, potential savings are based on the following:

- Two-thirds of hospitals elected to redirect these overall director functions (3,267 hospitals);
- On average, each position represents 2,000 hours per year;
- Only two-thirds of the hours eliminated represented net savings; and
- Compensation averages about $70 an hour.

Based on these assumptions, this reform would produce $305 million annually in staff savings (3,267 hospitals × 2,000 hours × ⅔ × $70 per hour). A similar result would be obtained if four-fifths of hospitals redirected these functions, but the net hours saved were only a little more than half of the current hours. We received very few comments on this reform, but all of these supported the reform and agreed it would produce substantial savings.

Transplant Organ Recovery (§ 482.92)

We are removing the current blood typing requirement entirely. The elimination of this section removes transplant center burden by eliminating a requirement to review and compare blood type and other vital data before organ recovery takes place. The OPOs already perform this type of verification prior to organ recovery. In addition, since publication of the existing rule, the transplant community has repeatedly told CMS that the verification that we are deleting is burdensome and unnecessary.

Under the current requirements for this situation, the OPO performs a verification before organ recovery, the surgeon working for the transplant center performs a verification before organ recovery, and the transplant center surgeon performs another verification before the organ is transplanted. Under this finalized requirement, the OPO performs a verification before organ recovery and the transplant center surgeon performs a verification before the organ is transplanted. We are eliminating the verification that is conducted by the staff working on behalf of the transplant center that must occur prior to organ recovery. In addition, the responsibility for maintaining these records is very unclear, and has caused conflict between surgeons, transplant centers, and the hospitals where the organ recoveries are performed. Eliminating

the extra verification step removes this source of conflict and confusion.

Between July 1, 2009 and June 30, 2010, the United States saw 2,293 heart and 1,699 lung transplants. During the same time frame, there were also 16,679 transplants for kidneys, 6,301 for livers, and 371 for pancreases. (Scientific Registry of Transplant Recipients (SRTR) *http://srtr.org/csr/current/nats.aspx,* date last accessed 6/9/10). Surgeons working for their own transplant centers conduct most organ recoveries for heart and lung transplants. By contrast, in the case of kidneys, livers, and pancreases, these organs are typically recovered by surgeons who are on-call for an OPO and who are not also working for, or privileged at, the same transplant center where the organ is delivered. Based on our experience with transplant centers, we estimate that surgeons who are working for the transplant centers conduct 25 percent of kidney, liver and pancreas organ recoveries. It is in this small percentage of transplant cases, roughly 5,800, together with the total number of heart and lung transplants, where the requirement for an additional verification has resulted in overlapping and burdensome requirements. For the purpose of analysis, we have assumed that conducting the verification and filing the corresponding paperwork would take 8 minutes and that there are 9,972 transplant cases. We therefore conclude that removing the duplicative verification requirement will result in an annual savings of 1,305 burden hours valued at $124 per hour for a monetary savings of $161,820.

Several commenters pointed out that we would need to change our IG to surveyors to assure these savings. We agree, and will make the necessary changes.

Infection Control Log (§ 484.42)

We are eliminating a requirement for keeping a dedicated log of incidents related to infections and communicable diseases, and instead allowing hospitals flexibility in their approach to the tracking and surveillance of infections. We believe the changes we are finalizing would result in the more efficient use of time.

We believe that the current log requirement requires roughly 30 hours annually of a nurse's time per hospital (that is., an average of 600 to 900 log entries per year and 2–3 minutes per entry). Thus, for all 4,900 hospitals this change would result in a savings of 147,000 burden hours valued at $45 per hour for a savings of $6,615,000. Again, we received no comments suggesting that these savings could not be realized.

CAH Provision of Services (§ 485.635)

Our removal of the ''direct services'' requirement imposed on CAHs would eliminate the requirement that certain services be provided only by employees and not through contractual arrangements with entities such as community physicians, laboratories, or radiology services. Opportunities may be limited because CAHs are both small and overwhelmingly located in rural areas where there may not be realistic alternatives to direct hiring. We estimate that this could produce savings of approximately one tenth of one full-time equivalent staff person in payroll savings on average, at an average compensation cost of $66, for a total of about $16 million saved annually across all 1,200 CAHs. This is an area where our savings may well be underestimated, based on the tenor of the comments we received. We did not, however, obtain suggestions for specific changes.

5. Alternatives Considered

From within the entire body of CoPs, the most serious candidates for reform were those identified by stakeholders, by recent research, or by experts as unusually burdensome if not unchanged. This subset of the universe of standards is the focus of this final rule.

For each requirement that we have deleted or modified, there were a number of possible options, including making no change, making the change we proposed, and in some but not all cases making some in-between change. There was a final set of alternatives revolving around entirely different methods of achieving potential benefits, such as incentive payments through Medicare or other health plans to high-performing institutions, or publishing quality scores to make hospital strengths and weaknesses transparent to both the public at large and to practitioners. A number of such reforms are underway. Likewise, there are alternatives such as technical assistance through Quality Improvement Organizations (QIOs) funded by CMS, also underway under the latest QIO contracts.

Throughout the preamble to this final rule, we have identified ways to improve, avoid problems, or clarify the proposed reforms. Many of these improvements arose directly from public comments. While some of those changes are vital to realizing the reforms we proposed, most of the final rule changes required no substantial changes to our estimates of the potential reductions in regulatory burden.

6. Uncertainty

Our estimates of the effects of this regulation are subject to significant uncertainty. While CMS is confident that these reforms would provide flexibilities to hospitals that would yield cost savings, we are uncertain about the magnitude of these effects. In addition, as we previously explained, we do not believe that any eliminated requirement contributed in any consequential way to patient safety. Thus, we are confident that the final rule yields net benefits. In this analysis, we provided some illustrative estimates to suggest the potential savings these reforms could achieve under certain assumptions. We appreciate that those assumptions are simplified, and that actual results could be substantially higher or lower. We have no basis for estimating the range of uncertainty with any precision. Moreover, in the set of calculations for each reform one assumption might be too high and another too low, with these offsetting effects leading to a similar overall saving even though each component of the calculation could be substantially higher or lower. Therefore, no one set of range estimates could capture the many uncertainties involved. We plan to evaluate these reforms over time, and welcome independent external evaluations of their effects by professional societies, individual hospitals, hospital associations, academics, and others. We are particularly interested in evidence as to actual savings in time and effort realized as hospitals implement the increased flexibility provided by these reforms.

7. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), we have prepared an accounting statement. As previously explained, achieving the full scope of potential savings will depend on future decisions by hospitals, by State regulators, and others. Many other factors will influence long-term results. We believe, however, that likely savings and benefits will reach many billions of dollars. Our primary estimate of the net savings to hospitals from reductions in regulatory requirements that we can quantify at this time, offset by increases in other regulatory costs, are approximately $940 million a year.

TABLE 2—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED COSTS AND SAVINGS

[$ In millions]

Category	Primary estimate	Units		
		Year dollars	Discount rate	Period covered
Benefits	None			
Costs:				
Annualized Monetized reductions in Costs	−$940	2012	7%	2012–16
	−$940	2012	3%	2012–16
Transfers	None			

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as modified by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), requires agencies to determine whether proposed or final rules would have a ''significant economic impact on a substantial number of small entities'' and, if so, to prepare a Regulatory Flexibility Analysis and to identify in the notice of proposed rulemaking or final rulemaking any regulatory options that could mitigate the impact of the proposed regulation on small businesses. For purposes of the RFA, small entities include businesses that are small as determined by size standards issued by the Small Business Administration (SBA), nonprofit organizations, and small governmental jurisdictions. Individuals and States are not included in the definition of a small entity. The SBA size threshold for ''small entity'' hospitals is $34.5 million or less in annual revenues. In addition, all non-profit hospitals are small entities under the RFA. About three-fifths of all hospitals (including CAHs) are non-profit and about one-third (many overlapping) have annual revenues below the SBA size threshold. Because the great majority qualifies as ''small entities,'' HHS policy for many years has been to treat all hospitals as small entities deserving protection under the RFA. Although the overall magnitude of the paperwork, staffing, and related cost reductions to hospitals and CAHs under this rule is economically significant, these savings are likely to be only about one percent of total hospital costs. Total national inpatient hospital spending is approximately nine hundred billion dollars a year, or an average of about $150 million per hospital, and our primary estimate of the net effect of these proposals on reducing hospital costs is only about $940 million annually (although potentially far higher). This is an average of slightly over $150,000 in savings on average for the 6,100 hospitals (including CAHs) that are regulated through the CoPs. Under HHS guidelines for Regulatory Flexibility Analysis, actions that do not negatively affect costs or revenues by about 3 to 5 percent a year are not economically significant. We believe that no hospitals of any size will be negatively affected. Accordingly, we have determined that this final rule would not have a significant economic impact on a substantial number of small entities, and that a Final Regulatory Flexibility Analysis is not required. Notwithstanding this conclusion, we believe that this RIA and the preamble as a whole meet the requirements of the RFA for such an analysis.

In addition, section 1102(b) of the Social Security Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. We do not believe a regulatory impact analysis is required here for the same reasons previously described and because, in addition, our proposals are particularly cost-reducing for the smallest hospitals, including especially CAHs (which in most cases have no more than 25 beds).

C. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act (UMRA) of 1995 requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates on State, local, or tribal governments in the aggregate, or on the private sector, require spending in any one year of $100 million in 1995 dollars, updated annually for inflation. That threshold level is currently about $139 million. This final rule would eliminate or reform existing requirements and would allow hospitals and CAHs to achieve substantial savings through staffing reforms. Accordingly, no analysis under UMRA is required.

D. Federalism

Executive Order 13132 on Federalism establishes certain requirements that an agency must meet when it publishes a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have determined that this final rule would not significantly affect the rights, roles, or responsibilities of the States. This final rule would not impose substantial direct requirement costs on State or local governments, preempt State law, or otherwise implicate federalism. It does, however, facilitate the ability of States to reform their scope of practice laws without Federal requirements reducing the effectiveness of such reforms. We received several comments on the Federalism analysis in the proposed rule and respond as follows. The problem facing States considering reforms in scope of practice and other laws was that our previous rules would in many areas have rendered useless State reforms, since we dictated stringent limits on non-physician roles. By removing these unnecessary limits, we are enabling States to consider such reforms without Federal constraints that, while not legally preemptive, in practical effect would have nullified potential State reforms. We believe that some States are therefore likely to legislate reforms that would take advantage of this increased flexibility to reduce health care costs by allowing non-physician practitioners to utilize the full scope of their training and expertise. We support this increased flexibility for States to make reforms that they determine are professionally appropriate and reduce health care costs while protecting or improving patient care.

Regulations Text

List of Subjects

42 CFR Part 482

Grant programs—Health, Hospitals, Medicaid, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 485

Grant programs—Health, Health facilities, Medicaid, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 482—CONDITIONS OF PARTICIPATION FOR HOSPITALS

■ 1. The authority citation for part 482 continues to read as follows:

Authority: Secs. 1102, 1871 and 1881 of the Social Security Act (42 U.S.C. 1302, 1395hh, and 1395rr), unless otherwise noted.

Subpart B—Administration

■ 2. Section 482.12 is amended by revising the introductory text to read as follows:

§ 482.12 Condition of participation: Governing body.

There must be an effective governing body that is legally responsible for the conduct of the hospital. If a hospital does not have an organized governing body, the persons legally responsible for the conduct of the hospital must carry out the functions specified in this part that pertain to the governing body. The governing body (or the persons legally responsible for the conduct of the hospital and carrying out the functions specified in this part that pertain to the governing body) must include a member, or members, of the hospital's medical staff.

* * * * *

■ 3. Section 482.13 is amended by —

■ a. Revising paragraphs (g)(1) through (3).

■ b. Adding paragraph (g)(4).

The revisions and addition read as follows:

§ 482.13 Condition of participation: Patient's rights.

* * * * *

(g) * * *

(1) With the exception of deaths described under paragraph (g)(2) of this section, the hospital must report the following information to CMS by telephone, facsimile, or electronically, as determined by CMS, no later than the close of business on the next business day following knowledge of the patient's death:

(i) Each death that occurs while a patient is in restraint or seclusion.

(ii) Each death that occurs within 24 hours after the patient has been removed from restraint or seclusion.

(iii) Each death known to the hospital that occurs within 1 week after restraint or seclusion where it is reasonable to assume that use of restraint or placement in seclusion contributed directly or indirectly to a patient's death, regardless of the type(s) of restraint used on the patient during this time. ''Reasonable to assume'' in this context includes, but is not limited to, deaths related to restrictions of movement for prolonged periods of time, or death related to chest compression, restriction of breathing, or asphyxiation.

(2) When no seclusion has been used and when the only restraints used on the patient are those applied exclusively to the patient's wrist(s), and which are composed solely of soft, non-rigid, cloth-like materials, the hospital staff must record in an internal log or other system, the following information:

(i) Any death that occurs while a patient is in such restraints.

(ii) Any death that occurs within 24 hours after a patient has been removed from such restraints.

(3) The staff must document in the patient's medical record the date and time the death was:

(i) Reported to CMS for deaths described in paragraph (g)(1) of this section; or

(ii) Recorded in the internal log or other system for deaths described in paragraph (g)(2) of this section.

(4) For deaths described in paragraph (g)(2) of this section, entries into the internal log or other system must be documented as follows:

(i) Each entry must be made not later than seven days after the date of death of the patient.

(ii) Each entry must document the patient's name, date of birth, date of death, name of attending physician or other licensed independent practitioner who is responsible for the care of the patient as specified under § 482.12(c), medical record number, and primary diagnosis(es).

(iii) The information must be made available in either written or electronic form to CMS immediately upon request.

* * * * *

Subpart C—Basic Hospital Functions

■ 4. Section 482.22 is amended by revising paragraphs (a) introductory text, (a)(2), and (b)(3) to read as follows:

§ 482.22 Condition of participation: Medical staff.

* * * * *

(a) *Standard: Eligibility and process for appointment to medical staff.* The medical staff must include doctors of medicine or osteopathy. In accordance with State law, including scope-of-practice laws, the medical staff may also include other categories of non-physician practitioners determined as eligible for appointment by the governing body.

* * * * *

(2) The medical staff must examine the credentials of all eligible candidates for medical staff membership and make recommendations to the governing body on the appointment of these candidates in accordance with State law, including scope-of-practice laws, and the medical staff bylaws, rules, and regulations. A candidate who has been recommended by the medical staff and who has been appointed by the governing body is subject to all medical staff bylaws, rules, and regulations, in addition to the requirements contained in this section.

* * * * *

(b) * * *

(3) The responsibility for organization and conduct of the medical staff must be assigned only to one of the following:

(i) An individual doctor of medicine or osteopathy.

(ii) A doctor of dental surgery or dental medicine, when permitted by State law of the State in which the hospital is located.

(iii) A doctor of podiatric medicine, when permitted by State law of the State in which the hospital is located.

* * * * *

■ 5. Section 482.23 is amended by revising paragraphs (b)(4) and (c) to read as follows:

§ 482.23 Condition of participation: Nursing services.

* * * * *

(b) * * *

(4) The hospital must ensure that the nursing staff develops, and keeps current, a nursing care plan for each patient. The nursing care plan may be part of an interdisciplinary care plan.

* * * * *

(c) *Standard: Preparation and administration of drugs.* (1) Drugs and biologicals must be prepared and administered in accordance with Federal and State laws, the orders of the practitioner or practitioners responsible for the patient's care as specified under § 482.12(c), and accepted standards of practice.

(i) Drugs and biologicals may be prepared and administered on the

orders of other practitioners not specified under § 482.12(c) only if such practitioners are acting in accordance with State law, including scope-of-practice laws, hospital policies, and medical staff bylaws, rules, and regulations.

(ii) Drugs and biologicals may be prepared and administered on the orders contained within pre-printed and electronic standing orders, order sets, and protocols for patient orders only if such orders meet the requirements of § 482.24(c)(3).

(2) All drugs and biologicals must be administered by, or under supervision of, nursing or other personnel in accordance with Federal and State laws and regulations, including applicable licensing requirements, and in accordance with the approved medical staff policies and procedures.

(3) With the exception of influenza and pneumococcal polysaccharide vaccines, which may be administered per physician-approved hospital policy after an assessment of contraindications, orders for drugs and biologicals must be documented and signed by a practitioner who is authorized to write orders in accordance with State law and hospital policy, and who is responsible for the care of the patient as specified under § 482.12(c).

(i) If verbal orders are used, they are to be used infrequently.

(ii) When verbal orders are used, they must only be accepted by persons who are authorized to do so by hospital policy and procedures consistent with Federal and State law.

(iii) Orders for drugs and biologicals may be documented and signed by other practitioners not specified under § 482.12(c) only if such practitioners are acting in accordance with State law, including scope-of-practice laws, hospital policies, and medical staff bylaws, rules, and regulations.

(4) Blood transfusions and intravenous medications must be administered in accordance with State law and approved medical staff policies and procedures.

(5) There must be a hospital procedure for reporting transfusion reactions, adverse drug reactions, and errors in administration of drugs.

(6) The hospital may allow a patient (or his or her caregiver/support person where appropriate) to self-administer both hospital-issued medications and the patient's own medications brought into the hospital, as defined and specified in the hospital's policies and procedures.

(i) If the hospital allows a patient to self-administer specific hospital-issued medications, then the hospital must have policies and procedures in place to:

(A) Ensure that a practitioner responsible for the care of the patient has issued an order, consistent with hospital policy, permitting self-administration.

(B) Assess the capacity of the patient (or the patient's caregiver/support person where appropriate) to self-administer the specified medication(s).

(C) Instruct the patient (or the patient's caregiver/support person where appropriate) in the safe and accurate administration of the specified medication(s).

(D) Address the security of the medication(s) for each patient.

(E) Document the administration of each medication, as reported by the patient (or the patient's caregiver/support person where appropriate), in the patient's medical record.

(ii) If the hospital allows a patient to self-administer his or her own specific medications brought into the hospital, then the hospital must have policies and procedures in place to:

(A) Ensure that a practitioner responsible for the care of the patient has issued an order, consistent with hospital policy, permitting self-administration of medications the patient brought into the hospital.

(B) Assess the capacity of the patient (or the patient's caregiver/support person where appropriate) to self-administer the specified medication(s), and also determine if the patient (or the patient's caregiver/support person where appropriate) needs instruction in the safe and accurate administration of the specified medication(s).

(C) Identify the specified medication(s) and visually evaluate the medication(s) for integrity.

(D) Address the security of the medication(s) for each patient.

(E) Document the administration of each medication, as reported by the patient (or the patient's caregiver/support person where appropriate), in the patient's medical record.

■ 6. Section 482.24 is amended by—

■ a. Removing paragraphs (c)(1)(i) through (iii).

■ b. Redesignating (c)(2) as (c)(4).

■ c. Adding a new paragraphs (c)(2) and (3).

The additions read as follows:

§ 482.24 Condition of participation: Medical record services.

* * * * *

(c) * * *

(2) All orders, including verbal orders, must be dated, timed, and authenticated promptly by the ordering practitioner or by another practitioner who is responsible for the care of the patient only if such a practitioner is acting in accordance with State law, including scope-of-practice laws, hospital policies, and medical staff bylaws, rules, and regulations.

(3) Hospitals may use pre-printed and electronic standing orders, order sets, and protocols for patient orders only if the hospital:

(i) Establishes that such orders and protocols have been reviewed and approved by the medical staff and the hospital's nursing and pharmacy leadership;

(ii) Demonstrates that such orders and protocols are consistent with nationally recognized and evidence-based guidelines;

(iii) Ensures that the periodic and regular review of such orders and protocols is conducted by the medical staff and the hospital's nursing and pharmacy leadership to determine the continuing usefulness and safety of the orders and protocols; and

(iv) Ensures that such orders and protocols are dated, timed, and authenticated promptly in the patient's medical record by the ordering practitioner or by another practitioner responsible for the care of the patient only if such a practitioner is acting in accordance with State law, including scope-of-practice laws, hospital policies, and medical staff bylaws, rules, and regulations.

* * * * *

■ 7. In § 482.25, paragraph (b)(6) is revised to read as follows:

§ 482.25 Condition of participation: Pharmaceutical services.

* * * * *

(b) * * *

(6) Drug administration errors, adverse drug reactions, and incompatibilities must be immediately reported to the attending physician and, if appropriate, to the hospital's quality assessment and performance improvement program.

* * * * *

■ 8. Section 482.42 is amended by revising paragraphs (a) introductory text and (b)(1) to read as follows:

§ 482.42 Condition of participation: Infection control.

* * * * *

(a) *Standard: Organization and policies.* A person or persons must be designated as infection control officer or officers to develop and implement policies governing control of infections and communicable diseases. The infection control officer or officers must develop a system for identifying,

reporting, investigating, and controlling infections and communicable diseases of patients and personnel.

* * * * *

(b) * * *

(1) Ensure that the hospital-wide quality assessment and performance improvement (QAPI) program and training programs address problems identified by the infection control officer or officers; and

* * * * *

Subpart D—Optional Hospital Services

■ 9. Section 482.54 is amended by revising paragraph (b) to read as follows:

§ 482.54 Condition of participation: Outpatient services.

* * * * *

(b) *Standard: Personnel.* The hospital must—

(1) Assign one or more individuals to be responsible for outpatient services.

(2) Have appropriate professional and nonprofessional personnel available at each location where outpatient services are offered, based on the scope and complexity of outpatient services.

Subpart E—Requirements for Specialty Hospitals.

§ 482.92 [Amended]

■ 10. Section 482.92 is amended by—

■ a. Removing paragraph (a).

■ b. Redesignating paragraphs (b) and (c) as (a) and (b) respectively.

PART 485—CONDITIONS OF PARTICIPATION SPECIALIZED PROVIDERS

■ 11. The authority citation for part 485 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395(hh)).

Subpart F—Conditions of Participation: Critical Access Hospitals (CAHs)

§ 485.602 [Removed]

■ 12. Section 485.602 is removed.

■ 13. In § 485.604, paragraph (a) is revised to read as follows:

§ 485.604 Personnel qualifications.

* * * * *

(a) *Clinical nurse specialist.* A clinical nurse specialist must be a person who—

(1) Is a registered nurse and is licensed to practice nursing in the State in which the clinical nurse specialist services are performed in accordance with State nurse licensing laws and regulations; and

(2) Holds a master's or doctoral level degree in a defined clinical area of nursing from an accredited educational institution.

* * * * *

■ 14. In § 485.623, paragraph (a) is revised to read as follows:

§ 485.623 Condition of participation: Physical plant and environment.

(a) *Standard: Construction.* The CAH is constructed, arranged, and maintained to ensure access to and safety of patients, and provides adequate space for the provision of services.

* * * * *

■ 15. In § 485.635, paragraphs (a)(3)(i) and (b) are revised to read as follows:

§ 485.635 Condition of participation: Provision of services.

(a) * * *

(3) * * *

(i) A description of the services the CAH furnishes, including those furnished through agreement or arrangement.

* * * * *

(b) *Standard: Patient services.* (1) *General:* The CAH provides those diagnostic and therapeutic services and supplies that are commonly furnished in a physician's office or at another entry point into the health care delivery system, such as a low intensity hospital outpatient department or emergency department. These CAH services include medical history, physical examination, specimen collection, assessment of health status, and treatment for a variety of medical conditions.

(2) *Laboratory services.* The CAH provides basic laboratory services essential to the immediate diagnosis and treatment of the patient that meet the standards imposed under section 353 of the Public Health Service Act (42 U.S.C. 236a). (See the laboratory requirements specified in part 493 of this chapter.) The services provided include the following:

(i) Chemical examination of urine by stick or tablet method or both (including urine ketones).

(ii) Hemoglobin or hematocrit.

(iii) Blood glucose.

(iv) Examination of stool specimens for occult blood.

(v) Pregnancy tests.

(vi) Primary culturing for transmittal to a certified laboratory.

(3) *Radiology services.* Radiology services furnished by the CAH are provided by personnel qualified under State law, and do not expose CAH patients or personnel to radiation hazards.

(4) *Emergency procedures.* In accordance with requirements of § 485.618, the CAH provides medical services as a first response to common life-threatening injuries and acute illness.

* * * * *

■ 16. Section 485.639 is amended by revising the introductory text to read as follows:

§ 485.639 Condition of participation: Surgical services.

If a CAH provides surgical services, surgical procedures must be performed in a safe manner by qualified practitioners who have been granted clinical privileges by the governing body, or responsible individual, of the CAH in accordance with the designation requirements under paragraph (a) of this section.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: March 19, 2012.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: April 2, 2012.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2012–11548 Filed 5–10–12; 9:15 am]

BILLING CODE 4120–01–P

FEDERAL REGISTER

Vol. 77 Wednesday,

No. 95 May 16, 2012

Part V

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To Downlist Three San Clemente Island Plant Species; Proposed Rule To Reclassify Two San Clemente Island Plant Species; Taxonomic Correction; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2012–0007; FXES11130900000C5–123–FF09E32000]

RIN 1018–AY04

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To Downlist Three San Clemente Island Plant Species; Proposed Rule To Reclassify Two San Clemente Island Plant Species; Taxonomic Correction

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month petition finding and proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce our 12-month findings on a petition to reclassify San Clemente Island lotus, and San Clemente Island paintbrush under the Endangered Species Act are warranted and we propose to change the status of these two species from endangered to threatened. We also propose to correct the scientific and common names of San Clement Island lotus. We are also announcing our 12-month finding on a petition to reclassify San Clemente Island bush mallow is not warranted at this time, and therefore we are not proposing to change the status of this species. We are taking these actions as a result of a petition to reclassify these three species.

DATES: The finding announced in this document was made on May 16, 2012 Regarding the proposed rule to reclassify *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea,* we will accept comments received or postmarked on or before July 16, 2012. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by July 2, 2012.

ADDRESSES: This finding is available on the Internet at *http://www.regulations.gov* at Docket Number [FWS–R8–ES–2012–0007]. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA, 92011. Please submit any new information, materials, comments, or questions concerning this finding to the above address. Regarding the proposed rule to reclassify *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea,* you may submit comments by one of the following methods:

Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments for Docket No. [FWS–R8–ES–2012–0007].

U.S. mail or hand delivery: Public Comments Processing, Attn: Docket No. [FWS–R8–ES–2012–0007]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept email or faxes. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments Solicited section below for more information).

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES**); by telephone at 760–431–9440; or by facsimile (fax) at 760–431–9624. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

This document contains: (1) 12-month findings in response to a petition to reclassify *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea* as threatened; and (2) a proposed rule to reclassify *A. d.* var. *traskiae* and *C. grisea* as threatened under the Act.

Species addressed. Malacothamnus clementinus (San Clemente Island bush mallow), *Acmispon* (previously listed as *Lotus*) *dendroideus* var. *traskiae* (previously San Clemente Island broom and currently known as San Clemente Island lotus), and *Castilleja grisea* (San Clemente Island paintbrush) are endemic to San Clemente Island, which is located 64 miles (mi) (103 kilometers (km)) west of San Diego, California. Current habitat conditions for *M. clementinus, A. d.* var. *traskiae,* and *C. grisea* on San Clemente Island are the result of present and historical land use practices. San Clemente Island is owned by the U.S. Department of the Navy and, with its associated offshore range complex, is the primary maritime training area for the Navy Pacific Fleet and Navy Sea, Air and Land teams (SEALs). The island also supports training by the U.S. Marine Corps, the U.S. Air Force, and other military organizations.

Purpose of the Regulatory Action. Under the Endangered Species Act, we may be petitioned to list, delist or reclassify a species. In 2010, we received a petition from the Pacific Legal Foundation requesting that the Service reclassify *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea* from endangered to threatened. These species are currently listed as endangered under the Act. In 2011, we published our 90-day finding on the petition which concluded that the petition contained substantial information indicating reclassification of the three San Clemente Island plants may be warranted. We therefore also announced that we were initiating status reviews for these taxa as required under the Act. A change in listing status can only be done by issuing a rule.

Basis for the Regulatory Action. Under the Endangered Species Act, a species may be determined to be endangered or threatened based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulatory mechanisms; or (E) Other natural or manmade factors affecting its continued existence.

We reviewed all available scientific and commercial information pertaining to the five threat factors in our status review of each species.

We summarize the results of our status review for each species below.

Malacothamnus clementinus (San Clemente Island Bush Mallow)

- Our review does not support a conclusion that the threats have been sufficiently removed, or that their imminence, intensity, or magnitude have been reduced to the extent that the species no longer meets the definition of an endangered species. Threats associated with military activities, erosion, nonnatives, fire, climate change, and low genetic diversity continue to impact *Malacothamnus clementinus* at all of the 11 occurrences on San Clemente Island. *M. clementinus* continues to be impacted throughout its range because of the change in intensity of training and associated impacts enacted in the 2008 San Clemente Island Military Operations and Fire Management Plan (MOFMP). Additionally, closure of areas on San Clemente Island to natural resource personnel creates uncertainty regarding the status of 4 of 11 occurrences, including the largest and most genetically diverse, and whether those

occurrences will benefit from conservation measures.

• We find that reclassifying *Malacothamnus clementinus* is not warranted at this time.

• Although we recommended downlisting in our 2007 status review, at this time we believe that *Malacothamnus clementinus* continues to be in danger of extinction throughout its range.

Acmispon dendroideus var. traskiae (San Clemente Island Lotus)

• We find that the ongoing threats are not of sufficient imminence, intensity, or magnitude to indicate that *Acmispon dendroideus* var. *traskiae* is presently in danger of extinction throughout its range and does not, therefore, meet the definition of an endangered species.

• Since listing and the removal of feral goats and pigs on San Clemente Island, the distribution of *Acmispon dendroideus* var. *traskiae* has expanded from 6 to 29 occurrences. Significant gains in distribution demonstrate that the species is persisting despite existing threats across the landscape.

• The Navy is implementing an Island Integrated Natural Resources Management Plan (INRMP) to coordinate the management of natural resources and provide for long-term conservation planning within the scope of military readiness.

• While it is anticipated that military training activities, erosion, nonnatives, and fire will have ongoing impacts to *A. d.* var. *traskiae* habitat, impacts from these threats are reduced and minimized based on its distribution and current and anticipated conservation efforts for the taxon.

• We find that reclassifying *Acmispon dendroideus* var. *traskiae* as threatened is warranted.

Castilleja grisea (San Clemente Island Paintbrush)

• We find the ongoing threats are not of sufficient imminence, intensity, or magnitude to indicate that *Castilleja grisea* is presently in danger of extinction across its range and does not, therefore, meet the definition of an endangered species.

• Since listing and the removal of feral goats and pigs on San Clemente Island, the distribution of *Castilleja grisea* has expanded from 19 to 29 known occurrences. This significant increase in occurrences shows that the species is persisting despite existing threats across the landscape.

• The Navy is implementing an Island Integrated Natural Resources Management Plan (INRMP) to coordinate the management of natural resources and provide for long-term conservation planning within the scope of military readiness.

• While it is anticipated that military training activities, erosion, nonnatives, and fire will have ongoing impacts to *Castilleja grisea* habitat, impacts from these threats are reduced and minimized based on its distribution and current and anticipated conservation efforts for the taxon.

• We find that reclassifying *Castilleja grisea* as threatened is warranted.

We are proposing the following changes to the List of Threatened and Endangered Plants:

• Correct the scientific and common names of *Acmispon dendroideus* var. *traskiae,* formerly known as *Lotus dendroideus* var. *traskiae* (San Clemente broom).

• Change the status of *Acmispon dendroideus* var. *traskiae* from endangered to threatened.

• Change the status of *Castilleja grisea* from endangered to threatened.

Acronyms Used

We use several acronyms throughout the preamble to this proposed rule. To assist the reader, we set them forth here:

AFP = Artillery Firing Point
AVMA = Assault Vehicle Maneuver Area
BMP = Best Management Practices
CERCLA = Comprehensive Environmental Response, Compensation and Liability Act
CESA = California Endangered Species Act
CDFG = California Department of Fish and Game
CNDDB = California Natural Diversity Database
CNPS = California Native Plant Society
DPS = Distinct Population Segment
EO = California Natural Diversity Database element occurrence
GIS = Geographic Information System
INRMP = Integrated Natural Resources Management Plan
IOA = Infantry Operations Areas
IPCC = Intergovernmental Panel on Climate Change
MOFMP = Military Operations and Fire Management Plan
Navy = United States Department of the Navy
NEPA = National Environmental Policy Act
NPPA = Native Plant Protection Act
OHV = Off Highway Vehicle
OMB = Office of Management and Budget
PL = Point Location
RCRA = Resource Conservation and Recovery Act
SEALs = Navy Sea, Air, and Land teams
SERG = San Diego State University Soil Ecology and Restoration Group
SHOBA = Shore Bombardment Area
SPR = Significant Portion of the Range
SWAT = Special Warfare Training Areas
TAR = Training Area Ranges
USFWS = United States Fish and Wildlife Service

Public Comments Solicited

Our intent is to use the best available commercial and scientific data as the foundation for all endangered and threatened species classification decisions. Therefore, we request comments or information from the public, other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested parties concerning this proposed rule to downlist *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea.* We particularly seek comments concerning:

(1) Reasons why we should or should not reclassify *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* under the Act.

(2) New biological, trade, or other relevant information and data concerning any threat (or lack thereof) to *A. d.* var. *traskiae* and *C. grisea.*

(3) New information and data on the projected and reasonably likely impacts to *A. d.* var. *traskiae* and *C. grisea* associated with climate change.

(4) The location of, and status, trends, and threats to, any additional occurrences of *A. d.* var. *traskiae* and *C. grisea.*

(5) New information and data concerning the range, distribution, occurrence size, and occurrence trends of *A. d.* var. *traskiae* and *C. grisea.*

(6) New information and data on the current or planned activities within the geographic range of *A. d.* var. *traskiae* and *C. grisea* that may adversely affect or benefit the species.

(7) New information on the host plants of *C. grisea.*

(8) Information and data on the hybridization of *A. d.* var. *traskiae,* and the impacts of this hybridization on the species.

We will also continue to accept new information that becomes available concerning the status or threats to the *Malacothamnus clementinus* or its habitat at any time.

We will post your entire comment on *http://www.regulations.gov.* 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.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule,

will be available for public inspection on *http://www.regulations.gov,* or by appointment during normal business hours at the Carlsbad Fish and Wildlife Office (see **ADDRESSES**).

Public Hearing

The Act provides for one or more public hearings on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be made in writing and addressed to the Field Supervisor (see **FOR FURTHER INFORMATION CONTACT** section above).

Background

Section 4(b)(3)(B) of the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*), requires that, for any petition to revise the Federal Lists of Endangered and Threatened Wildlife and Plants that contains substantial scientific or commercial information that reclassifying the species may be warranted, we make a finding within 12 months of the date of receipt of the petition. In this finding, we will determine whether the petitioned action is: (a) Not warranted, (b) warranted, or (c) warranted, but the immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are endangered or threatened, and expeditious progress is being made to add or remove qualified species from the Federal Lists of Endangered and Threatened Wildlife and Plants. We must publish these 12-month findings in the **Federal Register**.

Previous Federal Actions

Malacothamnus clementinus, Acmispon dendroideus var. *traskiae,* and *Castilleja grisea* were listed as endangered under the Act on August 11, 1977 (42 FR 40682). Subsequently, a Recovery Plan for Channel Island species, including *M. clementinus, A. d.* var. *traskiae,* and *C. grisea,* was finalized in 1984 (USFWS 1984, pp. 1–165), and 5-year status reviews were completed for each of these taxa in 2007 (USFWS 2007a, pp. 1–28; USFWS 2007b, pp. 1–22; USFWS 2007c, pp. 1–19). These status reviews recommended reclassification of *M. clementinus, A. d.* var. *traskiae,* and *C. grisea* from endangered to threatened status.

On May 18, 2010, we received a petition dated May 13, 2010, from the Pacific Legal Foundation requesting that the Service delist *Oenothera californica (avita)* subsp. *eurekensis* (Eureka Valley evening-primrose) and *Swallenia alexandrae* (Eureka Valley dunegrass), and downlist tidewater goby (*Eucyclogobius newberryi*), *Acmispon dendroideus (Lotus scoparius* subsp.) var. *traskiae, Malacothamnus clementinus,* and *Castilleja grisea* from endangered to threatened under the Act. The petition was based on the analysis and recommendations contained in the 2007 5-year reviews for these taxa. In a letter to the petitioner dated September 10, 2010, we acknowledged receipt of the petition and initiated a review of the petition under a provision of section 4 of the Act. We stated that we anticipated making an initial 90-day finding in Fiscal Year 2011 (based on available staffing and funding) as to whether or not the petition presented substantial information indicating that the requested action may be warranted.

On January 19, 2011, we published a 90-day finding (76 FR 3069) in which we concluded that the petition and information in our files provided substantial information that the reclassification of these species may be warranted, and announced that we were initiating status reviews for these species. Five-year reviews pursuant to section 4(c)(2)(A) of the Act for *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea* were previously initiated on May 21, 2010 (75 FR 28636). We will base our 5-year review recommendations on the information and conclusions provided in this finding, and we expect to finalize those reviews following publication of this finding. To ensure that the status reviews are comprehensive, we requested in the 90-day finding any scientific or commercial data and other information regarding these taxa be submitted by March 21, 2011. This document includes: (1) A notice that constitutes the 12-month finding in response to the petition to reclassify *M. clementinus, A. d.* var. *traskiae,* and *C. grisea* as threatened (the 12-month findings for *O. californica (avita)* subsp. *eurekensis, S. alexandrae,* and tidewater goby will be addressed in separate documents); and (2) a proposed rule to reclassify *A. d.* var. *traskiae* and *C. grisea* from endangered to threatened under the Act.

Species Information

For purposes of this finding, we present the species description and taxonomy for each individual plant species below. However, the remaining species information, where possible, is combined for all three taxa to avoid redundancy, followed by applicable species-specific information by taxon.

Species Description and Taxonomy—*Malacothamnus clementinus*

Malacothamnus clementinus is a rounded subshrub (stems woody only at the base) in the Malvaceae (mallow family). Plants are 2.3 to 3.3 feet (ft) (0.7 to 1 meters (m)) tall with numerous hairy branched stems arising from the base of the plant (Munz and Johnston 1924, p. 296; Munz 1959, pp. 122–125; Bates 1993, p. 752; Junak 2006a, pers. comm.). Plants have the ability to spread vegetatively by underground rhizomes, resulting in patches of spatially separate, but genetically identical, individuals (Evans and Bohn 1987, p. 538). The leaves are 1.2 to 2 inches (in) (3 to 5 centimeters (cm)) wide and conspicuously bicolored, with green upper surfaces covered in short fine hairs and veiny, white undersurfaces that are densely matted with hairs (Munz and Johnston 1924, p. 296). Flowers are clustered in the uppermost leaf axils, forming interrupted spikes 3.9 to 7.9 in (10 to 20 cm) long (Munz 1959, p. 125). Flowers are bisexual and variously described as having pink or white and fading lavender petals (Munz and Johnston 1924, p. 296; Bates 1993, p. 752). Each flower can produce about 10 seeds that are 0.08 in (2 millimeters (mm)) long (Munz 1959, p. 122; Navy 2002, p. C–43). The fruits mature and open slowly and irregularly on the plant (Navy 2002, p. C–43). The genus *Malacothamnus* includes 20 species found in the southwestern region of the United States (Junak and Wilken 1998, p. 290). *Malacothamnus clementinus* is endemic to San Clemente Island and is the only species within the genus that occurs there (Bates 1993, p. 752; Tierra Data Inc. 2005, p. C–8).

No taxonomic classifications or nomenclature changes affecting this taxon have been published since it was listed as endangered in 1977. The *Jepson Manual,* the standard reference flora for the State, continued to treat this species under the same name, *Malacothamnus clementinus,* in the recent edition (Bates 2012, pp. 1–2).

Species Description and Taxonomy—*Acmispon dendroideus* var. *traskiae*

Acmispon dendroideus var. *traskiae* is a suffrutescent (semi-woody), short-lived (less than 5 years), floriferous (flower bearing) subshrub in the legume family Fabacaeae (pea family). It is endemic to San Clemente Island (Isely 1993, p. 619), and is one of five taxa in the genus *Acmispon* found on the island (Tierra Data Inc. 2005, p. C–8; Brouillet 2008, pp. 388–392). There are no other varieties of *A. dendroideus* found on the island. This variety can be distinguished from other varieties of *A. dendroideus* by its bushy habit and elongated fruits (Allan 1999, p. 88). *Acmispon dendroideus* var. *traskiae* is typically

less than 4 ft (1.2 m) tall with slender erect green branches (Munz 1974, pp. 449–450; USFWS 1984, p. 59; Allan 1999, p. 82). Each leaf has three to five leaflets, each approximately 0.2 to 0.3 in (5 to 9 mm) long and uniformly glabrous (surface without hair) to finely hairy (USFWS 1984, p. 59; Allan 1999, p. 82). *Acmispon dendroideus* var. *traskiae* has small yellow flowers that are bisexual and arranged in one to five flowered clusters on stalks that arise from axils between the stem and leaf of terminal shoots (Junak and Wilken 1998, p. 256). Pistils are initially yellow, turning orange then red as the fruit matures (USFWS 1984, p. 59; California Native Plant Society (CNPS) 2001, p. 208).

Acmispon dendroideus var. *traskiae* has undergone taxonomic realignments since the 1977 listing. We accept the change of scientific name to *Acmispon dendroideus* (Greene) Brouillet var. *traskiae* (Noddin) Brouillet from *Lotus dendroideus* (Nutt.) Ottley subsp. *traskiae.* This change is supported by morphological and molecular data (Allan and Porter 2000, p. 1876; Sokoloff 2000, p. 128; Brouillet 2008, p. 389).

The name used for this taxon when it was listed in 1977 (42 FR 40682) was *Lotus scoparius* (Nutt.) Ottley subsp. *traskiae* (Abrams) Raven. Subsequently, Isely (1978, p. 467) separated this and two other Channel Islands endemic taxa (*L. scoparius* var. *veatchi* Ottley and *L. scoparius* var. *dendroideus* (Greene) Ottley) from mainland *Lotus scoparius.* He recognized them as varieties (considered equivalent to subspecies in plants) of a single species, *Lotus dendroideus,* which was the oldest name among the three taxa. The name, *Lotus dendroideus* var. *traskiae,* was published by Isely in 1978 (p. 467), and recognized in floristic (Isely 1993, p. 619) and systematic treatments (Isely 1998, p. 646). Following Isely's taxonomic revision, we amended the list of endangered and threatened plants (50 CFR 17.12), but incorrectly transcribed the name as *Lotus dendroideus* subsp. *traskiae* (USFWS 1980, 45 FR 82483). This combination, as a subspecies and not a variety, was never validly published and thus cannot be used.

Recent morphological (Sokoloff 2000, p. 128) and molecular (Allan and Porter 2000, p. 1876) data support recognition of a separate genus, *Acmispon,* from *Lotus.* The required nomenclatural combination *Acmispon dendroideus* (Greene) Brouillet var. *traskiae* (Noddin) Brouillet was made in 2008 (Brouillet 2008, p. 389). This name is recognized and accepted by the scientific community in floristic works, the *Jepson Manual* revision for California (Brouillet 2012), and the continental *Flora of North America,* as well as by the California Native Plant Society (CNPS 2011). We concur with the scientific evidence and acceptance by the scientific community and likewise accept the name *Acmispon dendroideus* var. *traskiae.* Based upon this acceptance, we will make appropriate corrections to this taxon's references in our regulations (50 C.F.R. 17.12) and will use this nomenclature in future notices regarding this taxon. Moreover, in previous documents, this taxon has been referred to by other common names (such as Trask's Island lotus, San Clemente Island broom, and San Clemente Island lotus) (Isely 1993, p. 619; 76 FR 3069, January 19, 2011; 42 FR 40682, August 11, 1977). In this document, we use San Clemente Island lotus to represent *A. d.* var. *traskiae.* The taxonomic and nomenclatural changes described here do not alter the description, distribution, or listing status of the taxon.

Species Description and Taxonomy—*Castilleja grisea*

Castilleja grisea is a highly branched hemiparasitic (plant that can be either free-living or parasitic) perennial herb to subshrub in the Orobanchaceae (broomrape family) (Chuang and Heckard 1993, p. 1016; Young *et al.* 1999, p. 890; Olmstead *et al.* 2001, p. 352). *Castilleja grisea* is endemic to San Clemente Island and the only species of the genus found there (Chuang and Heckard 1993, p. 1021; Helenurm *et al.* 2005, p. 1222; Tierra Data Inc. 2005, p. A–7). *Castilleja grisea* plants are 1.3 to 2 ft (0.4 to 0.6 m) tall and ash-gray in color with densely hairy leaves (Chuang and Heckard 1993, p. 1021). The leaves are alternate and linear, and 0.4 to 2 in (1 to 5 cm) long with 0 to 3 lobes (Chuang and Heckard 1993, p. 1021). The yellow bisexual flowers are borne in terminal spikes. The fruit is a semi-woody capsule, 0.4 to 0.5 in (10 to 12 mm) long, bearing many small seeds (Chuang and Heckard 1993, p. 1021; Junak and Wilken 1998, p. 83). Seeds have a deeply netted seedcoat, and are 0.4 to 0.6 in (1 to 1.5 mm) in diameter (Muller and Junak 2011, p. 12).

Castilleja grisea was described by Dunkle (p. 31) in 1943. The name has not changed since the species was listed, although the family affiliation has been changed to the Orobanchaceae (broomrape family) from the Scrophulariaceae (figwort family; Olmstead *et al.* 2001, p. 352). We will revise our regulations at 50 C.F.R. 17.12 to reflect this change in family affiliation. This taxonomic change remains consistent in the upcoming edition of the *Jepson Manual* (Chuang and Heckard, Weatherwax, rev. 2012).

Species Location

Description and Land Use of San Clemente Island

Malacothamnus clementinus, Acmispon dendroideus var. *traskiae,* and *Castilleja grisea* are endemic to San Clemente Island (Raven 1965, p. 60), which is located 64 miles (mi) (103 kilometers (km)) west of San Diego, California (USFWS 1984, p. 5). The island is approximately 56 square mi (145 square km) (Junak and Wilken 1998, p. 2) and is long and narrow: 21 mi (34 km) long by 1.5 mi (2.4 km) wide at the north end and 4 mi (6.4 km) wide at the south end (USFWS 1984, p. 5).

The historical ranges and distributions of *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea* on San Clemente Island are unknown because botanical studies were not conducted on the island prior to grazing, which began in the 1800s (Kellogg and Kellogg 1994, p. 4). The first herbarium specimens were collected in 1894 for *M. clementinus* and *C. grisea,* and in 1905 for *A. d.* var. *traskiae.* Although herbarium specimens were collected from time to time, the first surveys for these species did not occur until the 1970s (USFWS 2007b, p. 4).

San Clemente Island is owned by the U.S. Department of the Navy (Navy) and, with its associated offshore range complex, is the primary maritime training area for the Pacific Fleet and SEALs. The island also supports training by the U.S. Marine Corps, the U.S. Air Force, and other military organizations. As the western most training range in the eastern Pacific Basin where training operations are performed prior to troop deployments, portions of the island receive intensive use by the military (Navy 2008b, p. 2–2). Various training activities occur within particular land use designations and training areas on the island, which are coincidentally concentrated in habitat that supports *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea.* In 2008, the Navy adopted the MOFMP to increase the amount and intensity of training on San Clemente Island (Navy 2008b, pp. 2–1 to 2–52). The impact to habitat from military activities is increasing under this plan (USFWS 2008, pp. 1–237).

Military training activities within Naval Special Warfare Training Areas (SWAT), Training Area Ranges (TAR), Impact Areas, and the Infantry

Operations Areas (IOA) involve the movement of vehicles and troops over the landscape, and can include live munitions fire, incendiaries, demolitions, and bombardment. These activities have multiple impacts, including disturbances to soil and vegetation, spread of nonnative plant species, creation of road ruts and trails, and compaction of soils (USFWS 2008, pp. 83–87). TARs cover a total of 1,840 acres (ac) (744 hectares (ha)), or 5.4 percent of the island, while IOAs encompass 8,815 ac (3,567 ha) or approximately 25 percent of the island, SWATs cover a total of 10,897 ac (4410 ha) or approximately 30 percent of the island, and Impact Areas cover 3,459 ac (1,400 ha) or approximately 10 percent of the island (Navy 2008a, pp. 2–17, 2–45; Navy 2008b, p. 3.11–52).

The Navy has delineated areas of military use to define where specific activities will take place. These delineated areas include the Shore Bombardment Area (SHOBA), constituting the southern one third of the island. Please note that while the SHOBA boundary is illustrated in Figures 1 to 3, no other boundaries are shown for security reasons, although other training areas will be discussed in the text of this document. SHOBA, which covers approximately 10,061 ac (4071 ha) (Navy 2009, p. 2–4), serves as a buffer around Impact Areas I and II and supports a variety of training operations. Parts of SHOBA are not subject to training activities and serve only as a buffer, while other areas support military activities, including movement of troops and vehicles or bombing exercises (Navy 2002, p. 2–4). The Impact Areas sustain heavy live fire and are a recurrent source of wildfires. Fuel breaks are applied each year prior to fire season to help prevent spread of fire to areas outside of the Impact Areas.

Because parts of SHOBA are used for ship-to-shore bombardment, access to this area is restricted for nonmilitary personnel on days when bombing is occurring. Individuals conducting surveys or working on invasive species control projects are granted access to areas outside of the Impact Areas within SHOBA when military activities requiring exclusive use are not occurring. Because of the frequency of training, access to SHOBA can be restricted for long periods of time. Range operators are aware of the natural resource obligations within SHOBA, and at least 1 day a week is usually allowed for natural resource programs to conduct their activities. Weeks with reduced natural resource access, including infrequent events that exclude natural resource personnel from SHOBA for 10 to 20 days, are announced in advance and provide natural resource managers the opportunity to plan accordingly.

Safety concerns relative to the presence of unexploded ordnance within SHOBA have recently prompted the Navy to review access policies (O'Connor 2006, pers. comm.; USFWS 2008, p. 50; Munson 2011c, pers. comm.). In the Navy's MOFMP (Navy 2008a; pp. 2–38 to 2–44), Impact Areas I and II were indefinitely closed ''for any purpose, including monitoring and management of endangered and sensitive species and their habitat'' for safety reasons (Navy 2008a, p. 2–45). Impact Areas I and II cover approximately 3,459 ac (1,400 ha), or approximately 10 percent of the island's 36,000 ac (14,568 ha; Navy 2008a, p. 2–45. The Navy is revising its INRMP to develop solutions to monitor species and their threats in these areas potentially through unmanned vehicles, aircraft, or with the assistance of range maintenance personnel that regularly access the areas. In the meantime, there are no monitoring or management actions occurring in these areas.

Access to additional areas on the island where unexploded ordnance has been found is now also restricted for natural resource personnel (such as areas in the eastern escarpment within SHOBA, Eel Point, Pyramid Head, and Lemon Tank Canyon) (Munson 2011c, pers. comm.). Restricted access to these sites limits the opportunities to acquire information on the status of *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea* occurrences, and inhibits the ability to manage threats in those areas. The Navy is developing plans to trim the vegetation in these areas so that sweeps by specially trained technicians can clear the areas of unexploded ordnance to allow access by nonmilitary personnel (Munson 2011c, pers. comm.).

As part of its monitoring and recovery efforts for listed species, the Navy initiated several rare plant surveys on San Clemente Island (Junak and Wilken 1998, pp. 1–416, GIS data; Junak 2006, pp. 1–176, GIS data; Tierra Data Inc. 2008, pp. 1–24, appendices and GIS data; SERG 2009–2011, GIS data). These surveys involved the collection of point locations that represent discrete localities of plants detected during field surveys. Temporal and spatial variation among data points from these surveys is likely due to differences between individual researchers' survey techniques or accuracy of data records. Groups of plants were described in the past using many different terms including: Point localities, populations, occurrences, and element occurrences. Unless referring to a specific author's research and language, we refer to identifiable and separable groups of plants as ''occurrences'' in this finding and proposed rule. We defined these occurrences by mapping smaller groupings of plants (point locations) and combining point locations that fall within 0.25 mi (402 m) of one another with any corresponding California Natural Diversity Database (CNDDB) polygons. These combined points meet the broader California Department of Fish and Game (CDFG) definition of an element occurrence, which is a record of an observation or series of observations. Discussion of occurrences throughout this 12-month finding includes groupings of CNDDB element occurrences and point localities within a 0.25-mi (402 m) radius of a given occurrence. Information for each occurrence of these three taxa is described in Table 1.

TABLE 1—DISTRIBUTION AND STATUS OF OCCURRENCES OF *Malacothamnus clementinus* (SAN CLEMENTE ISLAND BUSH MALLOW), *Acmispon dendroideus* VAR. *traskiae* (SAN CLEMENTE ISLAND LOTUS), AND *Castilleja grisea* (SAN CLEMENTE ISLAND PAINTBRUSH)

Location description	Element occurrence (EO) # and point location (PL) [1]	Status [2] at listing; year of first record	Current status (reference)	Current threats [3]	Military use [4]
Malacothamnus clementinus					
Canchalagua Canyon	No EO; 1 PL	Unknown	Presumed Extant (SERG 2011).	A: Nonnative, Fire; E: Fire, Climate, Genetic.	Low Military Value; Area Recently Closed.
Horse Beach Canyon	EO 3; 48 PLs	Unknown	Presumed Extant (Junak 2005).	A: Land Use, Erosion, Nonnative, Fire, Fire Management; E: Movement, Fire, Climate, Genetic.	High Military Value; Area Closed.
Lower China Canyon	EO 1; 9 PLs	Extant; 1975 herbarium record.	Presumed Extant (Junak 1997, SERG 2009).	A: Land Use, Erosion, Nonnative, Fire, Fire Management; E: Movement, Fire, Climate, Genetic.	High Military Value; Area Closed.
Upper China Canyon (including Upper Horse Beach Canyon).	No EO; 4 PLs	Extant; 1975 herbarium record.	Extant (SERG 2010)	A: Land Use, Erosion, Nonnative, Fire, Fire Management; E: Movement, Fire, Climate, Genetic.	Low Military Value.
Cave Canyon (including Kinkipar Canyon).	No EO; 27 PLs	Unknown	Extant (SERG 2010)	A: Nonnative, Fire; E: Fire, Climate, Genetic.	Medium Military Value.
Chukit Canyon	2 PLs	Unknown	Extant (Junak 2004)	A: Nonnative, Fire; E: Fire, Climate, Genetic.	Low Military Value.
Lemon Tank Canyon	EO 2	Extant; 1923 herbarium record.	Presumed Extant (CNDDB 1996).	A: Land Use, Erosion, Nonnative; E: Movement, Climate, Genetic.	Low Military Value; Area Closed.
Box Canyon	EO 4; 9 PLs	Unknown	Extant (SERG 2009)	A: Nonnative; E: Climate, Genetic.	Low Military Value.
Norton Canyon	EO 7; 27 PLs	Unknown	Extant—(SERG 2011)	A: Nonnative; E: Climate, Genetic.	Low Military Value.
Middle Ranch Canyon	EO 5; 5 PLs	Unknown	Extant (SERG 2008)	A: Erosion, Nonnative; E: Climate, Genetic.	Low Military Value.
Waymuck Canyon	EO 6; 1 PL	Unknown	Presumed Extant (CNDDB 1985).	A: Erosion, Nonnative; E: Climate, Genetic.	High Military Value.
Acmispon dendroideus var. ***traskiae***					
Eagle Canyon	EO 1, 9 PLs	Extant; 1980 CNDDB	Extant (Junak 2006, SERG 2008).	A: Land Use, Erosion, Nonnative, Fire; E: Movement, Fire, Climate.	Low Military Value; Area Recently Closed.
Bryce Canyon	No EO, 14 PLs	Unknown	Extant (SERG 2009)	A: Nonnative, Fire; : Fire, Climate.	Low Military Value; Area Recently Closed.
North Mosquito Cove	EO 8, 14 PLs	Extant; 1939 herbarium record.	Extant (SERG 2010)	A: Land Use, Erosion, Nonnative, Fire; E: Movement, Fire, Climate.	Low Military Value; Area Recently Closed.
Canchalagua Canyon (including south Mosquito Cove).	EO 4, 21 PLs	Unknown	Extant (SERG 2011)	A: Land Use, Erosion, Nonnative, Fire; E: Movement, Fire, Climate.	Low Military Value; Area Recently Closed.
Thirst Canyon (including Vista Canyon).	No EO, 8 PLs	Unknown	Extant (SERG 2009)	A: Nonnative, Fire; E: Fire, Climate.	Medium Military Value.
Cave Canyon	No EO, 3 PLs	Unknown	Presumed Extant (Junak 1997).	A: Nonnative, Fire; E: Fire, Climate.	Medium Military Value.
Horse Canyon	No EO, 2 PLs	Unknown	Presumed Extant (Junak 1997).	A: Nonnative, Fire; E: Fire, Climate.	Medium Military Value.
Pyramid Head	EO 5, 1 PL	Extant; 1979 CNDDB	Presumed Extant (Junak 1997).	A: Nonnative, Fire; E: Fire, Climate.	High Military Value; Area Closed.

TABLE 1—DISTRIBUTION AND STATUS OF OCCURRENCES OF *Malacothamnus clementinus* (SAN CLEMENTE ISLAND BUSH MALLOW), *Acmispon dendroideus* VAR. *traskiae* (SAN CLEMENTE ISLAND LOTUS), AND *Castilleja grisea* (SAN CLEMENTE ISLAND PAINTBRUSH)—Continued

Location description	Element occurrence (EO) # and point location (PL) [1]	Status [2] at listing; year of first record	Current status (reference)	Current threats [3]	Military use [4]
SHOBA Boundary (north to Twin Dams Canyon).	No EO, 8 PLs	Unknown	Presumed Extant (Junak 1996).	A: Nonnative; E: Climate.	Medium Military Value.
Twin Dams Canyon	No EO, 2 PLs	Unknown	Extant (Junak 2006)	A: Nonnative; E: Climate.	Medium Military Value.
Horton Canyon (including Stone, Burn's, and Horton Canyons).	EO 13, 27 PLs	Unknown	Extant (SERG 2010)	A: Erosion, Nonnative; E: Climate.	Medium Military Value.
Tota Canyon	No EO, 7 PLs	Unknown	Presumed Extant (SERG 2010).	A: Erosion, Nonnative; E: Climate.	Low Military Value.
Lemon Tank Canyon (including Nanny Canyon).	No EO, 19 PLs	Unknown	Extant (Junak 2004)	A: Erosion, Nonnative; E: Movement, Climate.	Low Military Value; Area Partially Closed.
Larkspur Canyon	EO 16, 2 PLs	Unknown	Extant (SERG 2011)	A: Erosion, Nonnative, Fire; E: Movement, Fire, Climate.	Low Military Value.
Chamish Canyon	EO 3, 1 PL	Extant; 1980 CNDDB	Presumed Extant (Junak 1997).	A: Erosion, Nonnative, Fire; E: Movement, Fire, Climate.	Low Military Value.
Box Canyon	No EO, 2 PLs	Unknown	Presumed Extant (Junak 1997).	A: Nonnative; E: Climate.	Low Military Value.
Norton Canyon	No EO, 1 PL	Unknown	Extant (Junak 2004)	A: Nonnative; E: Climate, Hybridization.	Low Military Value.
Upper Middle Ranch Canyon.	EO 10, 5 PLs	Unknown	Extant (Junak 2004)	A: Erosion, Nonnative; E: Climate.	Low Military Value.
Lower Middle Ranch Canyon.	No EO, 3 PLs	Unknown	Extant (SERG 2008)	A: Nonnative; E: Climate.	Low Military Value.
Waymuck Canyon	No EO, 4 PLs	Unknown	Extant (SERG 2011)	A: Nonnative; E: Climate.	High Military Value.
Warren Canyon	EO 12, 20 PLs	Unknown	Extant (SERG 2011)	A: Erosion, Nonnative; E: Movement, Climate.	High Military Value.
Middle Wallrock Canyon.	No EO, 10 PLs	Unknown	Extant (Junak 2004)	A: Nonnative; E: Movement, Climate.	High Military Value.
Upper Wallrock Canyon.	No EO, 3 PLs	Unknown	Extant (Junak 2006)	A: Erosion, Nonnative; E: Climate.	High Military Value.
Seal Cove Terraces	No EO, 3 PLs	Unknown	Extant (Junak 2004)	A: Erosion, Nonnative, Fire; E: Movement, Fire, Climate.	High Military Value.
Eel Cove Canyon (including terraces).	EO 14, 6 PLs	Unknown	Extant (SERG 2010)	A: Erosion, Nonnative, Fire; E: Movement, Fire, Climate.	High Military Value.
Middle Island Plateau	EO 7, 6 PLs	Unknown	Extant (Tierra Data 2007).	A: Land Use, Erosion, Nonnative, Fire; E: Movement, Fire, Climate.	High Military Value.
Wilson Cove	EO 11, 52 PLs	Extant; 1981 CNDDB	Extant (SERG 2010)	A: Land Use, Erosion, Nonnative, Fire; E: Movement, Fire, Climate, Hybridization.	High Military Value.
North Wilson Cove	EO 9, no PLs	Extant; 1959 herbarium record.	Unknown	A: Erosion, Nonnative; E: Climate.	High Military Value.
North Island Terraces	EO 15, no PLs	Unknown	Presumed Extant (CNDDB 1996).	A: Erosion, Nonnative; E: Movement, Climate.	Medium Military Value.
Castilleja grisea					
Thirst Canyon (including Vista Canyon).	EO 10, 11 & 40; 21 PLs.	Extant; 1980 CNDDB	Extant (SERG 2010)	A: Nonnative, Fire; E: Climate.	Medium Military Value.

TABLE 1—DISTRIBUTION AND STATUS OF OCCURRENCES OF *Malacothamnus clementinus* (SAN CLEMENTE ISLAND BUSH MALLOW), *Acmispon dendroideus* VAR. *traskiae* (SAN CLEMENTE ISLAND LOTUS), AND *Castilleja grisea* (SAN CLEMENTE ISLAND PAINTBRUSH)—Continued

Location description	Element occurrence (EO) # and point location (PL) [1]	Status [2] at listing; year of first record	Current status (reference)	Current threats [3]	Military use [4]
Eagle Canyon (including Grove Canyon).	EO 7 & 30; 50 PLs	Extant; 1979 herbarium record.	Extant (Tierra Data 2006).	A: Land Use, Erosion, Nonnative, Fire; E: Movement, Climate.	Low Military Value; Area Recently Closed.
Bryce Canyon	EO 3, 8 & 47; 43 PLs	Extant; 1979 GIS data.	Extant (SERG 2010)	A: Land Use, Erosion, Nonnative, Fire; E: Movement, Climate.	Low Military Value; Area Recently Closed.
Canchalagua Canyon (including south Mosquito Cove and Matriarch Canyon).	EO 4 & 27; 56 PLs	Extant; 1963 herbarium record.	Extant (SERG 2011)	A: Land Use, Erosion, Nonnative, Fire, Fire Management; E: Movement, Climate.	Low Military Value; Area Recently Closed.
Knob Canyon	EO 2 & 49; 21 PLs	Extant; 1979 CNDDB	Extant (Tierra Data 2006, SERG 2008).	A: Land Use, Erosion, Nonnative, Fire, Fire Management; E: Movement, Climate.	Low Military Value; Area Recently Closed.
Pyramid Head	EO 1 & 15; 25 PLs	Extant; 1965 herbarium record.	Extant (SERG 2011)	A: Land Use, Erosion, Nonnative, Fire; E: Movement, Climate.	High Military Value; Partially Recently Closed.
Snake Canyon (including Sun Point).	EO 23; 4 PLs	Extant; 1939 CNDDB	Presumed Extant (Junak 1997).	A: Nonnative, Fire; E: Fire, Climate.	High Military Value; Area Closed.
Upper Chenetti Canyon.	EO 34; 1 PL	Unknown	Extant (Junak 2004)	A: Nonnative, Erosion, Fire, Fire Management; E: Fire, Climate.	High Military Value; Area Closed.
Horse Beach Canyon	EO 33 & 35; 49 PLs	Extant; 1939 herbarium record.	Presumed Extant (Junak 2005).	A: Land Use, Erosion, Nonnative, Fire, Fire Management; E: Movement, Fire, Climate.	High Military Value; Area Closed.
China Canyon	EO 25, 37 & 46; 6 PLs.	Extant; 1939 herbarium record.	Presumed Extant (Junak 1997; SERG 2009).	A: Land Use, Erosion, Nonnative, Fire, Fire Management; E: Movement, Fire, Climate.	High Military Value; Area Closed.
Red Canyon	EO 36; no PLs	Extant; 1975 herbarium record.	Presumed Extant (CNDDB 1986).	A: Land Use, Erosion, Nonnative, Fire, Fire Management; E: Movement, Fire, Climate.	High Military Value; Area Closed.
Kinkipar Canyon	No EO; 2 PLs	Unknown	Extant (SERG 2006)	A: Nonnative, Fire; E: Climate.	Medium Military Value.
Cave Canyon	EO 17, 18 & 45; 9 PLs.	Extant; 1980 CNDDB	Extant (SERG 2009)	A: Nonnative, Fire; E: Climate.	Medium Military Value.
Horse Canyon	No EO; 6 PLs	Unknown	Extant (SERG 2010)	A: Nonnative, Fire; E: Climate.	Medium Military Value.
Upper Horse Canyon	EO 19 & 39; 1 PL	Extant; 1979 CNDDB	Extant (Junak 2004)	A: Erosion, Nonnative, Fire; E: Climate.	Medium Military Value.
SHOBA Boundary (north to and including Twin Dams Canyon).	EO 31; 55 PLs	Extant; 1965 CNDDB	Extant (Junak 2006, SERG 2011).	A: Nonnative; E: Climate.	Medium Military Value.
Horton Canyon (including Stone and Burn's Canyons).	EO 12 & 44; 24 PLs	Extant; 1981 CNDDB	Extant (Junak 2006, SERG 2010).	A: Erosion, Nonnative; E: Climate.	Medium Military Value.
Lemon Tank Canyon (including Tota Canyon).	No EO; 14 PLs	Unknown	Extant (SERG 2010)	A: Land Use, Erosion, Nonnative, Fire; E: Movement, Fire, Climate.	Low Military Value; Area Closed.
Nanny Canyon	EO 13; 3 PLs	Extant; 1979 CNDDB	Extant (Junak 2004)	A: Nonnative; E: Movement, Climate.	Low Military Value; Area Partially Closed.

TABLE 1—DISTRIBUTION AND STATUS OF OCCURRENCES OF *Malacothamnus clementinus* (SAN CLEMENTE ISLAND BUSH MALLOW), *Acmispon dendroideus* VAR. *traskiae* (SAN CLEMENTE ISLAND LOTUS), AND *Castilleja grisea* (SAN CLEMENTE ISLAND PAINTBRUSH)—Continued

Location description	Element occurrence (EO) # and point location (PL) [1]	Status [2] at listing; year of first record	Current status (reference)	Current threats [3]	Military use [4]
Larkspur Canyon (including Chamish Canyon).	EO 14 & 48; 15 PLs	Extant; 1981 CNDDB	Extant (SERG 2006—2011).	A: Land Use, Erosion, Nonnative, Fire; E: Movement, Fire, Climate.	Low Military Value.
Box Canyon	EO 20 & 41; 22 PLs	Extant; 1979 CNDDB	Extant (SERG 2011)	A: Nonnative; E: Climate.	Low Military Value.
Upper Norton Canyon	EO 21; 6 PLs	Extant; 1979 CNDDB	Extant (SERG 2011)	A: Nonnative; E: Climate.	Low Military Value.
Middle Ranch Canyon	EO 24; 8 PLs	Extant; 1981 CNDDB	Extant (SERG 2008)	A: Nonnative; E: Climate.	Low Military Value.
Waymuck Canyon	EO 22; 1 PL	Unknown	Extant (Junak 2004)	A: Nonnative; E: Climate.	High Military Value.
Plain northeast of Warren Canyon.	No EO; 4 PLs	Unknown	Extant (Tierra Data 2007).	A: Land Use, Erosion, Nonnative; E: Movement, Climate.	Medium Military Value.
Seal Cove Terraces	EO 43; 2 PLs	Unknown	Extant (CNDDB 1985, SERG 2010).	A: Erosion, Nonnative, Fire; E: Movement, Fire, Climate.	High Military Value.
Eel Cove Canyon (including terraces).	No EO; 3 PLs	Unknown	Extant (Junak 2004)	A: Nonnative, Fire; E: Movement, Fire, Climate.	High Military Value.
Terrace Canyon (south to terraces around Spray).	No EO; 6 PLs	Unknown	Presumed Extant (SERG 2004).	A: Erosion, Nonnative; E: Movement, Climate.	High Military Value.
West Cove	No EO; 3 PLs	Unknown	Extant (Tierra Data 2006).	A: Land Use, Erosion, Nonnative; E: Movement, Climate.	Medium Military Value.

[1] EO: element occurrence, as defined and described according to the California Natural Diversity Database. PL: point locations of plants.
[2] Threats identified in the listing rule for these three taxa include: Factor A: habitat modification by feral animals; Factor C: grazing by animals; Factor E: nonnative plants.
[3] Current threats: Nonnative = Nonnative Plants; Movement = Movement of Vehicles and Troops; Climate = Climate Change; Genetic = Genetic Diversity.
[4] Military value as defined in the Navy's 2002 Integrated Natural Resources Management Plan (INRMP). Values defined according to the management emphasis, with high-value areas designated for maximum military use and low-value areas retaining the greatest flexibility for maintaining natural resource values.

Species Distribution—*Malacothamnus clementinus*

For many decades prior to its listing, *Malacothamnus clementinus* was only known from the type locality (the area where the species is first identified and described) at Lemon Tank Canyon, on the eastern side of the middle of the island (Kearney 1951, p. 128; USFWS 1984, p. 48). Dumping of scrap metal actually protected this occurrence from the ongoing threat of feral goat herbivory by preventing the goats from destroying the plants (USFWS 1984, p. 48). The historical range and distribution of *M. clementinus* on San Clemente Island is unknown because surveys were not carried out before the plant's decline. In the Recovery Plan, we noted that a public citizen commented in the Listing Rule on the discovery of two to three small plants on the edge of an inaccessible ledge in China Canyon (now described as two occurrences—Lower China Canyon and Upper China Canyon; 42 FR at 40683; USFWS 1984, p. 48). These two occurrences, along with the occurrence at Lemon Tank, were known at the time of listing. Since listing, eight new occurrences of *M. clementinus* have been discovered among the generally southwesterly facing coastal terraces and their associated escarpments in the southern and middle regions of San Clemente Island (Junak and Wilken 1998, pp. 1–416, GIS data; Junak 2006, pp. 1–176, GIS data; Tierra Data Inc. 2008, pp. 1–24, appendices and GIS data; SERG 2009–2011, GIS data; Figure 1). Many of these new occurrences have appeared since feral goats and pigs were removed from the island in the early 1990s. This suggests the possibility that the plants reemerged from underground stems that survived grazing by feral herbivores (Junak 2006a, pers. comm.).

Malacothamnus clementinus occurrences are scattered below canyon rims, at the base of terrace escarpments, and in flat areas from approximately Middle Ranch Canyon in the north to Horse Beach Canyon in the south. A large, genetically diverse occurrence is found within Horse Beach Canyon (Helenurm 1999, pp. 39–40). Ten of the 11 known occurrences are located throughout the southwestern region of the island; in addition, the Lemon Tank Canyon occurrence is located in the northeastern region of the island (Figure 1). Six of the occurrences are within SHOBA, and five are to the north outside of SHOBA. The main southern distribution of *M. clementinus* is disconnected from the historical type locality (the area where the species is first identified and described) of the species, which is the Lemon Tank Canyon occurrence. Lemon Tank lies about 3.6 mi (5.8 km) to the northeast of the nearest occurrence (Waymuck Canyon). The Lemon Tank Canyon occurrence has not been resurveyed since 1996, and its current status is uncertain and presumed extant (CNDDB

2011a, p. 2). Beyond the 11 known occurrences, there is an additional record of *M. clementinus* in the northern plateau area of the island, near Ridge Road, but this has not been confirmed despite targeted searches for the plant (SERG 2006, GIS data; Howe 2011a, pers. comm.). We are not considering this record as a known occurrence at this time due to the possibility of error.

The known range of *M. clementinus* has expanded to the south on San Clemente Island since its listing, with the distance between the northernmost and southernmost occurrence spanning about 9.5 mi (15.3 km). Occurrences within Impact Areas I and II in the southwestern portion of the island (within SHOBA) have not been surveyed since 2006, largely due to area closures implemented through the recent MOFMP (Navy 2008a, pp. 2–38 to 2–44; Munson 2011a, pers. comm.). Because of these closures, we were unable to evaluate the status of occurrences in Horse Beach Canyon, Lower China Canyon, and part of Upper China Canyon for this review. While the remaining eight occurrences fall outside of these Impact Areas, one of the largest and most genetically diverse of the 11 known occurrences, Horse Beach Canyon, is within the restricted area.

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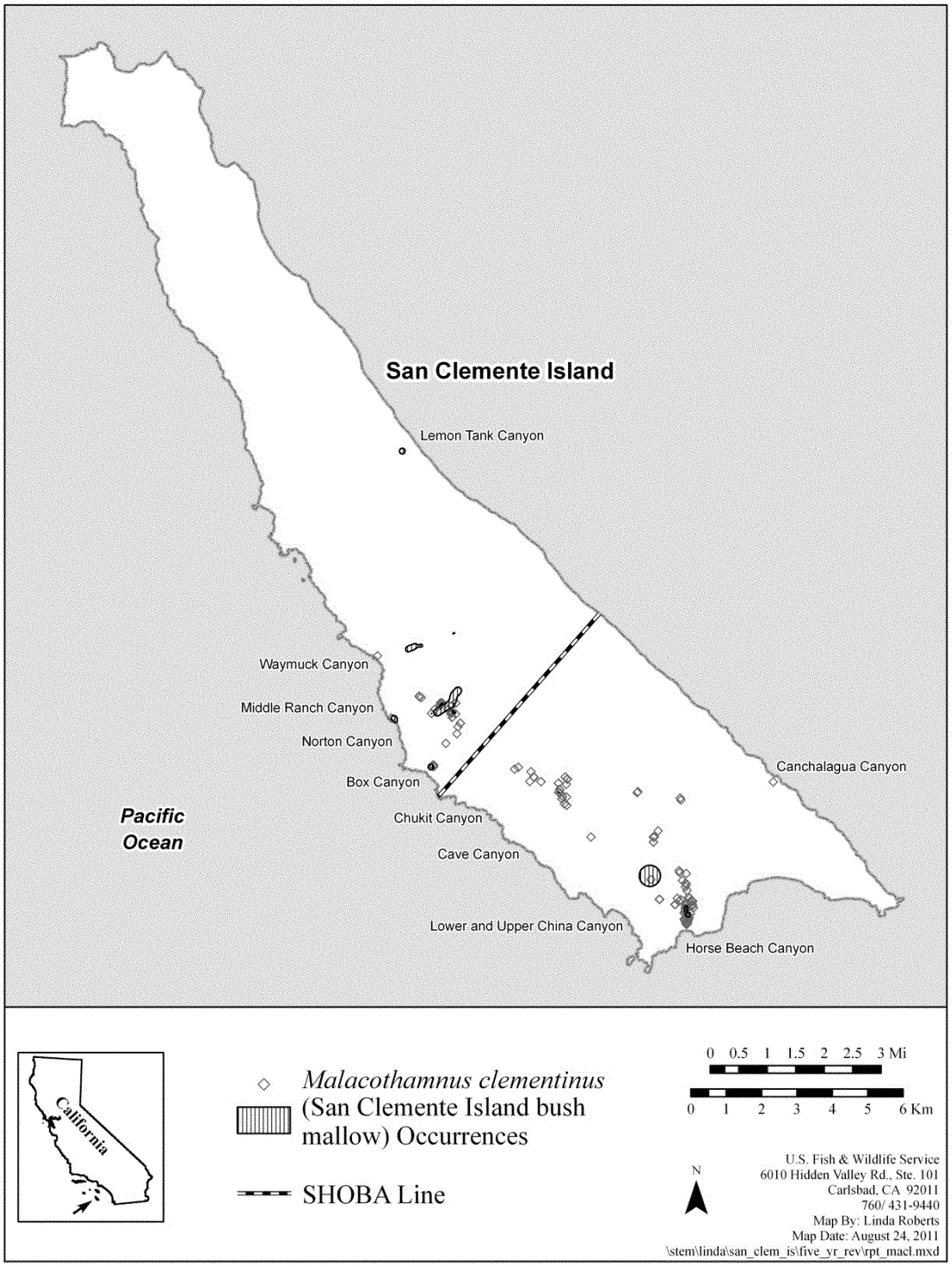

Figure 1. Distribution of 11 occurrences of *Malacothamnus clementinus* (San Clemente Island bush mallow) on San Clemente Island, Los Angeles County, California. General geographic location of each occurrence is indicated by name. Diamonds represent point locations and vertical striped polygons represent element occurrences.

Aerial stems of *Malacothamnus clementinus* can sprout from spreading underground stems (rhizomes). This makes it difficult to distinguish individual plants among groups of stems. Consequently, the size of an occurrence has been variously measured by counting the number of stem groupings or ''clumps,'' counting the total number of stems within a clump, and measuring the approximate area covered by plant groupings. These inconsistent survey methods make it difficult to document occurrence trends beyond the appearance of new

occurrences. There is no detailed information about the abundance (number or density of plants) of *M. clementinus* at the time of its listing in 1977 (42 FR 40683). Occurrences documented in 1996 to 1997 ranged in size from 1 to 50 clumps (Junak and Wilken 1998, p. 301). The Navy recently estimated 1,516 individuals of *M. clementinus* recorded since 2006 (Munson 2011d, pers. comm.). However, given the challenge in distinguishing individuals in a group of plants, and variability in methods of estimating the number of individuals, it is difficult to accurately quantify the abundance of *M. clementinus* on San Clemente Island and, as such, numbers should be interpreted cautiously.

Despite difficulties in determining species abundance, extensive surveys for *Malacothamnus clementinus* have detected 8 new occurrences since listing, for a total of 11 occurrences. This suggests that the species is responding favorably to the elimination of grazing pressure from feral herbivores on San Clemente Island. It is unknown to what extent this increase is attributable to more intensive survey efforts, detection of previously undetected individuals, recruitment from the seed bank, resprouting from rhizomes, recolonization associated with dispersal events, or management efforts.

Species Distribution—*Acmispon dendroideus* var. *traskiae*

Since the 1970s, the distribution of *Acmispon dendroideus* var. *traskiae* has been documented on north-facing slopes over most of the eastern and western sides of the island (USFWS 1984, p. 59; Junak and Wilken 1998, p. 256; Navy 2002, p. D–9; Junak 2006, p. 125). Twenty-nine occurrences of this taxon have been identified, which span the entire length of the island from Wilson Cove to the southern tip east of Pyramid Cove, a distance of approximately 19 mi (31 km) (Junak and Wilken 1998, p. 261; Junak 2006, Map A–C) (Figure 2). The majority of occurrences tend to be clustered on north-facing slopes on the eastern side of the island (Table 1). The distribution of *A. d.* var. *traskiae* spans the boundary of SHOBA at the southern end of the island: 8 occurrences fall within SHOBA and 21 are outside (Junak and Wilken 1998, pp. 1–416, GIS data; Junak 2006, pp. 1–176, GIS data; Tierra Data Inc. 2008, pp. 1–24, appendices and GIS data; SERG 2009–2011, GIS data). Approximately 13 of 29 (45 percent) of the occurrences (Wilson Cove, Canchalagua Canyon, Middle Island Plateau, North Mosquito Cove, Eagle Canyon, Larkspur Canyon, Chamish Canyon, Lemon Tank Canyon, Seal Cove Terraces, Eel Cove Canyon, Middle Wallrock Canyon, Warren Canyon, and North Island Terraces) are partially or wholly within the boundaries of a training area (IOA, TAR, or SWAT).

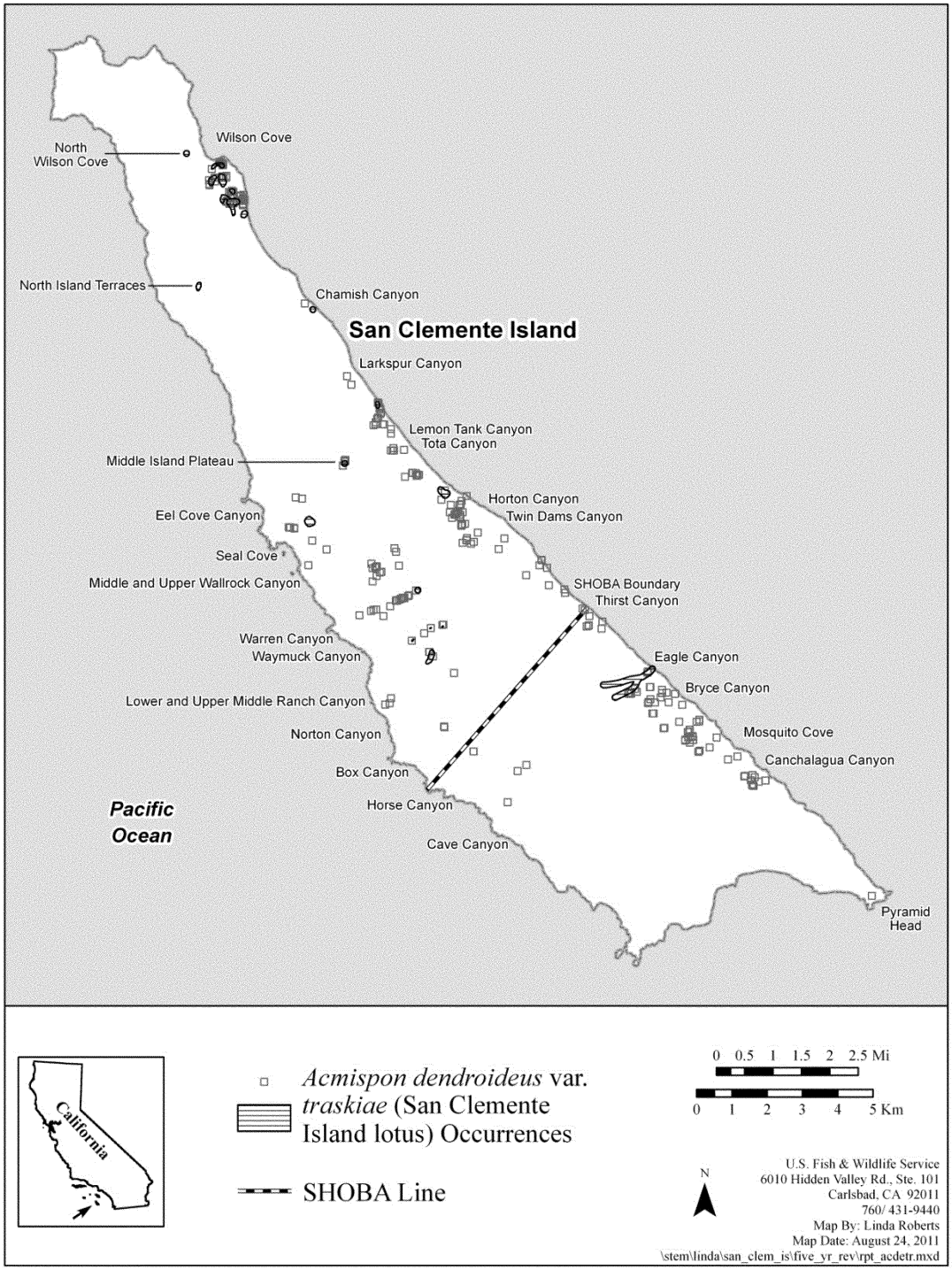

Figure 2. Distribution of 29 occurrences of *Acmispon dendroideus* var. *traskiae* (San Clemente Island lotus) on San Clemente Island, Los Angeles County, California. General geographic location of each occurrence is indicated by name. Squares represent point locations and horizontal striped polygons represent element occurrences.

Acmispon dendroideus var. *traskiae* tends to occur in small groups of 10 to 50 individuals (Allan 1999, p. 84). There is no information about the abundance of *A. d.* var. *traskiae* at the time of its listing in 1977. In the 1984 Recovery Plan (USFWS, p. 59), six occurrences of *A. d.* var. *traskiae* were recognized, all generally associated with rocky areas. However, no other specific information regarding species location or numbers of individuals at those six sites was provided in the Recovery Plan, except the statement that ''the largest number of plants grow in the vicinity of

Wilson Cove'' (USFWS 1984, p. 59). Additionally, there are only a few herbarium specimens of the taxon, making historical distribution and condition of the species difficult to assess. For purposes of comparison to the current status, we will use the number of occurrences cited in the recovery plan as the most conservative estimate of species' distribution around the time of its listing (Table 1). Thus, the historical range (based on herbarium records, CNDDB records, and the recovery plan) includes occurrences in the northern part of the island (Wilson Cove) down to the southern point (Pyramid Head).

CNDDB currently lists 14 element occurrences of *Acmispon dendroideus* var. *traskiae* (as *Lotus dendroideus* subsp. *traskiae*) (CNDDB 2011b) that are presumed extant. These occurrences are located on both the western and eastern sides of the island and are distributed across almost the entire length of the island. Recently, survey efforts have concentrated on discovering new plant occurrences, rather than tracking the status of historical occurrences (Junak 2006a, pers. comm.). New observations were mainly concentrated on north-facing slopes in the middle of the island, both on the eastern and western sides. Analysis of these newer point localities revealed proximity to individuals detected during the 1996 and 1997 surveys. These element occurrences and point localities combined total 29 separate *A. d.* var. *traskiae* occurrences (Table 1).

Abundance is difficult to determine for this species because range-wide surveys were not conducted each year. Instead, monitoring took place over multiple years with varying conditions. A recent estimate from the Navy reported 3,525 individuals of *Acmispon dendroideus* var. *traskiae* recorded since 2006 (Munson 2011d, pers. comm.). Even though there is uncertainty in the number of individuals, the number of occurrences has increased from 6 to 29. Thus, extensive survey findings suggest that *A. d.* var. *traskiae* has increased throughout most of its historical range, and there are more occurrences now than there were at the time of listing. It is unknown to what extent this increase is attributable to more intensive survey efforts, detection of previously undetected individuals, recruitment from the seed bank, recolonization associated with dispersal events, or management efforts. The increase in number of occurrences could indicate an increase in the distribution of *A. d.* var. *traskiae* on San Clemente Island.

Species Distribution—*Castilleja grisea*

Castilleja grisea was described as relatively common on San Clemente Island in the 1930s, and subsequently declined as a result of unchecked grazing by introduced feral herbivores (Helenurm *et al.* 2005, p. 1222). The historical range and distribution of *C. grisea* on San Clemente Island is unknown because botanical studies were not completed before the plant's decline. Herbarium records documented the species on the south and east sides of the island before the time of listing (California Consortium of Herbaria 2011, records for *C. grisea*). By 1963, *C. grisea* was reported as rare or occasional (Raven 1963, p. 337). Since the complete removal of goats and pigs from San Clemente Island in 1992, *C. grisea* has been detected across much of the island (Helenurm *et al.* 2005, pp. 1221, 1226; Junak 2006, p. 47; USFWS 2007c, p. 14). Plants have been recorded across the southern two-thirds of the island, and a single disjunct occurrence was documented at the northern end in West Cove (Junak and Wilken 1998, pp. 1–416, GIS data; Junak 2006, pp. 1–176, GIS data; Tierra Data Inc. 2008, pp. 1–24, appendices and GIS data; SERG 2009–2011, GIS data) (Figure 3). The distribution of any parasitic or hemiparasitic plant is limited by the distribution of its host or hosts. However, host availability does not appear to be limiting the abundance of this species.

The linear distance between the northernmost and southernmost occurrences is 19.7 mi (32 km), with plants primarily distributed across the southern 15.5 mi (25 km) of the island. Occurrences on the southern end of the island on both the western and eastern sides are reported in the CNDDB (CNDDB 2011c). We combined CNDDB element occurrences with adjacent point localities from island surveys to identify *Castilleja grisea* occurrences (Table 1). The known distribution for *C. grisea* documented since 1992 reflects a more continuous and slightly expanded distribution since the time of listing (Tierra Data Inc. 2008, p. B–3). Survey efforts have concentrated on discovering new occurrences rather than tracking the status of historical occurrences (Junak, 2006a, pers. comm.). Using available GIS and distribution data, we have determined there are 29 occurrences of *C. grisea* currently on the island; only 19 of these were known at listing.

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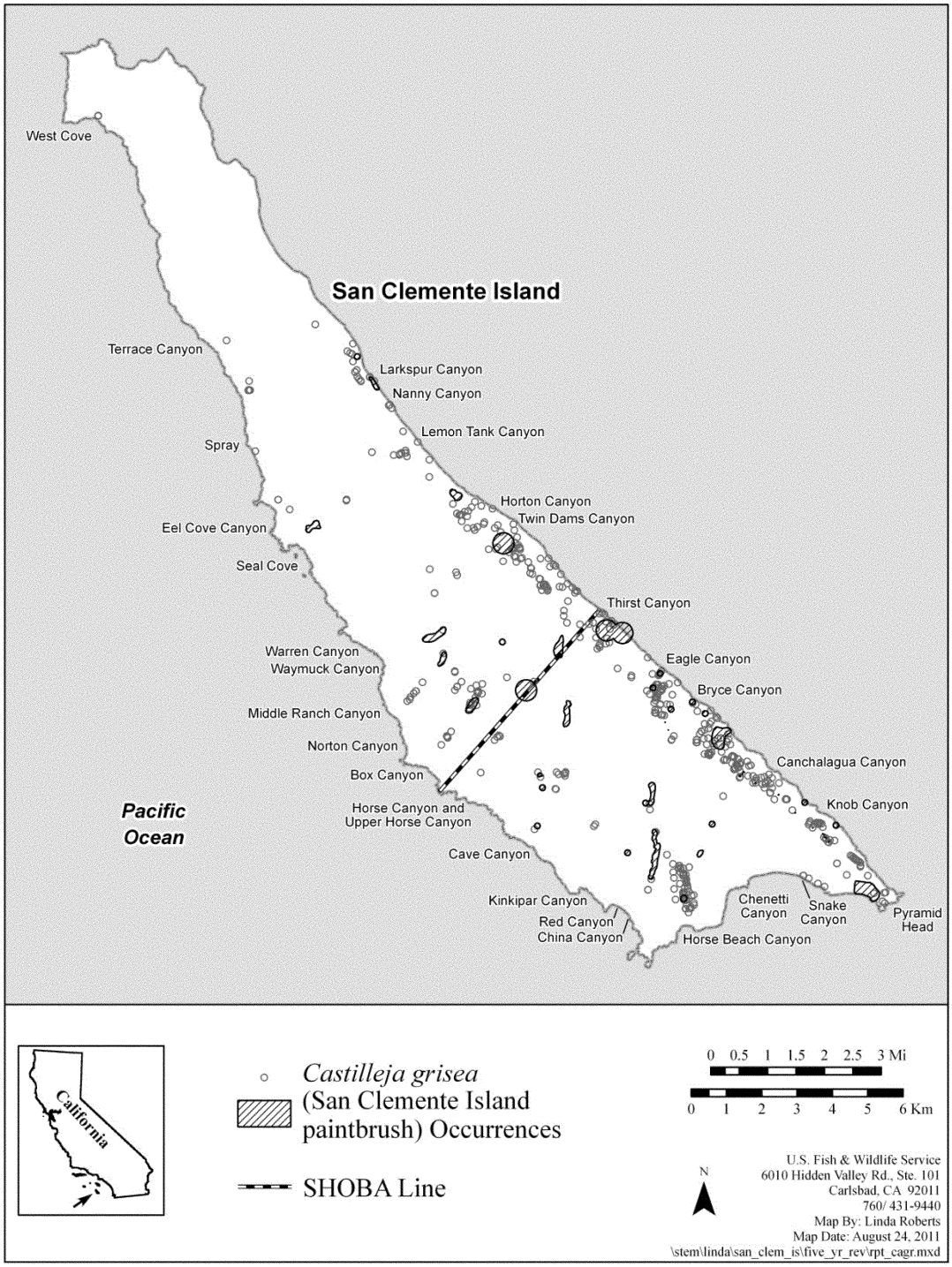

Figure 3. Distribution of 29 occurrences of *Castilleja grisea* (San Clemente Island paintbrush) on San Clemente Island, Los Angeles County, California. General geographic location of each occurrence is indicated by name. Circles represent point locations and diagonal striped polygons represent element occurrences.

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(Table 1). The extant occurrences at listing are derived from herbarium records, CNDDB records, and information in the Recovery Plan. Distribution of *C. grisea* extends into SHOBA at the southern end of the island; 15 occurrences fall within and 14 outside of SHOBA.

A number of surveys have found new occurrences throughout the island (Junak and Wilken 1998, GIS data; Junak 2006, GIS data; Tierra Data Inc. 2008, GIS data; SERG 2009–2011, GIS data; CNDDB 2011c). Most new observations were concentrated in steep canyons on the western side of the island, although a few were discovered near previously

recorded individuals in the eastern canyons. Recent counts, based on the Navy's data, estimate 11,733 individuals of *Castilleja grisea* since 2006 (Munson 2011d, pers. comm.). Extensive survey efforts since 1992 suggest *C. grisea* has filled in its known historical range on the island, and there are more individuals now than at listing. Even though there is uncertainty in the number of individuals, the number of occurrences of species has increased from 19 to 29. It remains unknown how much of this apparent increase in range density can be attributed to more intensive survey efforts, detection of previously undetected individuals, recruitment from the seed bank, recolonization associated with dispersal events, or management efforts. However, the increase in the number of occurrences suggests an expansion of the species across the island.

Habitat

General Habitat Conditions

Current habitat conditions for *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea* on San Clemente Island are the result of present and historical land use practices. San Clemente Island has been inhabited by humans for thousands of years (Schoenherr *et al.* 1999, p. 317). There is evidence that the Gabrielino people used the island for harvesting marine organisms before European settlers arrived. The first lease for sheep ranching was granted in 1848 (Schoenherr *et al.* 1999, p. 317). From 1850 until 1934, San Clemente Island was used for sheep and cattle ranching, goat grazing, and pig farming (Navy 2002, pp. 3–4). Some accounts even report goats present on the island as early as 1827 (Dunkle 1950, p. 261). These nonnative herbivores greatly changed the vegetative landscape of San Clemente Island, and were cited in the final listing rule (42 FR 40682; August 11, 1977) for *M. clementinus, A. d.* var. *traskiae,* and *C. grisea* as the main cause of these species' decline. Sheep were removed from the island in the 1930s, but feral goats and pigs were not completely eradicated until 1992. Since the removal of goats and pigs, the vegetation on San Clemente Island has rebounded, and the condition of many rare plants has improved (Junak 2006a, pers. comm.). As a persistent historical impact to the landscape, overgrazing also led to the creation of bare trails, denuded areas, and severe erosion. Grazing animals also facilitated the introduction and spread of nonnative plants. Specifically, nonnative grasses were spread through grazing and ranching on the island (Navy 2002, p. 3–31).

Fire

Past and current fire regimes (pattern, frequency, and intensity of fire in an area) have influenced the distribution of native and nonnative plants on San Clemente Island (Navy 2002, p. 3–28). Although the natural fire regime of the island is unknown, there have only been three documented lightning ignitions of wildfires on the Channel Islands in 140 years (Carroll *et al.* 1993, p. 83). Natural fire ignition was probably rare, as lightning-caused fires tend to be less frequent with proximity to the coastline, due to higher fuel moisture levels and a cooler climate (Keeley 1982, pp. 436–437; Keeley 2002, p. 305). While the island was used for ranching, fires were set intermittently to increase the forb and grass cover (Navy 2002, p. 3–29). After purchase by the Navy in 1934, fire ignited by military training activities became a more common occurrence throughout much of the island.

It was assumed in previous descriptions that *Malacothamnus clementinus* is adapted to, and tolerant of, the periodic fires that probably occurred in a prehistorical, lightning-ignition fire regime, although there is no direct research to support this assumption (USFWS 1984. p. 48; Navy 2002, D–20; USFWS 2007a, p. 3). Other species in the same genus are fire tolerant and able to adapt, such as *Malacothamnus fremontii* (Fremont's bushmallow), a primary successional species that can form the major shrub cover after a fire (Rundel 1982, p. 86). The seeds of *M. fremontii* are stimulated by heat shock treatments, suggesting that it is adapted to germinate after fires (Keeley *et al.* 2005, p. 175). Another related species, *M. fasciculatus* (Mendocino bushmallow), germinates after being stimulated by heat and is known to flourish after fires (Swensen *et al.* 1995, pp. 412–413; Beyers and Wakeman 1997, p. 2). *Malacothamnus clementinus* has underground stems, and can resprout after disturbance to reproduce vegetatively. The fire tolerance of the genus and its ability to resprout suggest that *M. clementinus* may be adapted to fire. Although no direct research has been done on the effects of fire on *M. clementinus,* its continued presence in areas that have burned (such as SHOBA) indicates that it is tolerant of at least occasional fire (intervals of at least 5 years) (Navy 2008b, pp. 3.11–24, 3.11–81). However, frequent fires could exceed its tolerance of fire intensity and frequency.

The fire tolerance of *Acmispon dendroideus* var. *traskiae* is unknown. Some studies have shown that the related mainland species, *Lotus scoparius* (deerweed), is fire tolerant and becomes more abundant in years after fire (Nilsen and Schlesinger 1981, p. 217; Westman and O'Leary 1986, pp. 184–185). Other studies indicate that intense or frequent burns (three times in 6 years) of *L. scoparius* lead to establishment of fewer seedlings (Westman and O'Leary 1986, p. 185; Haidinger and Keeley 1993, p. 141). In San Clemente Island species, observations show that *Acmispon argophyllus* var. *adsurgens* (San Clemente Island bird's-foot trefoil) germination is slowed or depressed after fire, but *A. argophyllus* var. *argenteus* (silver bird's-foot trefoil) flourishes in burn areas (Allan 1999, pp. 90–91). Observations of *A. d.* var. *traskiae* before and several years following a fire in Canchalagua Canyon found that adult plants were usually killed by fire, but were replaced with a similar number of seedlings after the fire (Navy 2002, p. D–10; Tierra Data Inc. 2005, p. 80). Based on *A. d.* var. *traskiae*'s growth characteristics and occurrence increases in areas affected by fire, and the fire adaptations of related species, *A. d.* var. *traskiae* may be resilient to at least occasional fire. Frequent fires could exceed its tolerance of fire intensity and frequency, and exhaust the seed bank in repeatedly burned areas. Until studies can be conducted specifically on *A. d.* var. *traskiae,* it is prudent to avoid the conclusion that the species benefits from, or germinates with, fire.

The fire tolerance of *Castilleja grisea* is unknown at this time. We do not know of any studies conducted on the fire tolerance of this species, and there is very little information from related species to infer fire tolerance for the genus *Castilleja.* A related rare species, *C. levisecta* (golden Indian paintbrush), tolerates fire and performs better in areas that have burned in the past (Dunwiddie 2002, p. 1; Dunwiddie 2009, p. 5). *Castilleja grisea* has survived and expanded its distribution in areas that have burned. It is generally assumed that the species has some tolerance of infrequent fire (Navy 2002, D–32) based on *C. grisea* occurrence increases in areas affected by fire, and the fire adaptations of other plants in the genus. However, until species-specific research is conducted, we cannot conclude with certainty that *C. grisea* is adapted to fire. Additionally, research is needed on the fire tolerance of potential host plants and their impacts on establishment of *C. grisea.*

Although the three species share the same island habitat, they inhabit different niches. The habitat

characteristics of each species are discussed below.

Habitat—*Malacothamnus clementinus*

Malacothamnus clementinus occurs in a variety of habitats on San Clemente Island. Historically, it was observed on rocky canyon walls and ridges, presumably because foraging goats did not graze those areas. More recently, *M. clementinus* has been found at the base of escarpments between coastal terraces on the western side of the island within maritime cactus scrub (Navy 2002, pp. D–19, D–20). It can also occur on low canyon benches and in rocky grasslands. *Malacothamnus clementinus* is found at approximately 30 to 900 ft (10 to 275 m) elevation (CNPS 2001, p. 215). Moisture that collects in rock crevices and at the base of canyon walls and escarpments may provide favorable conditions for this species (Junak 2006a, pers. comm.). Based on its habitat range on the island and the ease of cultivating the plant, *M. clementinus* appears to tolerate a broad range of soil types (USFWS 1984, p. 50). It is often associated with maritime cactus scrub vegetation on coastal flats at the southwestern end of the island (Junak and Wilken 1998, p. 256). In the INRMP, *M. clementinus* is listed as associated with canyon woodlands (approximately 696 ac (282 ha)), maritime desert scrub-prickly pear vegetation community (approximately 8,921 ac (3,610 ha)), and maritime sage scrub (approximately 369 ac (149 ha)) (Navy 2002, pp. 3–57, 3–63, 3–66). According to Junak and Wilken (1998, p. 290), it is associated with numerous plant species, including: *Artemisia californica* (California sage brush), *Avena fatua* (wild oat), *Bromus* spp. (brome grass), *Calystegia macrostegia* subsp. *amplissima* (island morning glory), *Encelia californica* (California brittlebush), *Nassella cernua* (nodding needlegrass), *Nassella lepida* (foothill stipa), *Opuntia littoralis* (western prickly pear), *Opuntia oricola* (chaparral prickly pear), *Opuntia prolifera* (cholla), and *Rhus intergrifolia* (lemonade sumac).

Habitat—*Acmispon dendroideus* var. *traskiae*

Acmispon dendroideus var. *traskiae* occurs on north-facing slopes, canyon bottoms, or ridgelines (Junak 2006, p. 125). Plants grow somewhat colonially around rock outcrops and boulders in grassy areas, and along the interface between grassland and maritime sage scrub (Allan 1999, p. 84; Navy 2002, p. D–9). *Acmispon dendroideus* var. *traskiae* occurs between 25 and 1,400 ft (7.6 to 463 m) in elevation on well-drained soils where adequate soil moisture is available to the plant (Junak and Wilken 1998, p. 256; Navy 2002, p. D–9). Some plants have been found in close proximity to buildings, roads, and pipelines, indicating that *A. d.* var. *traskiae* is capable of colonizing disturbed areas (Allan 1999, p. 84; Navy 2002, p. D–9). *A. d.* var. *traskiae* is associated with two habitat types on the island: Canyon woodland supported on approximately 696 ac (282 ha) and maritime desert scrub along the northeastern escarpment supported on approximately 6,228 ac (2,520 ha) (Navy 2002, pp. 3–57, 3–58). According to Junak and Wilken (1998, p. 256), *A. d.* var. *traskiae* is associated with numerous plant species including, but not limited to: *Artemisia californica, Avena fatua, Bromus* spp., *Calystegia macrostegia* subsp. *amplissima, Dichelostemma capitatum* (wild hyacinth), *Gnaphalium bicolor* (bicolored everlasting), *Hemizonia clementina* (island tarplant), *Opuntia* spp. (prickly pear), *Nassella pulchra* (purple stipa), and *Quercus tomentella* (island live oak).

Habitat—*Castilleja grisea*

Castilleja grisea is often associated with coastal sage scrub found on approximately 369 ac (149 ha) of the island and maritime desert scrub plant communities found on approximately 5,858 ac (2,371 ha), with scattered concentrations of plants in canyon woodland (approximately 696 ac (282 ha)) and grassland habitat (approximately 8,921 ac (3,610 ha)) (Navy 2002, pp. 3–58, 3–63, 3–66). Plants are located in steep, rocky canyons on both the eastern escarpment and western side of the island, although some have been observed on coastal bluffs, slopes, and terraces around the island's perimeter. Some of the largest concentrations of plants are located in bowl-shaped swales on coastal terraces (Junak and Wilken 1998, p. 82). *Castilleja grisea* grows between 32 and 2,000 ft (10 and 365 m) in elevation. This hemiparasitic plant is known to parasitize many different plants, although a definitive understanding of host-plant associations is currently unknown. Potential host plants include *Calystegia macrostegia* subsp. *amplissima* (island morning glory), *Opuntia littoralis* (prickly pear), and *Constancia nevinii* (Nevin's eriophyllum). These may be important habitat components for *C. grisea.* Junak and Wilken (1998, p. 82) suggest that habitat conditions must be of sufficient quality to sustain potential host plants and provide opportunities for *C. grisea* establishment. Numerous plant species are associated with *C. grisea* including, but not limited to: *Artemisia californica, Calystegia macrostegia* subsp. *amplissima, Encelia californica, Constancia nevinii* (Nevin's woolly sunflower), *Hemizonia clementina, Isocoma menziesii* (Menzies' goldenbush), *Lycium californicum* (California boxthorn), and *Opuntia* spp. (Junak and Wilken 1998, p. 82).

Biology and Genetics

Biology—*Malacothamnus clementinus*

Malacothamnus clementinus is an herbaceous clonal plant (descended asexually from a single individual) that may spread locally by underground rhizomes that produce aerial stems. On average there are 90 flowers per inflorescence (a flower cluster) (Junak and Wilken 1998, p. 291). The species flowers in the spring, typically from March to August (Kearney 1951, p. 115; Navy 2002, D–19; California Native Plant Society 2011). Junak and Wilken (1998, p. 291) found that *M. clementinus* is self-compatible (capable of self-fertilization), but not self-pollinating. The plant produced seed when hand pollinated with pollen from the same plant, but not when flowers were bagged to prevent pollinator visitations (Junak and Wilken 1998, p. 291). It is generally thought that *M. clementinus* is pollinated by insects, although no specific pollinator for this species is known. Other species in the family *Malvaceae* are pollinated by specialist bees in the genus *Diadasia* (Sipes and Tepedino 2005, p. 487). Given the evidence that suggests pollinators may be necessary for successful seed production, a decline in *M. clementinus* may in part be due to a decline in pollinators or an absence of pollinator visitations (Junak and Wilken 1998, p. 291).

Each fertilized flower produces three to four seeds on average (Junak and Wilken 1998, p. 291). Seed production in natural occurrences of *Malacothamnus clementinus* is very low (Helenurm 1997, p. 51; Helenurm 1999, p. 39; Junak 2006a, pers. comm.), as is germination, with low germination rates of only 4 to 35 percent (Evans and Bohn 1987, p. 538; Junak and Wilken 1998, p. 291). Junak and Wilken (1998, p. 291) hypothesized that the relatively low number of seeds produced *in situ* could be due to low pollinator visitation rates or some other unknown factor. Seed germination may be stimulated by heat associated with fire in other *Malvaceae* species, although this has not been studied in *M. clementinus* (Keeley *et al.* 2005, p. 175). Junak and Wilken (1998, p. 291) tried scarifying seeds (softening the outer coat of a seed through

mechanical or chemical means) to promote germination, but this did not significantly increase germination rates. Based on these limited studies of seed production and germination in *M. clementinus,* it is difficult to determine the cause of its low reproductive output.

In addition to sexual reproduction, *Malacothamnus clementinus* can reproduce vegetatively, or clonally, by sprouting from rhizomes (Evans and Bohn 1987, p. 538). Because *M. clementinus* typically occurs in clusters of stems, it is difficult to differentiate between individuals, as rhizome sprouts can also look like seedlings. Therefore, it can be a challenge to determine in the field if a small plant is a seedling or a sprout without digging up the root system (Junak 2006b, pers. comm.). The life history of *M. clementinus* suggests that many of the newly detected occurrences have sprouted from underground rhizomes (Junak 2006a, pers. comm.).

Genetics—*Malacothamnus clementinus*

Genetic studies have provided insights into the clonal nature of *Malacothamnus clementinus.* Overall, genetic diversity found in the *M. clementinus* occurrences is very low compared with other island endemic plant taxa (Helenurm 1999, p. 40). However, individuals in a patch do not represent the same genetic individual, and there is genetic diversity within patches of *M. clementinus* (Helenurm 1999, p. 39). A substantial proportion of the genetic diversity in *M. clementinus* is found among different occurrences rather than within a single occurrence. This research indicates that each occurrence may contain unique genetic variation not found elsewhere, and that there is not much cross pollination or gene flow between occurrences or even patches in the same area (Helenurm 1999, pp. 39–40); this underscores the high conservation value of each of the different occurrences to the long-term survival and recovery of the species.

Malacothamnus clementinus may have low genetic fitness due to small occurrence numbers, low seed production, and low genetic diversity. Helenurm (1999, p. 40) found that most of the species' genetic variation is within the Box Canyon and Horse Beach Canyon occurrences, although other occurrences may contain unique genetic material not found elsewhere (Helenurm 1999, p. 40). Occurrences of *M. clementinus* could be vulnerable to inbreeding depression (loss of vigor and general health) and reduced seed production due to apparently limited outcrossing (reproduction between individuals of different strains) of the plant (Helenurm 1997, p. 50; Helenurm 1999, p. 40).

Biology—*Acmispon dendroideus* var. *traskiae*

Acmispon dendroideus var. *traskiae* flowers between February and August, with halictid bees (a family of small solitary bees that typically nest in the ground), bumblebees, and small beetles observed foraging on the flowers (Junak and Wilken 1998, p. 257; Allan 1999, pp. 64, 85). The taxon is self-compatible (Allan 1999, pp. 85–86), but plants may also rely on insects for more effective pollination (Arroyo 1981, pp. 728–729). Fertilized ovaries develop into a slender, beak-like fruit 1 to 2 in (2.5 to 5 cm) long containing up to six seeds (Isely 1993, p. 619; Junak and Wilken 1998, p. 257; Allan 1999, p. 82). The fruits do not split open to release their seeds at maturity (Isely 1993, p. 619), so it is likely that they disperse close to the parent plants, which may limit the ability of *A. d.* var. *traskiae* to colonize unoccupied suitable habitat. Junak and Wilken (1998, p. 257) found that, on average, a single *A. d.* var. *traskiae* individual can produce approximately 36 to 64 flowering shoots, 118 to 144 flowers per shoot, and 4 to 6 seeds per fruit. This suggests that, under ideal conditions, an individual *A. d.* var. *traskiae* can produce a high volume of seeds (16,000 or more). Like most legumes, *A. d.* var. *traskiae* seeds require scarification or gradual seed coat degradation to germinate (Wall 2011, pers. comm.).

Genetics—*Acmispon dendroideus* var. *traskiae*

Allan (1999, pp. 1–105) analyzed 10 California mainland and Channel Island taxa of *Lotus* (all of which are now in the genus *Acmispon* and referred to as such here), including *Acmispon dendroideus* var. *traskiae.* Of the 29 occurrences of *A. d.* var. *traskiae* on San Clemente Island, Allan (1999, pp. 50–53) sampled only the Wilson Cove occurrence. The *Acmispon* island populations, including *A. d.* var. *traskiae,* tended to have lower genetic variability than mainland populations (Allan 1999, p. 63). There are several possible explanations for this lower genetic variation, including small occurrence size, genetic bottlenecks associated with the establishment of new island occurrences, stochastic events (a random incident such as local extinctions), and genetic isolation (Allan 1999, p. 63). Allan's (1999, p. 61) analysis of genetic diversity also found that the majority (67 percent) of *A. d.* var. *traskiae's* variability is found among, rather than within, occurrences. He postulated that the low genetic variability within a given occurrence may be due to endemism (native to or confined to a certain region), partial inbreeding, isolation, and stochastic events in small occurrences (Allan 1999, pp. 63–64).

Acmispon dendroideus var. *traskiae* has been known to hybridize with *A. argophyllus* var. *argenteus* in disturbed areas in Wilson Cove (Liston *et al.* 1990, pp. 239–240; Allan 1999, p. 86). Based on intermediate characteristics, the hybrid plants appear to be first generation plants (F_1 generation) from a cross between the two varieties. It is not known whether these plants are capable of producing viable seeds by backcrossing between the hybrids or with the putative parent plants (Allan 1999, p. 86). Plants of intermediate morphology were first observed by R.M. Beauchamp in 1986 (Liston *et al.* 1990, p. 239). In April 1989, Liston *et al.* (1990, pp. 239–240) noted a small number of suspected hybrids in the same area as the largest known occurrence of *A. d.* var. *traskiae* in Wilson Cove. A smaller group of nonhybrid *A. argophyllus* var. *argenteus* was found approximately 80 ft (24.4 m) upwind; the two taxa were separated by a road. No documented evidence of hybridization has been recorded anywhere else on the island (Allan 1999, p. 86), although there are unconfirmed reports in other areas (e.g., Warren Canyon; A. Braswell 2011, pers. obs.).

Biology—*Castilleja grisea*

All taxa of *Castilleja* are considered hemiparasitic. Plants are capable of photosynthesis and can exist without a host, but are able to derive water, nutrients, or photosynthates from a host plant if present (Heckard 1962, p. 25). *Castilleja* roots have haustorial attachments (specialized absorbing structures) that penetrate the host plant's root tissue, forming an organic bridge with the host (Heckard 1962, p. 27). In field settings, species of *Castilleja* tend to establish haustorial connections with one or more hosts (Heckard 1962, p. 27; Atsatt and Strong 1970, p. 280). In greenhouse studies, seedlings of *C. grisea* grown in the absence of host plants did not perform well and died shortly after germination, suggesting that host plants are important for this species (Junak and Wilken 1998, p. 84). Greenhouse studies have also shown that overall performance and fecundity of parasitic plants are usually higher with a host than without one (Heckard 1962, p. 29; Atsatt and Strong 1970, p. 280).

Castilleja grisea appears to be capable of forming haustorial connections with a range of plant species (Heckard 1962, p. 28; Atsatt and Strong 1970, p. 280; Marvier 1996, p. 1399; Adler 2002, p. 2704; Adler 2003, p. 2086). *Nassella pulchra, Calystegia macrostegia* subsp. *amplissima,* and *Constancia nevinii* are considered potential hosts (Muller 2009, pers. comm.). Twelve co-occurring plant taxa have been found consistently in *C. grisea* occurrences (Muller and Junak 2011, p. 5). However, further study is needed to determine which of these plants serve as hosts to *C. grisea,* and at what frequency. *Castilleja grisea* may rely on more than one host species for growth and reproduction. Therefore, recovery may depend on the conservation of a community of host species (Marvier and Smith 1997, p. 846).

Castilleja grisea flowers between February and May, producing yellow bisexual flowers (Chuang and Heckard 1993, pp. 1016–1024; Navy 2002, p. D–31). *Castilleja grisea* is likely self-incompatible (unable to produce viable seed through self-fertilization), as observed in other species of the genus (Carpenter 1983, p. 218; Junak and Wilken 1998, p. 84). Among four populations of *C. grisea* examined, Junak and Wilken (1998, pp. 83–84) found limited flower-to-fruit conversion (67 to 71 percent of flowers produced fruits) and large variation in the number of seeds set per fruit. *Castilleja grisea* appears to produce seed primarily through outcrossing, and relies on pollinators for sexual reproduction (Junak and Wilken 1998, p. 84; Helenurm *et al.* 2005, p. 1225).

Castilleja grisea is most closely related to, and shares floral traits with, other species in the genus primarily adapted for bee pollination (Chuang and Heckard 1991, p. 658). A single bee from the family Andrenidae, covered in pollen, was recently collected from a flowering *C. grisea* plant in Canchalagua Canyon on San Clemente Island (Howe 2009a, pers. comm.). The fruit of *C. grisea* is an ovoid capsule, less than 0.5 in (1.27 cm) long, and contains approximately 150 seeds (Junak and Wilken 1998, pp. 82–83). The seed coats are deeply netted, which indicates they can float and may be able to disperse via water (Muller and Junak 2011, pp. 12, 16). During attempts to propagate *C. grisea* plants from seed, no significant differences were found between seed viability (79.5 to 85 percent) and germination (68.3 to 76.7 percent), suggesting that most viable seed are able to germinate immediately without a period of dormancy to induce germination (Junak and Wilken 1998, pp. 83–84).

Genetics—*Castilleja grisea*

Genetic variation within *Castilleja grisea* is moderately high for an insular endemic plant, particularly given its history of extreme rarity (Helenurm *et al.* 2005, p. 1225). This suggests *C. grisea* may have retained substantial genetic variation through the period of overgrazing. Consistent with an outcrossing breeding system, most of the genetic variation in C. *grisea* is within, rather than among, occurrences (Helenurm *et al.* 2005, p. 1225). Historically, there were likely high rates of gene flow between occurrences. The transmittal of genes between occurrences in the past influenced the genetic similarity found between occurrences by Helenurm *et al.* (2005, p. 1226). While all occurrences are important for maintaining levels of gene flow, the loss of any single occurrence is unlikely to represent a significant loss of genetic diversity to the species (Helenurm *et al.* 2005, p. 1226). Overall, this species likely does not have low fitness due to limiting genetic factors (Helenurm *et al.* 2005, p. 1226).

Recovery

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species unless we determine that such a plan will not promote the conservation of the species. The Act directs that, to the maximum extent practicable, we incorporate into each plan:

(1) Site-specific management actions that may be necessary to achieve the plan's goals for conservation and survival of the species;

(2) Objective, measurable criteria, which when met would result in a determination, in accordance with the provisions of section 4 of the Act, that the species be removed from the list; and

(3) Estimates of the time required and cost to carry out the plan.

However, revisions to the list (adding, removing, or reclassifying a species) must reflect determinations made in accordance with sections 4(a)(1) and 4(b) of the Act. Section 4(a)(1) requires that the Secretary determine whether a species is endangered or threatened (or not) because of one or more of five threat factors. Therefore, recovery criteria must indicate when a species is no longer endangered or threatened by any of the five factors. In other words, objective, measurable criteria, or recovery criteria contained in recovery plans, must indicate when we would anticipate an analysis of the five threat factors under section 4(a)(1) would result in a determination that a species is no longer endangered or threatened. Section 4(b) of the Act requires that the determination be made ''solely on the basis of the best scientific and commercial data available.''

Thus, while recovery plans are intended to provide guidance to the Service, States, and other partners on methods of minimizing threats to listed species and on criteria that may be used to determine when recovery is achieved, they are not regulatory documents and cannot substitute for the determinations and promulgation of regulations required under section 4(a)(1) of the Act. Determinations to remove a species from the list made under section 4(a)(1) of the Act must be based on the best scientific and commercial data available at the time of the determination, regardless of whether that information differs from the recovery plan.

In the course of implementing conservation actions for a species, new information is often gained that requires recovery efforts to be modified accordingly. There are many paths to accomplishing recovery of a species, and recovery may be achieved without all criteria being fully met. For example, one or more recovery criteria may have been exceeded while other criteria may not have been accomplished, yet the Service may judge that, overall, the threats have been minimized sufficiently, and the species is robust enough, that the Service may reclassify the species from endangered to threatened or perhaps delist the species. In other cases, recovery opportunities may have been recognized that were not known at the time the recovery plan was finalized. These opportunities may be used instead of methods identified in the recovery plan.

Likewise, information on the species may be learned that was not known at the time the recovery plan was finalized. The new information may change the extent that criteria need to be met for recognizing recovery of the species. Overall, recovery of species is a dynamic process requiring adaptive management, planning, implementing, and evaluating the degree of recovery of a species that may, or may not, fully follow the guidance provided in a recovery plan.

Thus, while the recovery plan provides important guidance on the direction and strategy for recovery, and indicates when a rulemaking process may be initiated, the determination to remove a species from the Federal List of Endangered and Threatened Plants (50 CFR 17.12) is ultimately based on an

analysis of whether a species is no longer endangered or threatened. The following discussion provides a brief review of recovery planning for *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea,* as well as an analysis of the recovery criteria and goals as they relate to evaluating the status of the taxa.

In 1984, the Service published the Recovery Plan for the Endangered and Threatened Species of the California Channel Islands (Recovery Plan) that addresses 10 plants (including *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea*) and animals distributed among three of the Channel Islands (USFWS 1984). Recovery plans are intended to guide actions to recover listed species and to provide measurable objectives against which to measure progress towards recovery. Following guidance in effect at that time, the Recovery Plan was not focused on criteria that specifically addressed the point at which threats identified for each species in the listing rule would be removed or sufficiently ameliorated. Given the threats in common to the 10 species addressed, the Recovery Plan is broad in scope and focuses on restoration of habitats and ecosystem function. Instead of specific criteria, it included six general objectives covering all 10 of the plant and animal species:

Objective 1: Identify present adverse impacts to biological resources and strive to eliminate them.

Objective 2: Protect known resources from further degradation by: (a) Removal of feral herbivores, carnivores, and selected exotic plant species; (b) control of erosion in sensitive locations; and (c) direct military operations and adverse recreational uses away from biologically sensitive areas.

Objective 3: Restore habitats by revegetation of disturbed areas using native species.

Objective 4: Identify areas of San Clemente Island where habitat restoration and population increase of certain addressed taxa may be achieved through a careful survey of the island and research on habitat requirements of each taxon.

Objective 5: Delist or upgrade the listing status of those taxa that achieve vigorous, self-sustaining population levels as the result of habitat stabilization, restoration, and preventing or minimizing adverse human-related impacts.

Objective 6: Monitor effectiveness of recovery effort by undertaking baseline quantitative studies and subsequent follow-up work (USFWS 1984, pp. 106–107).

Progress has been made toward achieving these objectives. Our review of the Recovery Plan focuses on the actions identified that promote the recovery of *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea.* The Recovery Plan adopts a generalized strategy of eliminating or controlling selected nonnative species and restoring habitat conditions on the Channel Islands to support viable, self-sustaining occurrences of each of the addressed taxa. The Recovery Plan states that ''[o]nce the threats to these taxa have been removed or minimized and the habitats are restored, adequately protected, and properly managed, reclassification for some taxa may be considered'' (USFWS 1984, p. 108). Actions specified in the Recovery Plan that are pertinent to recovery of the endangered San Clemente Island plant taxa include:

(1) Removing feral animals;

(2) Removing or controlling selected nonnative plants;

(3) Controlling erosion;

(4) Revegetating eroded and disturbed areas;

(5) Reintroducing and reestablishing listed plant species populations;

(6) Modifying existing management plans to minimize habitat disturbance and incorporate recovery actions into natural resource management plans;

(7) Protecting habitat by minimizing habitat loss and disturbance and by preventing the introduction of additional nonnative organisms;

(8) Determining the habitat and other ecological requirements of the listed plant taxa (such as reproductive biology and fire tolerance);

(9) Evaluating the success of management actions;

(10) Increasing public support for recovery efforts; and,

(11) Using existing laws and regulations to protect each taxon.

Recovery Plan Implementation

The primary objective of the Recovery Plan is to restore endangered and threatened species to nonlisted status. Though specific size and number of occurrences needed for self-sustaining populations for each species was not identified, habitat restoration and protection that would result in achieving self-sustaining populations (see Objective 5) were discussed. The Recovery Plan stated that reclassification of these taxa may be considered after threats have been removed or sufficiently minimized and the habitat is restored. Specific criteria for determining when threats have been removed or sufficiently minimized were not identified in the Recovery Plan, but six objectives were described in general to achieve recovery of the Channel Island species. This section provides a summary of actions and activities that have been implemented according to the 1984 Recovery Plan (USFWS 1984, pp. 106–107) and contribute to achievement of these objectives.

Objective 1: Identify Present Adverse Impacts to Biological Resources and Strive To Eliminate Them

The Navy has taken steps to eliminate incidental impacts to the three species by educating Navy personnel stationed on San Clemente Island. To increase support for recovery efforts, the Navy has created the position of Island Operations Manager. This individual's role is to act as a liaison between the Navy's natural resource branch and other island users (Larson 2009, pers. comm.). The Island Operations Manager educates users of the island to the uniqueness and fragility of the island's ecosystem, and briefs new operational groups as they come onto the island (Larson 2009, pers. comm.). These briefings inform operational groups of the Navy's natural resource management responsibilities under the law, and may include additional information about threats to, and locations of, listed taxa.

The Recovery Plan recommends that existing laws and regulations be used to protect *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea* from threats on San Clemente Island. Based on the occurrence of these taxa on federally owned land, the primary laws with potential to protect them include the National Environmental Policy Act (NEPA) and the Act. NEPA requires Federal action agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. The Navy has implemented NEPA since its enactment in 1970. Likewise, the Navy has a history of consultation and coordination with the Service under the Act regarding the effects of various San Clemente Island activities on federally listed species since taxa on the island were first listed in 1977. Finally, pursuant to the Sikes Act Improvement Act, the Navy adopted an INRMP for San Clemente Island in 2002 that helps guide the management and protection of these taxa (Navy 2002, pp. 1.1–8.12). An INRMP is a plan that is intended ''* * * to guide installation commanders in managing their natural resources in a manner that is consistent with the sustainability of those resources while

ensuring continued support of the military mission'' (Navy 2002, p. 1–1). To achieve this, the INRMP identifies goals and objectives for specified management units and their natural resources. The following objectives have been incorporated as part of the INRMP to address the Recovery Plan task of incorporating recovery actions into existing management plans:

(1) Protect, monitor, and restore plants and cryptograms (soil crusts composed of living cyanobacteria, algae, fungi, or moss) in order to manage for their long-term sustainability on the island;

(2) Consider *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* or *Castilleja grisea* as ''Management Focus Plants,'' such that they are considered independently from their plant communities as special management focuses (habitat protection alone is not assumed to be sufficient for their protection);

(3) Conduct status surveys for listed plants;

(4) Ensure that Management Focus Plants have a network of suitable sites;

(5) Perform studies to determine the pollinators of *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* or *Castilleja grisea;* and

(6) Continue to apply genetic research and management approaches to rare plant management.

Through these mechanisms, the Navy is required to identify and address all threats to these species during the INRMP planning process. If possible, threats are ameliorated, eliminated, or mitigated through this procedure. The Navy has strived to fulfill this objective through both internal planning (INRMP) and through compliance with Federal law (consultations with the Service under the Act and preparing environmental review documents under NEPA). As discussed below under the five factors, the actions taken by the Navy under the INRMP have not completely eliminated all adverse impacts, but many threats have been greatly reduced. These contributions to the elimination of adverse impacts partially fulfill, but do not fully achieve, the objective for all three species.

Objective 2: Protect Known Resources From Further Degradation By: (a) Removal of Feral Herbivores, Carnivores, and Selected Exotic Plant Species; (b) Control of Unnatural Erosion in Sensitive Locations; and (c) Directing Military Operations and Adverse Recreational Uses Away From Biologically Sensitive Areas

In 1992, the Navy fulfilled a major part of this objective by removing the last of the feral goats and pigs from San Clemente Island (as described above in the *Habitat* section). Nonnative plants have also been targeted for removal from San Clemente Island, and efforts to control nonnatives have been implemented on an annual basis since approximately 1993 (O'Connor 2009a, pers. comm.). The specific nonnative plants targeted and amount of money allocated to this program are adjusted on an annual basis (O'Connor 2009b, pers. comm.; Munson 2011a, pers. comm.). The effectiveness of this program was recently improved by providing authorization to apply herbicides (O'Connor 2009b, pers. comm.). Priorities in the nonnative plant program are currently focused on new nonnatives to the island and particularly destructive nonnative species.

The Navy is also taking steps to minimize the effects of erosion on the island. Erosion control measures are being incorporated into project designs to minimize the potential to exacerbate existing erosion (O'Connor 2009c, pers. comm.). With the expansion of military operational areas, the Navy committed to prepare and implement an erosion control plan that will minimize soil erosion within and adjoining the operational areas (Navy 2008b, pp. 5–30; USFWS 2008 p. 62). However, this plan has not been finalized nor yet implemented, and it is unclear whether erosion control measures will be implemented consistently or at all in areas that are operationally closed to monitoring and access due to unexploded ordnance. The proposed erosion control plan includes development and application of best management practices (BMPs) such as: Establishing setbacks and buffers from steep slopes, drainages, and sensitive resources; constructing site-specific erosion control structures; conducting revegetation and routine maintenance; and monitoring and adjusting the BMPs as appropriate. While the erosion control plan is being prepared, the Navy has postponed all major battalion movements and training, and is using BMPs when creating and approving projects that might contribute to erosion on the island. The Navy has taken steps to reduce the threat of erosion on the island and contribute to the achievement of this objective.

The Navy is taking precautions to avoid plants when possible to minimize direct impacts to *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea* resulting from military activities. For example, in the MOFMP, the Navy proposed to develop a Training Area Range (TAR) that contained *A. d.* var. *traskiae* within its boundaries. After consultation with USFWS, the Navy revised these boundaries to avoid most of the *A. d.* var. *traskiae* and minimize the impact of training on the species (USFWS 2008, p. 118).

This objective has been largely met for *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea.* Feral herbivores have been removed, erosion control measures are being implemented, and military activities are avoiding direct impacts to plants whenever possible. The Navy is also developing an erosion control plan for military activities. However, many occurrences of *Malacothamnus clementinus* are located in areas that continue to be impacted, or their status remains unknown due to closures. Therefore, Objective 2 has not been sufficiently satisfied for this taxon.

Objective 3: Restore Habitats by Revegetation of Disturbed Areas Using Native Species

Since 2001, the Navy has contracted with the San Diego State University Soil Ecology and Restoration Group (SERG) to propagate and outplant (transplant individuals from the greenhouse to vegetative communities) native species on the island (Howe 2009b, pers. comm.). The SERG propagates and outplants approximately 4,000 native plants per year, and has initiated restoration at approximately 28 sites (O'Connor 2009b, pers. comm.). This program has not included propagation and outplanting of listed plant taxa, except in one recent instance to replace *Acmispon dendroideus* var. *traskiae* plants that were extirpated during a scrap metal removal project (Munson 2011a, pers. comm.). The outplanting of native species is primarily focused on restoring sensitive island habitats and improving habitat conditions for endangered animal taxa (such as the San Clemente loggerhead shrike (*Lanius ludovicianus mearnsi*)), with some revegetation of eroded and disturbed areas (O'Connor 2009, pers. comm.). Although only one of the restoration efforts was specifically designed for the benefit of one of the three plant taxa addressed in this finding, restoration of the island's vegetation communities should help improve habitat suitability for all three taxa by reducing the spread of invasive nonnative plants and restoring ecological processes. Although progress has been made towards restoring disturbed areas, there are still areas (e.g., especially within SHOBA) that need further restoration of native species. Therefore, while restoration is occurring, the objective has not been

fully met at this time for the three species.

Objective 4: Identify Areas of San Clemente Island Where Habitat Restoration and Population Increase of Certain Addressed Taxa May be Achieved Through a Careful Survey of the Island and Research on Habitat Requirements of Each Taxon

Since they were listed, a number of studies have addressed the ecology, taxonomy, and genetics of the three plant taxa. Evans and Bohn (1987, pp. 537–545) observed insects on plants, collected seeds, and studied the germination of *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea.* Junak and Wilken (1998, pp. 1–426) studied flowering and fruiting in natural populations and performed germination trials with collected seeds from all three taxa. Allan (1999, pp. 46–105) observed pollinators and germinated seeds collected from *A. d.* var. *traskiae.* Liston *et al.* (1990) confirmed suspected hybridization between *A. d.* var. *traskiae* and *A. argophyllus* var. *argenteus* using genetic techniques. Additionally, Allan (1999, pp. 46–105) surveyed the genetics of a number of taxa within the genus *Lotus,* including a group that includes *A. d.* var. *traskiae,* to compare genetic divergence between California mainland and island taxa. Helenurm *et al.* (2005, pp. 1221–1227) studied patterns of genetic variation among occurrences of *C. grisea.* Helenurm (1997, pp. 41–51; 1999, pp. 29–40) studied the genetic variation and clonal nature of *M. clementinus.* These studies have helped to elucidate potential plant pollinators and mating systems, plant propagation techniques, and to design management strategies that take into consideration genetic factors. There is a growing body of knowledge on the habitat requirements and life history of listed species on the island. This research, encouraged and supported by the Navy, has contributed to achieving Objective 4 and to planning successful restoration of habitat and recovery of the three taxa. Additional surveys and research necessary to identify appropriate restoration, management, and recovery actions include: further genetic studies for *M. clementinus,* research on the degree of hybridization in *A. d.* var. *traskiae* and study of the host plants of *C. grisea.* Thus, this objective has not been fully achieved at this time for the three species.

Objective 5: Delist or Upgrade the Listing Status of Those Taxa That Achieve Vigorous, Self-Sustaining Population Levels as the Result of Habitat Stabilization, Restoration, and Preventing or Minimizing Adverse Human-Related Impacts

The distributions of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* have increased substantially over much of the island since listing. There are now vigorous, self-sustaining occurrences of *A. d.* var. *traskiae* and *C. grisea* on San Clemente Island, as described above. Threats to these taxa have also been reduced to levels such that they are no longer in danger of extinction throughout all of their range (USFWS 2007b, pp. 1–22; USFWS 2007c, pp. 1–19). Although the goal of delisting has not yet been met, the objective to improve the status of *A. d.* var. *traskiae* and *C. grisea* to the point they can be reclassified has been met. Because many occurrences of *Malacothamnus clementinus* are located in areas that continue to be impacted, or their status remains unknown due to closures, we have not yet met either standard of this objective to reclassify or delist this species.

Objective 6: Monitor Effectiveness of Recovery Efforts by Undertaking Baseline Quantitative Studies and Subsequent Follow Up Work

To evaluate the success of management actions undertaken to benefit the three plant taxa, the Navy implemented a long-term vegetation monitoring study (Tierra Data Inc. 2005, pp. i–96 and Appendices) and commissioned sensitive plant surveys (Junak and Wilken 1998, pp. 1–416; Junak 2006, pp. 1–176). Overall, vegetation trend monitoring reveals that the cover of both native and nonnative plant species has changed since the removal of feral goats and pigs, but the response of individual species and vegetative communities has varied, with some species and communities exhibiting greater changes than others. Discerning long-term vegetative community trends is difficult because the vegetative community study was preceded by a wet year that likely had a strong influence on the data collected (Tierra Data Inc. 2005, p. 29). Within the few monitoring plots that included the three plant taxa, occurrence counts varied among years and did not provide a clear indication of trend (Tierra Data Inc. 2005, pp. 79–80). The clearest indication of the success of feral animal removals for the three plant taxa was obtained from rare plant survey data (Junak and Wilken 1998, pp. 1–416, GIS data; Junak 2006, pp. 1–176, GIS data; Tierra Data Inc. 2008, pp. 1–24, appendices and GIS data; SERG 2009–2011, GIS data). These surveys have added substantially to the number of documented occurrences of each of the three taxa.

Rare plant surveys and island flora studies have documented many more locations occupied by *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea* than were known at the time of listing. Since listing, 8 additional occurrences of *M. clementinus,* 23 occurrences of *A. d.* var. *traskiae,* and 10 occurrences of *C. grisea* have been documented (Table 1). It is unknown whether the higher number of occurrences represents detections due to increased survey efforts, recruitment from the seed bank, or recolonization by the plants as a result of management actions implemented by the Navy to conserve listed species on the island (see *Distribution* section for each taxon above). However, this improvement in the documented status of each of these taxa suggests that feral goats and pigs were a significant threat to each. Thus, their improved status may largely be due to the implementation of a single action identified in the Recovery Plan. Because portions of the island remain closed, monitoring effectiveness of recovery efforts is not being fully implemented. Occurrences for each species, as described above, are closed to access for monitoring or any recovery efforts. Thus, Objective 6 cannot be fully met for the three taxa under current operational closure directives.

Summary of Recovery Plan Implementation

In summary, while the Recovery Plan does not include taxon-specific downlisting or delisting criteria for measuring the recovery of *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea,* many of the actions identified in the Recovery Plan have been implemented to benefit these taxa. Most significantly, the Navy removed feral goats and pigs from San Clemente Island in 1992. The improvement in the documented status of each of these listed plant taxa suggests that the removal of these animals was integral to their ability to establish vigorous, self-sustaining occurrences. Though the distribution of *Malacothamnus clementinus* has continued to increase on the island, the majority of its range occurs within SHOBA. Since access to Impact Areas within SHOBA is restricted to military personnel, the status of three *M. clementinus*

occurrences is uncertain at this time. A fourth occurrence, with a significant amount of genetic diversity, outside of the impact areas is also closed at this time. Due to limited access to these areas, there are insufficient data to indicate that the objectives have been successfully met. In addition, limited access precludes natural resource managers from implementing management actions, such as nonnative control and fire suppression.

In contrast, threats are reduced in areas occupied by *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea,* and many of the objectives have been met in part or full. Complementing the success of these conservation measures, the ecology and genetics of each of these taxa have been studied, and a number of programs are now in place to improve habitat suitability, prevent introductions of nonnative species, guide and track management efforts, and protect occurrences of these plant taxa. We investigated other potential threats for these taxa and concluded that they do not pose significant impacts. Based on our review of the Recovery Plan, we conclude that the status of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* has improved due to activities being implemented by the Navy on San Clemente Island. The effects of these activities on the status of the three taxa are discussed in further detail below.

Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth procedures for listing species, reclassifying species, or removing species from the Federal Lists of Endangered and Threatened Wildlife and Plants. ''Species'' is defined by the Act as including any species or subspecies of fish or wildlife or plants, and any distinct vertebrate population segment of fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). Once the ''species'' is determined, we then evaluate whether that species may be endangered or threatened because of one or more of the five factors described in section 4(a)(1) of the Act. Those factors are:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

We must consider these same five factors in reclassifying or delisting a species. Listing, reclassifying, or delisting may be warranted based on any of the above threat factors, either singly or in combination. For species that are already listed as threatened or endangered, an analysis of threats is an evaluation of both the threats currently facing the species and the threats that are reasonably likely to affect the species in the foreseeable future following the delisting or downlisting.

Under section 3 of the Act, a species is ''endangered'' if it is in danger of extinction throughout all or a significant portion of its range, and is ''threatened'' if it is likely to become endangered in the foreseeable future throughout all or a significant portion of its range. The word ''range'' refers to the range in which the species currently exists, and the word ''significant'' refers to the value of that portion of the range being considered to the conservation of the species. The ''foreseeable future'' is the period of time over which events or effects reasonably can or should be anticipated, or trends extrapolated.

We considered and evaluated the best available scientific and commercial information for this analysis. Information pertaining to *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea* in relation to the five factors provided in section 4(a)(1) of the Act is discussed below. For the purposes of this analysis, we will first evaluate whether the currently listed species should be considered threatened or endangered throughout all their ranges. If we determine that the species are threatened, then we will consider whether there are any significant portions of their ranges where they are in danger of extinction or likely to become endangered within the foreseeable future. The five factors listed under section 4(a)(1) of the Act and their applications to *M. clementinus, A. d.* var. *traskiae,* and *C. grisea* are presented below.

Malacothamnus clementinus (San Clemente Island Bush Mallow)

In the 2007 status review, we acknowledged that the predominant threat at listing (grazing from feral herbivores) was ameliorated with the removal of goats and pigs from the island in 1992 (USFWS 2007a, pp. 1–28). Threats to *Malacothamnus clementinus* identified in 2007 included: (1) Land use, (2) fire, (3) nonnative species, (4) erosion, (5) natural factors, (6) fire management, and (7) limited access to SHOBA. Land use, fire, nonnatives, erosion, and fire management are discussed as habitat threats below under *Factor A.* Natural factors in the 2007 status review refer to the low genetic diversity of this taxon and are discussed in *Factor E* below. In 2007, access to SHOBA was described as a threat because it ''undermines the effectiveness of surveys and management efforts'' (USFWS 2007a, p. 21). While lack of access to portions of the island still limits our ability to assess the status of the taxon, access to SHOBA is not considered a threat. Rather, the lack of access contributes to uncertainty in assessing threats and the species' response to those threats and to actions taken to ameliorate threats. In this finding, we focus on threats responsible for impacting the listed entity or habitat where it occurs, not our inability to access these areas.

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

The final listing rule (42 FR 40682; August 11, 1977) identified the following threats to *Malacothamnus clementinus:* Habitat alteration and destruction, competition from nonnative species, and direct predation by nonnative herbivores (goats and pigs). With the final removal of these herbivores in 1992, the vegetation on San Clemente Island has rebounded, and the status of many rare plant occurrences, including *M. clementinus,* has improved (Tierra Data Inc. 2005, p. 8; Junak 2006a, pers. comm.). Although the direct threat from predation to *M. clementinus* identified in the final listing rule has been eliminated, erosion as a result of overgrazing and invasive nonnative plants remain ongoing threats to habitat of *M. clementinus.* The Recovery Plan also identified habitat alteration and disturbance from the Navy's use of the island for military operational and training needs as additional threats to the habitats occupied by *M. clementinus* (USFWS 1984, pp. 58–63). Additional threats identified since listing include alteration of San Clemente Island habitats by military training activities, fire, and fire management. As outlined below, we discuss in this section the impacts of the following threats that affect the habitat or range of *M. clementinus:* (1) Land use, (2) erosion, (3) nonnative plants, (4) fire, and (5) fire management.

Land Use

In this section we describe threats considered likely based on land use designations. A total of 11 *Malacothamnus clementinus* occurrences are distributed on San

Clemente Island, including one mid-island (Lemon Tank Canyon) and the remaining 10 approximately 9.5 mi (15.3 km) along the southwesterly facing coastal terraces at the southern end of the island. Historically, the island was used for grazing and ranching. At the time of listing, the Navy had acquired the island, although military operations were not intense and feral grazers were still on the island. Since listing, training activities and land use by the Navy have increased significantly. Since it was first listed in 1977, the Navy has consulted and coordinated with us regarding the effects of various activities on *M. clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea* (USFWS 2002, pp. 1–21; USFWS 2003, p. 1; USFWS 2004, pp. 1–2; USFWS 2008, pp. 1–237). These consultations have addressed numerous activities including training, fire management, the installation of wind turbines, missile tests, maintenance and construction of Ridge Road and the assault vehicle maneuver route, construction of berthing buildings, and development and use of training areas.

Most recently, training activities approved in the MOFMP include substantial increases in vehicle and foot traffic in the IOA (Navy 2008b, pp. 2–1 to 2–52). In November 2008, we completed a biological opinion describing the impact of the Navy's military training program proposed in the MOFMP on 11 federally listed species on San Clemente Island, including the three taxa that are the subject of this finding (USFWS 2008, pp. 1–237). This consultation addressed the proposed expansion of the frequency and amount of military training on the island, along with enhanced training complex capabilities, construction of new gates and buildings, use of an IOA, change in fire management strategies, and use of an assault vehicle maneuver corridor. Examples of projected increases in training levels relative to a representative year of training prior to 2008 include: 11 percent increase in naval fire support exercises, 23 percent increase in land bombing exercises, 150 percent increase in explosive ordnance disposal, 60 percent increase in artillery operations, 90 percent increase in land demolitions, 19 percent increase in land navigation exercises, and 96 percent increase in SEAL platoon operations (USFWS 2008, p. 11).

We considered the status and distribution of *Malacothamnus clementinus,* and the various management, avoidance, and minimization measures in place, including those the Navy will implement with the new MOFMP in our 2008 biological opinion (we also considered impacts to *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea*). Additionally, the Service made conservation recommendations within the biological opinion, including: (1) Considering recommended actions from the 5-year review in the upcoming revision of the INRMP, (2) propagation and outplanting of narrowly distributed, listed plant species, and (3) the collection of *M. clementinus* cuttings and seeds from Horse Beach Canyon for the propagation and outplanting of individuals in areas without military training. We concluded that ongoing and likely impacts from the proposed increases in military training activities would not jeopardize the continued existence of *M. clementinus, A. d.* var. *traskiae,* and *C. grisea* (USFWS 2008, p. 90).

The southern portion of the distribution of *Malacothamnus clementinus* spans the boundary of SHOBA, which supports a variety of training operations involving both live and inert munitions fire. The majority of this area serves as a buffer for areas of more intense training and is less susceptible to direct land use threats than occurrences within TAR, IOA, or Impact Areas. Six of 11 known occurrences (54 percent; Canchalagua Canyon, Horse Beach Canyon, Lower China Canyon, Upper China Canyon, Cave Canyon, and Chukit Canyon) fall within SHOBA, where diffuse or accidental impacts to *M. clementinus* are likely to occur, and training might result in the alteration of habitat by Off Highway Vehicle (OHV) movement and large-scale troop movements through the military impact and training areas. Within the Impact Areas, some munitions exercises involve the use of incendiary devices, such as illumination rounds, white phosphorous, and tracer rounds, which pose a high risk of fire ignition (USFWS 2008, pp. 11–13). One occurrence (Lower China Canyon) is within the IOA, and could experience direct impacts from troop and vehicle movement through the area. Three additional occurrences (Upper China Canyon, Horse Beach Canyon, and Lemon Tank Canyon) are near the IOA (within 1,000 ft (305 m)), and could be subjected to diffuse or accidental impacts. Because of the elevated risk of fire and disturbance associated with training activities, live and inert munitions fire are targeted towards two delineated Impact Areas (I and II) within SHOBA where bombardments and land demolition are concentrated. Three of 11 occurrences (27 percent; Upper China Canyon, Lower China Canyon, and Horse Beach Canyon) are within Impact Areas I or II, and are now closed to nonmilitary personnel (USFWS 2008, p. 50).

As a result, it is not possible to assess the magnitude of the threat in these areas, and the status of the three occurrences remains unknown. These occurrences, although limited in number, contain the greatest numbers of individuals and some of the highest genetic diversity on the island (Helenurm 1999, p. 40). The intense training activities within the Impact Areas pose a direct threat to habitat and occurrences due to associated ground disturbance and bombardment (USFWS 2008, pp. 83–84). The majority (8 of 11) of *Malacothamnus clementinus* occurrences are located outside of any training areas (IOA, TAR, or Impact Area) and are less likely to sustain direct impacts from military activities associated with land use; three occurrences (Upper China Canyon, Lower China Canyon, and Horse Beach Canyon) are partially or wholly within the boundaries of a training area (IOA, TAR, or Impact Area).

The Lemon Tank Canyon occurrence falls within an area identified by the INRMP as needing environmental cleanup pursuant to the Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (Navy 2002, p. 2–18). This site is still in the study phase and has not been listed, or proposed for listing, on the National Priorities List. Habitat at this occurrence could receive improvements by future environmental cleanup (Munson 2011b, pers. comm.). Initial surveys of the project footprint have been completed, and *Malacothamnus clementinus* was not found in the project footprint (B. Munson 2011e, pers. comm.), although additional surveys will need to be undertaken to ensure there is no impact to the plant. RCRA and CERCLA require that impacts to the species and its habitat be avoided and minimized to the extent practicable. This area has also been closed to natural resource personnel, and the status of the occurrence in this area is unknown (Munson 2011c, pers. comm.).

While the increase in military training affects the species (as well as *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea*), the Navy through implementation of the INMRP is avoiding and minimizing the impacts to the extent practicable while meeting operational needs. Land use is currently impacting habitat of 4 of the 11 occurrences (36 percent; Lemon Tank

Canyon, Lower China Canyon, Upper China Canyon, and Horse Beach Canyon) on the island, which may lead to overall habitat degradation, and cause the loss of individuals or groupings of plants in a given area. Military operations and training are island-wide threats to *M. clementinus,* particularly to the occurrences in or adjacent to military training areas.

Erosion

Erosion and associated soil loss caused by browsing of feral goats and rooting of feral pigs likely modified the island's habitat (Navy 2002, p. 1–14). Defoliation from overgrazing on San Clemente Island increased erosion over much of the island, especially on steep slopes where denuded soils can quickly wash away during storm events (Johnson 1980, p. 107; Navy 2002, pp. 1–14, 3–9; Tierra Data Inc. 2007, pp. 6–7). In the INRMP, erosion was identified as a threat to canyon woodland and maritime desert scrub vegetation communities, which is *Malacothamnus clementinus* habitat (Navy 2002, pp. 4–3, 4–12). In the southwestern portion of its distribution, *M. clementinus* is found along coastal terraces, canyon rims, and at the base of escarpments where erosion is more prevalent. The erosion process can remove soil that provides nutrients and physical support for the plants, displace seeds and deposit them in unsuitable locations, and bury extant individuals or small occurrences of the plants. This stripping of soil and plants can affect vegetation composition and landscape long after the herbivores are removed (Johnson 1980, p. 107). Erosion has likely been exacerbated by reductions in vegetation cover due to drought and fire (Johnson 1980, pp. 105–118). Currently, the Navy has a program run by SERG that grows and outplants native vegetation to areas that need to be restored (Navy 2002, pp. 3–51 to 3–52). Restoration of native vegetation helps retain soil and ameliorate erosion in stripped areas.

Increased military activities, especially where *Malacothamnus clementinus* is found within training area boundaries, cause erosion through soil compaction or other soil disturbances in occupied habitat near roadways or vehicle maneuver areas (Tierra Data Inc. 2007, p. 12). With the exception of the main road, the roads on San Clemente Island are largely unpaved, and 5 of the 11 occurrences (45 percent; Lower China Canyon, Horse Beach Canyon, Middle Ranch Canyon, Waymuck Canyon, and Lemon Tank Canyon) are within 500 ft (152 m)) of a road on the island (Forman and Alexander 1998, p. 217). These occurrences could be subject to diffuse disturbance (spread out over a large area or not concentrated) and road effects that degrade habitat quality. Roads can concentrate water flow, causing incised channels and eroded slopes (Forman and Alexander 1998, pp. 216–217). This increased erosion around roads can degrade habitat, especially along steep canyons and ridges. Erosion impacts are likely greatest in SHOBA, where bombardment has led to a pattern of surface disturbance and recurrent fire (Navy 2002, pp. 3–5). The Navy studied the potential for erosion from several proposed military activities (Tierra Data Inc. 2007, pp. 1–45, Appendices). One additional occurrence at Upper China Canyon is also impacted by erosion. Therefore, 6 of the 11 occurrences (54 percent; Lower China Canyon, Upper China Canyon, Horse Beach Canyon, Middle Ranch Canyon, Waymuck Canyon, and Lemon Tank Canyon) of *M. clementinus* are likely to be further impacted by erosion (Table 1).

Erosion control measures are incorporated into all site feasibility studies and project planning, design, and construction to minimize the potential to exacerbate existing erosion and avoid impacts to listed species (Munson 2011a, pers. comm.). The INRMP requires that all projects include erosion conservation work and associated funding (Navy 2002, p. 4–89). These conservation actions include best management practices for construction and engineering, choosing sites that are capable of sustaining disturbance with minimum soil erosion, and stabilizing disturbed sites with native plants (Navy 2002, pp. 4–89–4–91). Additionally, large-scale island-wide maneuvers with assault vehicles have been postponed until an erosion control plan is drafted and implemented. Due to potential new training in the IOA and the Assault Vehicle Maneuver Area (AVMA), an erosion control plan to minimize the effects of the potential training is currently being developed for San Clemente Island (Munson 2011a, pers. comm.). The Navy has committed to preparing this plan and implementing it prior to any new training or operations in the IOA or AVMA (Navy 2008b, pp. 5–29, 5–30). The proposed erosion control plan includes development and application of BMPs including: establishing setbacks and buffers from steep slopes, drainages, and sensitive resources; constructing site-specific erosion control structures; conducting revegetation and routine maintenance; and monitoring and adjusting the BMPs as appropriate. Implementation of the erosion control plan is expected to prevent soil erosion from adversely affecting federally listed species, including *Malacothamnus clementinus,* and their habitats. Additionally, the plan is designed to prevent soil erosion from significantly impacting other sensitive resources, including sensitive plant and wildlife species and their habitats. This erosion control plan will address military operations associated with the IOA, AVMA, and AFP; however, since the plan is not yet finalized, it does not currently ameliorate the noted threats from erosion.

The processes and results of erosion are island-wide threats to the habitat of *Malacothamnus clementinus,* particularly to the occurrences in or adjacent to military training areas or roads. Erosion is currently impacting 6 of the 11 occurrences (54 percent) on the island, which may lead to overall habitat degradation, and cause the loss of individuals or groupings of plants in a given area. Of the six occurrences currently impacted by erosion, four (Lower China Canyon, Upper China Canyon, Horse Beach Canyon, and Lemon Tank Canyon) are in areas that are operationally closed to access, and likely not afforded conservation measures to control or monitor erosion. With these closures and continued impacts, erosion remains a threat to the habitat of *M. clementinus.*

Nonnative Species

One of the threats to *Malacothamnus clementinus* identified in the final listing rule was the spread of nonnative plants into its habitat (42 FR 40682; August 11, 1977). Nonnatives can alter habitat structure, ecological processes (such as fire regimes), nutrient cycling, hydrology, and energy budgets and compete for water, space, light, and nutrients (Zink *et al.* 1995, p. 307; Brooks 1999, pp. 16–17; Mack *et al.* 2000, p. 689). By 1992, researchers had documented 99 nonnative plant species on San Clemente Island (Kellogg and Kellogg 1994, p. 5), and transfer of nonnative species to the island continues to be a problem today (Dunn 2006, pers. comm.; Junak 2006c, pers. comm.; Kellogg 2006, pers. comm.; O'Connor 2009c, pers. comm.). Nonnative species of particular concern include *Foeniculum vulgare* (fennel) and *Brassica tournefortii* (Sahara mustard), which have already invaded *M. clementinus* habitat. Since nonnative herbivores were removed from the island, the most significant structural alteration to the habitat has been the proliferation of nonnative annual grasses, such as *Avena* spp. (oats), *Bromus* spp. (bromes), and *Vulpia*

myuros (annual fescue). Annual grasses vary in abundance with rainfall, potentially changing the vegetative community from shrubs to grasses, and may increase the fuel load in wet years (see *Factor A—Fire* section below). Nonnative grasses are present in the native maritime desert scrub vegetation community where *M. clementinus* is often found (Tierra Data Inc. 2005, pp. 36–42).

Although previous invasions of nonnatives probably were introduced in grazing fodder, current invasions are typically introduced by military activities and training on the island. Nonnative plants likely come in with equipment, vehicles, material, and personnel, and are spread by their movements. The primary pathway and vector for nonnative species into arid and semi-arid ecosystems are vehicles and vehicular routes, and disturbances along these routes and corridors enable their establishment (Stylinski and Allen 1999, p. 551; Gelbard and Belnap 2003, pp. 424–425; Von der Lippe and Kowarik 2007, p. 986). Island ecosystems and species are especially vulnerable to nonnative plant invasions due to the relative lack of biotic diversity and natural predators (Mack and Lonsdale 2002, p. 164).

Nonnative plants constitute a rangewide threat to the endemic plant community and habitat on San Clemente Island, including the habitat of all occurrences of *Malacothamnus clementinus.* Five of 11 occurrences (45 percent; Lower China Canyon, Horse Beach Canyon, Middle Ranch Canyon, Waymuck Canyon, and Lemon Tank Canyon) are within 500 ft (152 m) of Ridge Road or China Point Road, and may be subject to diffuse disturbance and road effects that degrade habitat quality along the road (Forman and Alexander 1998, p. 217). Roadsides tend to cultivate conditions (high disturbance, seed dispersal by vehicles, ample light, and water runoff) favorable to nonnative species (Forman and Alexander 1998, p. 210). Nonnatives, including *Foeniculum vulgare* and *Mesembryanthemum crystallinum* (crystalline iceplant), have been found in the disturbed shoulders along the road between Ridge Road and China Point in SHOBA (Braswell 2011, pers. obs.).

Potential impacts from nonnative plants to the habitats of the three taxa analyzed in this finding are minimized through annual implementation of the Navy's island-wide nonnative plant control program (O'Connor 2009b, pers. comm.; Munson 2011a, pers. comm.). The focus of the nonnative plant species program is to control plants on the island with the potential to adversely impact habitat of federally listed species, which includes the eradication of isolated occurrences of nonnatives and early detection and eradication of new nonnative species (Navy 2008b, p. 5–28). This program targets nonnative species for elimination using herbicide and mechanical removal, with priorities currently focused on new invasions and particularly destructive nonnative species. Nonnative species management targets are identified and prioritized annually by Navy natural resource managers (Munson 2011a, pers. comm.). These tactics have been successful in isolating and limiting some species, such as *Foeniculum vulgare,* to a few locations (Howe 2011b, pers. comm.). To reduce the potential for transport of nonnative plants to San Clemente Island, military and nonmilitary personnel inspect tactical ground vehicles and remove any visible plant material, dirt, or mud on them prior to going to San Clemente Island (USFWS 2008, p. 63). This cleaning helps prevent nonnative plants from reaching the island, but once there, nonnative plants are easily spread from one area to another by the movement of vehicles.

The Navy has implemented preventative and control programs for the nonnative plant species on the island. Although nonnatives will continue to pose a rangewide risk to the habitat of *Malacothamnus clementinus,* the Navy has taken steps to curtail habitat conversion by nonnative plants. Management and control of nonnative plants is not in place at the four occurrences that are closed to natural resource managers. However, outside of these areas, *M. clementinus* has persisted on the island and, despite the continued risk of encroachment by nonnatives, its range has continued to expand. Nonnatives remain a threat to the *M. clementinus'* habitat, particularly in the four occurrences that are closed to monitoring and management efforts.

Fire

Fire was not considered a threat to *Malacothamnus clementinus* at the time of listing (42 FR 40682; August 11, 1977). Since that time, however, over 50 percent of the island has experienced at least one wildfire (Navy 2002, Map 3–3, p. 3–32), and some areas have burned multiple times with short intervals between fires (Navy 2002, Map 3–4, p. 3–33). Between 1990 and 2004, there were 114 wildfires on the island suspected to be from Navy operational sources (Navy 2008a, pp. 5–18, 5–19). The majority of fires are concentrated in SHOBA, and potentially impact the habitat of 6 of 11 (54 percent) of *M. clementinus* occurrences (Canchalagua Canyon, Horse Beach Canyon, Lower China Canyon, Upper China Canyon, Cave Canyon, and Chukit Canyon). Three of these occurrences (Upper China Canyon, Lower China Canyon, and Horse Beach Canyon) are in Impact Areas I and II, where the risk of frequent fire (less than 5 years apart) is especially high (Navy 2002, pp. 5–93, 5–99). The effects of fire on habitat within the Impact Areas are currently unknown due to closure to natural resource personnel (USFWS 2008, p. 50).

The remaining land in SHOBA acts as a buffer from fires and munitions between the Impact Areas and the rest of the island. Fires are occasionally ignited by activities north of SHOBA, posing a low-magnitude threat to the remaining five occurrences (Lemon Tank Canyon, Box Canyon, Norton Canyon, Middle Ranch Canyon, and Waymuck Canyon) (Navy 2002, Map 3–4, p. 3–33). Due to the potential for unexploded ordnance within SHOBA, unless a fire threatens human life or facilities, it usually is allowed to burn itself out (Navy 2002, p. 3–32; Kellogg 2006, pers. comm.). This contrasts with the northern portion of the island where wildfires are usually suppressed (Kellogg 2006, pers. comm.).

Increased fire frequency (more than every 5 years) from intensified military use could lead to localized changes in vegetation. Nonnative annual grasses can increase fuel load for fire ignition and spread within the landscape. Dried grasses provide a fuel that is easily ignitable, and can extend the fire season by more than a month because they desiccate sooner than the native herbaceous flora. These grasses can also colonize a burned area better and more quickly than native species, thereby creating a cycle where fire and nonnatives are positive feedbacks for one another (Brooks *et al.* 2004, p. 677). Frequent fires within and adjoining military training areas have the potential to alter the vegetative community, resulting in the conversion of shrublands to nonnative grasslands, and a reduction in native perennial bunchgrasses (O'Leary and Westman 1988, p. 779; D'Antonio and Vitousek 1992, p. 73; Minnich and Dezzani 1998, pp. 383–384; Keeley *et al.* 2005, p. 2109; Tierra Data Inc. 2005, p. 88).

At the time of listing, fire was not identified as a threat because of lack of fire history and the low intensity of military training on the island. Since that time, military training has significantly increased, and we have better records of the fire frequency on the island. Fire is a rangewide threat to the habitat of *M. clementinus,* and 6 of

the 11 occurrences (54 percent) of *Malacothamnus clementinus* occur within areas that may be subject to recurrent fire associated with military training (Table 1; Canchalagua Canyon, Horse Beach Canyon, Lower China Canyon, Upper China Canyon, Cave Canyon, and Chukit Canyon). The remaining five occurrences are in habitat with a lower risk of recurrent fire and are less likely to experience changes in vegetation community due to fire. It is unlikely that fire control or prevention measures will be undertaken in the habitat at the three occurrences within the Impact Areas that are operationally closed. Fires that escape designated training areas may threaten other parts of the island, though because of its broad distribution, it is unlikely that one fire would be capable of spreading throughout the entire range of *M. clementinus.* The Navy's implementation of the MOFMP will limit the frequency of fires that escape Impact Areas. Through the annual review process, the Navy identifies mechanisms to reduce fire return intervals in areas where this taxon is concentrated (USFWS 2008, pp. 91–122).

The Navy has implemented preventative and control programs for fire on the island. Although fire will continue to pose a rangewide risk to the habitat of *Malacothamnus clementinus,* the Navy has taken steps to curtail habitat conversion by frequent and intense fire. Six of the 11 occurrences (54 percent) of *M. clementinus* occur within areas that may be subject to recurrent fire associated with military training. Management and control of fire is not in place at the three occurrences that are closed to natural resource managers. However, *M. clementinus* has persisted on the island and, despite the continued risk of fire, its range has continued to expand. Fire remains a threat to the *M. clementinus'* habitat, particularly in the three occurrences in the impact areas that are closed to monitoring and management efforts.

Fire Management

In 2008, the Service issued a biological opinion to the Navy on its MOFMP on San Clemente Island (USFWS 2008, pp. 1–244). The biological opinion addressed impacts to all 11 currently listed terrestrial taxa known to occur on San Clemente Island, including the three taxa analyzed in this finding. Military activities contribute to fires on San Clemente Island that may adversely affect listed plants and wildlife (USFWS 2008, p. 3). The Navy's focus on fire management is related to military training and other human-related activities and facilities, as these activities represent the primary source of ignition on the island (USFWS 2008, p. 3). Seasonal range and training modifications, based on weather patterns and moisture, are efforts taken by the Navy to assist in the prevention of fire ignition, containment, and fire suppression (USFWS 2008, pp. 3–4).

In response to the potential hazard of wildfires on San Clemente Island, firefighting techniques have improved for known operational-related ignition sources (Navy 2008b, pp. 3.11–71). Within the MOFMP, the Navy proposed the expansion of military training, as well as the implementation of a fire management plan directed at fire suppression, fire prevention, and fuels management. This plan was developed to provide flexibility for the timing of military training, and will modify the level of fire suppression resources required to be present during training activities. Real-time weather data and fuels management, in combination with the ready availability of fire suppression resources, are used to minimize the risk of fires spreading from areas approved for the use of ordnance and incendiary devices. The Navy has committed to conducting an annual review of fire management and fire occurrences that will allow for adaptive management and changes in the MOFMP (USFWS 2008, pp. 91–122).

The MOFMP was developed by the Navy to provide flexibility for the timing of military training, and to ensure that elevated fire suppression resources were present to address an increased level of training activities and fire risk. In response to the potential hazard of wildland fires on San Clemente Island, firefighting techniques have improved for known operational-related ignition sources (Navy 2008b, pp. 3.11–71). The MOFMP defines the conditions under which certain fire protection resources must be available and ready for use (for example, a dedicated fire helicopter) (USFWS 2008, p. 53). The MOFMP calls for the use of real-time weather and fire forecasting to determine when certain munitions may be used and when helicopters must be present. After extensive consultation with the Navy, we issued a biological opinion on the MOFMP that concluded the MOFMP would not jeopardize the continued existence of listed species, including the three taxa analyzed in this Finding (USFWS 2008, pp. 1–237). While the increase in military training and fire suppression could affect habitat of *Malacothamnus clementinus* (as well as *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea*), we have worked with the Navy to avoid and minimize the impacts to habitat of individuals or occurrences to the extent practicable while meeting the operational needs of the Navy.

Fire suppression activities described in the MOFMP and used by the Navy include creating firebreaks (bare soil created through manual or herbicide removal of vegetation), use of fire retardants (spraying of fire retardants along fire breaks) and aerial drops of saltwater from aircraft. Fire management on San Clemente Island includes the creation of fuelbreaks within areas of SHOBA that impact the habitat at three *Malacothamnus clementinus* occurrences (Horse Beach Canyon, Lower China Canyon, and Upper China Canyon) (USFWS 2008, p. 57). Fuelbreaks are maintained along the boundaries of Impact Areas I and II to prevent the spread of fire outside of the areas (USFWS 2008, p. 57). Fuelbreaks on the island are created using herbicides and strip burning, and maintained using herbicides and fire retardant (Phos-Chek D75F) (USFWS 2008, pp. 97–98). The use of fire retardant or herbicide, as proposed in the MOFMP, results in the loss of *M. clementinus* and *Castilleja grisea* habitat within the fuelbreak footprint (USFWS 2008, p. 81). The use of Phos-Chek may also allow or facilitate the expansion and persistence of nonnative species due to the fertilizing effect of this retardant (Larson *et al.* 1999, p. 115; Kalabokidis 2000, p. 130). Fire retardants act as a source of nitrogen and phosphorous, which are nutrients that can affect plant species composition (Larson and Duncan 1982, p. 702). The Navy has begun a study on the effects of Phos-Chek on San Clemente Island vegetation, and has avoided application of Phos-Chek within 300 ft (91.4 m) of mapped listed species (including *M. clementinus* and *C. grisea*) to the extent allowable with fuelbreak installation (USFWS 2008, pp. 97–98).

It is anticipated that the Navy will construct fuelbreaks to minimize the risk of fire spreading from areas of live fire and demolition training north of SHOBA (USFWS 2008, p. 98). In the MOFMP, the Navy agreed to conduct preseason briefings for firefighting personnel on the guidelines for fire suppression, and the limitations associated with the use of Phos-Chek and saltwater drops (USFWS 2008, pp. 97–98). The impact of saltwater on the habitat of *M. clementinus* (and *Castilleja grisea*) has not yet been assessed. However, if salt persists, the composition of the plant community could change to favor more salt-tolerant taxa. Fire management could have a

direct impact on the habitat and species composition of at least three occurrences of *M. clementinus.*

The Navy's implementation of a MOFMP will help to reduce the risk of habitat conversion by fire, though the habitat of *Malacothamnus clementinus* could be altered by the management of fire. Although the threat is ameliorated through implementation of the MOFMP, fire management remains a threat to *M. clementinus,* particularly to the three occurrences that fall within areas that may be managed using fuel breaks and fire suppression.

Summary of Factor A

From 1850 until 1934, San Clemente Island was used for sheep ranching, cattle ranching, goat grazing, and pig farming (Navy 2002, pp. 3–4). The effects of these grazers, which were not completely removed from the island until 1992, on the habitat and plants were one of the original reasons for classifying *Malacothamnus clementinus* as endangered in the 1977 listing rule (42 FR 40682); this threat is now eliminated. Currently, *M. clementinus* is threatened by the destruction and modification of habitat caused by impacts related to designated land use, erosion, the spread of nonnative plants, fire, and fire management practices. To help ameliorate these threats, the Navy is implementing a MOFMP and the island-wide control of nonnative plants as outlined in the INRMP (Navy 2002, pp. 3–114–3–116; USFWS 2008, pp. 1–237). The fire management plan within the MOFMP has been used to inform strategic decisions for training using live fire or incendiary devices. Three occurrences within the Impact Areas are now closed to natural resource monitoring and management, and currently their status is unknown; a fourth occurrence (Lemon Tank) is also closed but is not within the Impact Areas.

Per our 2008 biological opinion, the Navy has postponed major troop and assault vehicle maneuvers across the island until it completes and implements an erosion control plan (USFWS 2008, pp. 62, 87). Natural resource managers have been successful at decreasing the prevalence of particularly destructive nonnatives, such as *Foeniculum vulgare.* Management actions directed at conservation of *Malacothamnus clementinus* may not be fully implemented at 4 of the 11 known occurrences (Lower China Canyon, Upper China Canyon, Horse Beach Canyon, and Lemon Tank Canyon) currently closed to natural resource access. This will reduce and fragment the effectiveness of the conservation measures. Although the species is expanding, and ongoing and anticipated conservation efforts contribute to its conservation, military training activities, erosion, nonnatives, and fire have ongoing impacts to all *M. clementinus* occurrences rangewide both now and into the future.

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

In the listing rule (42 FR 40682; August 11, 1977), the Service did not identify any threats from overutilization, and there is no new information to indicate that overutilization is a threat to *Malacothamnus clementinus.* Although herbarium specimens of *M. clementinus* and seeds have been collected for research and seed banking, overutilization of *M. clementinus* for any purpose is not currently considered a threat nor is expected to be in the future.

Factor C. Disease or Predation

Grazing of feral goats and the rooting of feral pigs was considered a threat under this category to *Malacothamnus clementinus* in the final listing rule (42 FR 40682, at 40684; August 11, 1977). This threat was ameliorated by the removal of the goats and pigs from San Clemente Island in 1992, as recognized in our 2007 status review (USFWS 2007a, p. 16). Currently, no other predators or diseases on San Clemente Island are known to pose a significant threat to *M. clementinus,* nor are they expected to in the future.

Factor D. Inadequacy of Existing Regulatory Mechanisms

The Act requires us to examine the adequacy of existing regulatory mechanisms with respect to those existing and foreseeable threats that may affect *Malacothamnus clementinus.* The inadequacy of existing regulatory mechanisms was not indicated as a threat to *M. clementinus* at listing (42 FR 40682; August 11, 1977). Since it was listed as endangered, the Act has been and continues to be the primary Federal law that affords protection to *M. clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea.* The Service's responsibilities in administering the Act include sections 7, 9, and 10.

Section 7(a)(1) of the Act requires all Federal agencies, including the Navy, to utilize their authorities in furtherance of the purposes of the Act by carrying out programs for the conservation of endangered and threatened species. Section 7(a)(2) of the Act requires Federal agencies, including the Service and the Navy, to ensure that actions they fund, authorize, or carry out do not ''jeopardize'' the continued existence of a listed species or result in the destruction or adverse modification of habitat in areas designated by the Service to be critical. Critical habitat has not been designated or proposed for this taxon. A jeopardy determination is made for a project that is reasonably expected, either directly or indirectly, to appreciably reduce the likelihood of both the survival and recovery of a listed species in the wild by reducing its reproduction, numbers, or distribution (50 CFR 402.02). A non-jeopardy opinion may include reasonable and prudent measures that minimize the extent of impacts to listed species associated with a project. Under section 9(a)(2) of the Act, with respect to endangered plant taxa, it is unlawful to remove and reduce to possession (collect) any such taxon from areas under Federal jurisdiction; maliciously damage or destroy any such taxon on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law.

Since it was first listed in 1977, the Navy has consulted and coordinated with us regarding the effects of various activities on *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea.* In November 2008, we completed a biological opinion describing the impact of the Navy's military training program proposed in the MOFMP on 11 federally listed species that occur on San Clemente Island (USFWS 2008, pp. 1–237). We considered the status and distribution of *M. clementinus,* the various management strategies, and the avoidance and minimization measures in place and those the Navy will implement with the new plan (as well as *A. d.* var. *traskiae* and *C. grisea*). Additionally, the Service made conservation recommendations within the biological opinion, including: (1) Considering recommended actions from the 5-year review in the upcoming revision of the INRMP, and (2) propagation and outplanting of narrowly distributed, listed plant species. We concluded that ongoing and likely impacts from the proposed increases in military training activities would not jeopardize the continued existence of *M. clementinus, A. d.* var. *traskiae,* and *C. grisea* (USFWS 2008, pp. 1–237).

Thus, listing *Malacothamnus clementinus* provided a variety of protections, including the prohibitions against removing or destroying plants within areas under Federal jurisdiction and the conservation mandates of section 7 for all Federal agencies. If *M. clementinus* were not listed, these protections would not be provided. Thus, we must evaluate whether other regulatory mechanisms would provide adequate protections absent the protections of the Act.

Other Federal Protections

National Environmental Policy Act (NEPA)

All Federal agencies are required to adhere to the National Environmental Policy Act (NEPA) of 1970 (42 U.S.C. 4321 *et seq.*) for projects they fund, authorize, or carry out. The Council on Environmental Quality's regulations for implementing NEPA (40 CFR parts 1500–1518) state that agencies shall include a discussion on the environmental impacts of the various project alternatives (including the proposed action), any adverse environmental effects that cannot be avoided, and any irreversible or irretrievable commitments of resources involved (40 CFR part 1502). The NEPA is a disclosure law, and does not require subsequent minimization or mitigation measures by the Federal agency involved. Although Federal agencies may include conservation measures for *Malacothamnus clementinus* as a result of the NEPA process, any such measures are typically voluntary in nature and are not required by the statute. NEPA does not itself regulate activities that might affect *M. clementinus,* but it does require full evaluation and disclosure of information regarding the effects of contemplated Federal actions on sensitive species and their habitats.

On San Clemente Island, the Navy must meet the NEPA requirements for actions significantly affecting the quality of the human environment. Typically, the Navy prepares Environmental Assessments and Environmental Impact Statements on operation plans and new or expanding training actions. Absent the listing of *M. clementinus,* we would expect the Navy to continue to meet the procedural requirements of NEPA for its actions, including evaluating the environmental impacts to rare plant species and other natural resources. However, as explained above, NEPA does not itself regulate activities that might affect *M. clementinus.*

Sikes Act Improvement Act (Sikes Act)

The Sikes Act (16 U.S.C. 670) authorizes the Secretary of Defense to develop cooperative plans with the Secretaries of Agriculture and the Interior for natural resources on public lands. The Sikes Act Improvement Act of 1997 requires Department of Defense installations to prepare Integrated Natural Resources Management Plans (INRMPs) that provide for the conservation and rehabilitation of natural resources on military lands consistent with the use of military installations to ensure the readiness of the Armed Forces. An INRMP is a plan intended ''* * * to guide installation commanders in managing their natural resources in a manner that is consistent with the sustainability of those resources while ensuring continued support of the military mission'' (Navy 2002, p. 1–1). INRMPs are developed in coordination with the State and the Service, and are generally updated every 5 years. Although an INRMP is technically not a regulatory mechanism because its implementation is subject to funding availability, it is an important guiding document that helps to integrate natural resource protection with military readiness and training.

San Clemente Island Integrated Natural Resources Management Plan (INRMP)

Pursuant to the Sikes Act, the Navy adopted an INRMP for San Clemente Island that targets multiple objectives towards protection of *Malacothamnus clementinus* and its habitat, and helps to reduce threats to this taxon (Navy 2002). The INRMP includes provisions to comply with the Endangered Species Act, the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601), the Resources Conservation and Recovery Act (42 U.S.C. 6901), the Federal Noxious Weed Act of 1974 (7 U.S.C. 2801), and the Soil Conservation Act (16 U.S.C 3B). Goals and objectives in the INRMP for specified management units on the island are identified based on each unit's ranking for both military and natural resource value. Natural resource management objectives for the management units are stepped down from broader natural resource objectives identified for species and habitats. Of relevance to the protection of *M. clementinus,* the INRMP includes an objective to: ''Protect, monitor, and restore plants and cryptograms in order to manage for their long-term sustainability on the island'' (Navy 2002, p. 4–39).

The INRMP specifically includes the following objectives for *Malacothamnus clementinus* management: removal of nonnatives, restoration of native plant communities, monitoring of the species, studies of the species' response to fire, and studies and inventory of insect pollinators (Navy 2002, pp. D–20, D–21). Other INRMP strategies that target the plant communities within which the three species occur include: controlling erosion, with priority given to locations where erosion may be affecting listed species; producing a new vegetation map; reducing nonnative plant cover from 1992–1993 baseline levels; managing the size and intervals of fires; experimenting with fire management to improve native plant dominance while protecting sensitive plant occurrences; and conducting genetic and biological studies of *M. clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea* across the island.

To date, multiple INRMP management strategies, or aspects of them, have been implemented. The Navy has implemented rare plant surveys and has documented new occurrences of *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea* on the island. Genetic research and natural history studies have also been performed. Concerted efforts have been made to control escape of fire from military training activities, and the Navy has annually implemented nonnative plant species control activities, with a focus on species that have the potential to compete with listed species. Overall, considerable progress has been made toward the identified INRMP goals to maintain sustainable occurrences and implement strategies that help reduce threats to *M. clementinus, A. d.* var. *traskiae,* and *C. grisea.*

The INRMP is an important guiding document that helps to integrate the military's mission with natural resource protection on San Clemente Island. Although the INRMP includes objectives targeted toward habitat protection of optimal *Malacothamnus Clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea* habitat, Navy operational needs may diverge from INRMP natural resource goals. For example, control measures for erosion, fire, and nonnatives described in the INRMP may not be implemented effectively or consistently in those areas that are operationally closed due to the presence of unexploded ordnance. The MOFMP, Erosion Control Plan, and nonnative plant species control conducted on the island are discussed above under *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range.* Absent listing under the Act, the Navy would still be required to develop and

implement INRMPs under the Sikes Act. However, as noted under the other factors, while the INRMP helps to ameliorate threats and provides some protection for *M. clementinus* occurrences, those occurrences within Impact Areas or operationally closed areas may not benefit from the conservation measures. While the INRMP has reduced the severity of threats and contributed to conservation of the species, it still allows for land use consistent with military readiness and training. Thus, Navy activities will continue to impact *M. clementinus* as described under Factor A.

State Protections

Since the time of listing, *Malacothamnus clementinus* has benefited from additional State protections under the Native Plant Protection Act (NPPA) and California Endangered Species Act (CESA; listed 1982). However, the range of *M. clementinus* is restricted to a Federal military installation, so listing under NPPA and CESA may only afford protection to this species in rare instances when the lead agency is a non-Federal agency or when proposed activities fall under other State laws.

Summary of Factor D

In continuance of a long history of cooperative conservation efforts, the Navy has implemented several conservation actions that benefit this taxon. The Navy has a MOFMP to reduce the risk of fire on the island and a nonnative plant species control program. Following review of the Navy's MOFMP, we issued a non-jeopardy biological opinion, which included measures that the Navy has implemented to manage fires and avoid and minimize the impacts of military activities on listed plants. The provisions included in the San Clemente Island INRMP provide protection to accessible *Malacothamnus clementinus* occurrences, and adaptive management of their habitat, to help address threats from military activities and nonnative plants. However, as indicated in the discussion under *Factor A,* not all of the management tools described in the INRMP are in place, and conservation measures may not be implemented at several of the closed occurrences of the species. *Malacothamnus clementinus* occurrences are afforded some protection through Federal and military mechanisms. However, in the absence of the Act, the existing regulatory mechanisms are not currently adequate to provide for the long-term conservation of *M. clementinus*.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

The 1977 listing rule identified nonnatives as a threat to *Malacothamnus clementinus* under *Factor E:* competition from nonnative plants (42 FR 40682; August 11, 1977). In this 5-factor analysis, impacts from nonnative plants are discussed above under *Factor A* as a threat to habitat. Other Factor E threats identified since listing that currently impact *M. clementinus* plants include: (1) Movement of vehicles and troops, (2) fire, (3) climate change, and (4) genetic diversity. Factor E addresses threats to individuals of the species, rather than the habitat modification threats that are discussed in Factor A. Therefore, while some threats are discussed in both sections, in this section we are focusing on the direct impacts to individuals of *M. clementinus*.

Movement of Vehicles and Troops

Military training activities within SWAT, TAR, and the IOA often entail the movement of vehicles and troops over the landscape with the potential of trampling or crushing individual plants of all three species. SWATs are large areas that typically support the movement of small groups to reach an objective or destination. The dispersed movement of troops through these areas is likely to result in occasional trampling of plants, with minor or temporary impacts at the occurrence level. TARs are generally smaller areas designated to accommodate intensive use and bombardment. Plants located within TARs are therefore more vulnerable to being trampled by vehicle and troop movements, particularly as the level of military training increases in these areas.

Use of the IOA, at its highest intensity, involves the movement of battalion-sized landings of troops (1,500 individuals) from the northern to southern end of the island several times a year. During such operations, it is anticipated that about half of the troops will travel on roads in vehicles, while the other half will proceed on foot. Based on the distribution of *Malacothamnus clementinus* occurrences and type of troop movements likely to occur, impacts due to trampling and crushing are likely to occur within the IOA, along roads and in the Impact Areas. Specifically, major troop movements and vehicle landings are planned through Horse Beach and the Horse Beach Canyon occurrence, with troops and assault vehicles moving north along Horse Beach Road from the beach (USFWS 2008, pp. 30, 41). These operations could affect the Horse Beach Canyon and Lower China Canyon occurrences (USFWS 2008, pp. 85–86).

The implementation of conservation measures and the status of the plants at Horse Beach Canyon, Upper and Lower China Canyon, and Lemon Tank Canyon are currently unknown because they are closed to natural resource personnel (USFWS 2008, p. 50). Four of 11 occurrences (36 percent; Lower China Canyon, Upper China Canyon, Horse Beach Canyon, and Lemon Tank Canyon) are partially or wholly within the boundaries of a training area (Impact Area or SWAT) and are likely to sustain some losses due to trampling associated with the proposed increases in troop and vehicle movements. With the lack of access to all four occurrences, the management of this threat and the ability to assess the plant's condition is compromised, and the full effects of trampling on the species are unknown. Therefore, the movement of troops and vehicles is still considered a threat to *M. clementinus*.

Fire

Although not specifically mentioned in the listing rule, intense or frequent fires impact plants at 6 of the 11 occurrences (54 percent) of *Malacothamnus clementinus*. In the *Factor A* discussion above, we addressed impacts of fire on the habitat. This section includes discussion on the discrete threat to individuals of *M. clementinus*. As discussed in the Background section, it is unknown if *M. clementinus* is adapted to fire, though it is likely that this species is resilient to occasional fires (USFWS 1984. p. 48; Navy 2002, D–20; USFWS 2007a, p. 3). No direct studies have been done on the effects of fire on *M. clementinus;* however, its continued presence in areas that have burned (such as in SHOBA), and its ability to vegetatively reproduce, suggest it is at least tolerant of periodic fire. The species' adaptation to fire frequency is unknown. In areas that burn on a more frequent basis, the seed bank may become depleted if individuals burn before they produce seeds. Additionally, *M. clementinus* was observed to have low numbers of seeds in natural populations (Junak and Wilken 1998, p. 291). Frequent burns might exhaust the already small seed bank, and inhibit reproduction in *M. clementinus*.

Malacothamnus clementinus occurs in some areas of the island that may experience elevated fire frequency, such as in SHOBA and especially within the Impact Areas (Lower China Canyon, Upper China Canyon, and Horse Beach

Canyon) (see *Factor A* above). The Navy's fire management practices are expected to minimize ignitions as well as the spread of fires (see *Factor A*). However, fires ignited within the boundaries of the Impact Areas will not be suppressed due to closures and safety restrictions within these areas. This would affect the three occurrences *of M. clementinus* found within these areas. The Navy conducts annual reviews of fire management and fire occurrences to allow for adaptive management. These measures should minimize the frequency and spread of fires that could result in the loss of *M. clementinus* individuals or occurrences. The Navy's ongoing implementation of the MOFMP will limit the frequency with which fires escape Impact Areas and TAR, and that, through the annual review process, the Navy will identify mechanisms to reduce fire return intervals in areas not designated for incendiary use (USFWS 2008, pp. 76–91).

Although the Navy has planned and implemented fire management, fire still affects six occurrences of *Malacothamnus clementinus.* Three of these occurrences fall within areas that are closed to natural resources management and prone to fire due to bombing of the area. Therefore, fires within these areas are allowed to burn, affecting the individuals and occurrences. Due to these conditions and the continued impacts of fire within SHOBA, fire remains a Factor E threat to the existence of *M. clementinus* both currently and in the future.

Climate Change

Consideration of climate change is a component of our analyses under the Endangered Species Act, and applies in this finding to our analysis of all three taxa. In general terms, ''climate change'' refers to a change in the state of the climate (whether due to natural variability, human activity, or both) that can be identified by changes in the mean or variability of its properties, and that persists for an extended period—typically decades or longer (Intergovernmental Panel on Climate Change (IPCC) 2007a, p. 78).

Changes in climate are occurring. Examples include warming of the global climate system over recent decades, and substantial increases in precipitation in some regions of the world and decreases in other regions (for these and other examples see IPCC 2007a, p. 30; Solomon *et al.* 2007, pp. 35–54, 82–85).

Most of the observed increase in global average temperature since the mid-20th century cannot be explained by natural variability in climate, and is very likely due to the observed increase in greenhouse gas concentrations in the atmosphere as a result of human activities, particularly emissions of carbon dioxide from fossil fuel use (IPCC 2007a, p. 5 and Figure SPM.3; Solomon *et al.* 2007, pp. 21–35). Therefore, to project future changes in temperature and other climate conditions, scientists use a variety of climate models (which include consideration of natural processes and variability) in conjunction with various scenarios of potential levels and timing of greenhouse gas emissions (e.g., Meehl *et al.* 2007 entire; Ganguly *et al.* 2009, pp. 11555, 15558; Prinn *et al.* 2011, pp. 527, 529).

The projected magnitude of average global warming for this century is very similar under all combinations of models and emissions scenarios until about 2030. Thereafter, the projections show greater divergence across scenarios. Despite these differences in projected magnitude, however, the overall trajectory is one of increased warming throughout this century under all scenarios, including those which assume a reduction of greenhouse gas emissions (Meehl *et al.* 2007, pp. 760–764; Ganguly *et al.* 2009, pp. 15555–15558; Prinn *et al.* 2011, pp. 527, 529). (For examples of other global climate projections, see IPCC 2007b, p. 8).

Various types of changes in climate can have direct or indirect effects on species and these may be positive or negative depending on the species and other relevant considerations, including interacting effects with existing habitat fragmentation or other non-climate variables. There are three main components of vulnerability to climate change: Exposure to changes in climate, sensitivity to such changes, and adaptive capacity (IPCC 2007, p. 89; Glick *et al* 2011, pp. 19–22). Because aspects of these components can vary by species and situation, as can interactions among climatic and non climatic conditions, there is no single way to conduct our analyses. We use the best scientific and commercial data available to identify potential impacts and responses by species that may arise in association with different components of climate change, including interactions with non climatic conditions.

As is the case with all potential threats, if a species is currently affected or is expected to be affected in a negative way by one or more climate-related impacts, this does not necessarily mean the species meets the definition of a threatened or endangered species as defined under the Act. The impacts of climate change and other conditions would need to be to the level that the species is in danger of extinction, or likely to become so, throughout all or a significant portion of its range. If a species is listed as threatened or endangered, knowledge regarding the species' vulnerability to, and impacts from, climate-associated changes in environmental conditions can be used to help devise appropriate strategies for its recovery.

While projections from global climate model simulations are informative and in some cases are the only or the best scientific information available, various downscaling methods are being used to provide higher-resolution projections that are more relevant to the spatial scales used to assess impacts to a given species (see Glick *et al,* 2011, pp. 58–61). With regard to the area of analysis for the San Clemente Island and specifically for the three species at issue here, downscaled projections are available at least with respect to southern California.

San Clemente Island is located within a Mediterranean climatic regime, but with a significant maritime influence. Climate change models indicate a 1.8 to 5.4 degrees Fahrenheit (1 to 3 degrees Celsius) increase in average temperature for southern California by the year 2070 (Field *et al.* 1999, p. 5; Cayan *et al.* 2008, p. S26; PRBO 2011, p. 40). Over the same time span, a 10 to 37 percent decrease in annual precipitation is predicted (PRBO 2011, p. 40), though other models predict little to no change in annual precipitation (Field *et al.* 1999, pp. 8–9; Cayan *et al.* 2008, p. S26). Although the island has a short rainy season, the presence of fog during the summer months helps to reduce drought stress for many plant species (Halvorson *et al.* 1988, p. 111; Fischer *et al.* 2009, p. 783). However, fog projections remain uncertain (Field *et al.* 1999, pp. 21–22). There is also substantial uncertainty in precipitation projections, and relatively little consensus concerning precipitation patterns and projections for southwestern California (PRBO 2011, p. 40). San Clemente Island typically gets less rainfall than the neighboring mainland areas (Tierra Data 2005, p. 4). Therefore, the models may underestimate the effects of precipitation changes on island vegetation. Additionally, *Malacothamnus clementinus* typically occurs on the western side of the island, which is a less productive and drier climate (Tierra Data 2005, p. 7). Less rainfall and warmer air temperatures could limit the range of *M. clementinus,* although there is no direct research on the effects of climate change on the species.

The impacts of predicted future climate change to *Malacothamnus clementinus* remain unclear. The best available information does not provide sufficient certainty on how and when climate change will affect the species, the extent of average temperature increases in California, or potential changes to the level of threat posed by fire on San Clemente Island. The most recent literature on climate change includes predictions of hydrological changes, higher temperatures, and expansion of drought areas (IPCC 2007a, pp. 1–18). While we recognize that climate change is an important issue with potential effects to listed species and their habitats, the best available information does not inform accurate predictions regarding its impacts to *M. Clementinus* at this time.

Genetic Diversity

As discussed in the Background section, *Malacothamnus clementinus* has low genetic variability when compared with other island endemic plant species (Helenurm 1999, p. 40). This lack of diversity could hinder the species' ability to persist through a fluctuating environment or stochastic event. Although the number of known occurrences of *M. clementinus* has increased from 3 to 11 since its listing, there appears to be little gene flow among occurrences, and each comprises a relatively small number of genetically distinct individuals (Junak and Wilken 1998, p. 290; Helenurm 1999, p. 39). Genetic fitness typically decreases with decreasing genetic variation and population size (Leimu *et al.* 2006, p. 942). Specifically, small population size and low levels of genetic interchange make *M. clementinus* occurrences particularly vulnerable to inbreeding depression and loss of genetic variability due to genetic drift (the change in the frequency of appearance of a gene in a population of organisms due to chance or random events) (Ellstrand and Elam 1993, p. 217).

Genetic analysis suggests that *M. clementinus* has very low genetic variation at both the species and population levels (Helenurm 1997, p. 50; Helenurm 1999, p. 39), even far below average when compared to other endemic plant species (Helernurm 1999, p. 39). Low genetic variation may affect the ability of occurrences to adjust to novel or fluctuating environments, survive stochastic events, or maintain high levels of reproductive performance (Huenneke 1991, p. 40). This constitutes a species and rangewide threat for which there is no immediate solution or amelioration.

Malacothamnus clementinus occurrences have low seed production, suggesting the existence of a self-incompatibility mechanism (Helenurm 1997, p. 50; Junak and Wilken 1998, p. 291; Helenurm 1999, p. 39). Low seed production may also be the result of low pollinator visitation and, in combination with low genetic diversity, could contribute to observed low recruitment in populations (Huenneke 1991, pp. 37–40; Junak and Wilken 1998, p. 291; Helenurm 1999, pp. 39–40). Although studies show that patches of plants are not made up of a single clonal individual (clump of genetically identical stems resulting from vegetative reproduction), it is still possible that patches comprise closely related individuals that share alleles controlling their ability to successfully reproduce with each other (Helenurm 1999, pp. 39–40). Although this species has apparently expanded its range from that known at the time of listing and persisted through habitat disturbance, it may still remain susceptible to extirpation from low genetic variation and genetic drift. A reduction in occurrence size through years of grazing could have substantially lowered genetic variation (Helenurm 2005, p. 1221), which could decrease genetic fitness and compromise the species' ability to adapt to stochastic events (Huenneke 1991, p. 40). The apparent loss of genetic diversity resulting in current low genetic variation and low recruitment constitute a species and rangewide threat to *M. clementinus.*

Summary of Factor E

Threats associated with trampling from military activities, fire, climate change, and low genetic diversity continue to impact *Malacothamnus clementinus* at all of the 11 occurrences on San Clemente Island. Trampling and crushing of individual plants are likely to increase at four occurrences (36 percent) in association with increased training levels on the island. However, this taxon has expanded its distribution on the island and the Navy is implementing conservation measures that will improve conditions for *M. clementinus.* Military training activities have the potential to ignite fires within occurrences or that spread to habitat supporting this species. In preparation for these training efforts, the Navy implemented a MOFMP to limit the frequency of fires escaping from the Impact Areas, although suppression likely will not occur within the boundaries of the Impact Areas. Climate change may also likely influence *M. clementinus,* though the effects are largely unknown. The genetic fitness of *M. clementinus* may be threatened by low genetic diversity and small population size. The threats described here affect all of the occurrences of *M. clementinus* both now and in the future; therefore, these threats also affect its recovery.

Combination of Factors—Malacothamnus clementinus

A species may be affected by more than one threat in combination. Within the preceding review of the five listing factors, we have identified multiple threats that may have interrelated impacts on *Malacothamnus clementinus* (these interrelated impacts also occur for *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea*). For example, fires (Factor A and E) may be more intense or frequent in the habitat if there are greater amounts of nonnative grass (Factor A) present in the vegetative community. Similarly, fires (Factor A and E) also may become more frequent if the climate changes (Factor E) into a drier, hotter environment. The movement of troops and vehicles (Factor E) and land use (Factor A) can also create more disturbance and erosion (Factor A) in *M. clementinus'* habitat (as well as *A. d.* var. *traskiae* and *C. grisea* habitat). The historical past on San Clemente is an illustration of interacting threats: Nonnative herbivores (Factor C) ate and killed much of the vegetation, causing greater impacts of erosion (Factor A) on the island. Thus, the species' productivity may be reduced because of these threats, either singularly or in combination. However, it is not necessarily easy to determine (nor is it necessarily determinable) whether a particular threat is the primary threat having the greatest effect on the viability of the species, or whether it is exacerbated by or working in combination with other threats to have cumulative or synergistic effects on the species. While the combination of factors is a threat to the existence of *M. clementinus,* we are unable to determine the magnitude or extent of cumulative or synergistic effects of the combination of factors on the viability of the species at this time.

***Acmispon dendroideus* var. *traskiae* (San Clemente Island lotus)**

In the 2007 status review, we acknowledged that the predominant threat at listing (grazing and rooting from feral herbivores) was ameliorated with the removal of goats and pigs from the island in 1992 (USFWS 2007b, pp. 1–22). Threats to *Acmispon dendroideus* var. *traskiae* identified in the 2007 status review include: (1) Erosion, (2) nonnative species, (3) fire,

(4) land use, (5) access to SHOBA, and (6) hybridization. Impacts from erosion, nonnatives, fire, and land use are discussed below under *Factor A,* and hybridization is discussed under *Factor E* below. As discussed above, access to SHOBA is not considered a threat, though it limits our ability to assess all occurrences of the taxon reviewed here.

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

The final listing rule (42 FR 40682; August 11, 1977) identified the following threats to *Acmispon dendroideus* var. *traskiae:* Habitat alteration and destruction, competition from nonnative species, and direct predation caused by nonnative herbivores (goats and pigs). The vegetation on San Clemente Island has rebounded, and the status of many rare plant occurrences, including *A. d.* var. *traskiae,* has improved with the final removal of herbivores in 1992 (Junak and Wilken 1998, p. 18; Junak 2006a, pers. comm.). Although the principle threat to *A. d.* var. *traskiae* identified in the final listing rule has been eliminated, erosion as a result of overgrazing and invasive nonnative plants remain ongoing threats to habitat of *A. d.* var. *traskiae.* Habitat alteration and disturbance from the Navy's use of the island for military operation and training were identified as additional threats to the habitats occupied by *A. d.* var. *traskiae* in the Recovery Plan and the 2007 status review (USFWS 1984, pp. 58–63; USFWS 2007b, pp. 11, 12). Additional threats recognized since listing include land use by military training activities, and fire. As outlined below, we discuss impacts of the following threats that affect the habitat or range of *A. d.* var. *traskiae:* (1) Land use, (2) erosion, (3) nonnative plants, and (4) fire.

Land Use

Eight of 29 *Acmispon dendroideus* var. *traskiae* occurrences (28 percent; Eagle Canyon, Bryce Canyon, North Mosquito Cove, Canchalagua Canyon, Thirst Canyon, Cave Canyon, Horse Canyon, and Pyramid Head) occur within SHOBA, where impacts are more likely. Most of the land area of the SHOBA serves as a buffer from the Impact Areas, although military training in parts of SHOBA could result in habitat alteration due to OHV and large-scale troop movements through the military impact and training areas (IOA and AVMA). Most of the occurrences within SHOBA are located along the eastern escarpment, which should provide a level of protection from training impacts. Large-scale troop movements are less likely in this area, because of the extreme slope of the escarpment. Training impacts may become difficult to assess and manage with the recent closure of the eastern escarpment due to unexploded ordnance.

Four of 29 of *A. d.* var. *traskiae* occurrences (14 percent; Canchalagua Canyon, Middle Island Plateau, North Mosquito Cove, and Eagle Canyon) are within or partially within the IOA and may experience direct impacts, while nine occurrences (31 percent; Upper Middle Ranch Canyon, Warren Canyon, Horton Canyon, Upper Wallrock Canyon, Tota Canyon, Lemon Tank Canyon, Larkspur Canyon, Chamish Canyon, and North Island Terraces) are within 1,000 ft (305 m) of the IOA, and could experience diffuse or accidental impacts associated with troop movement. These areas near the IOA are at less risk of disturbance than the occurrences within the IOA, and would only be likely to sustain diffuse or accidental impacts to the habitat. While the increase in military training could affect the species, the Navy through implementation of the INRMP will avoid and minimize impacts to individuals or occurrences of *A. d.* var. *traskiae* (as a rare plant species), to the extent practicable while meeting operational needs (Navy 2002, p. 1–2) (see above discussion on Land Use under *Malacothamnus clementine—Factor A*).

Because of the taxon's close proximity to Navy facilities, military activities have the potential to impact habitat at one of the largest known occurrences of *Acmispon dendroideus* var. *traskiae,* near Wilson Cove. All construction, maintenance, and training activities in the Wilson Cove area go through a site approval request process. Through this process, the areas are assessed to see if the activities will potentially impact any listed species, including *A. d.* var. *traskiae.* Part of this occurrence is within a TAR where tactical training and movement are projected to occur, possibly causing habitat damage through troop traffic (USFWS 2008, pp. 119–120). Work was done recently at Wilson Cove that affected *A. d.* var. *traskiae,* and the Navy assessed the impact to be a loss of habitat occupied by 50 plants. The Navy worked to salvage plant material and outplant back to the site. Thus far, this outplanting has been successful, the habitat has rebounded, and more plants are present in the area than before the work was done (Munson 2011a, pers. comm.).

Twenty-four of 29 occurrences (83 percent) of *A. d.* var. *traskiae* are located outside of heavily impacted training areas. Though five occurrences (17 percent; Wilson Cove, Canchalagua Canyon, Middle Island Plateau, North Mosquito Cove, and Eagle Canyon) are partially or wholly within the boundaries of an IOA or TAR, many of the impacts to these occurrences would be diffuse, and are unlikely to have a high impact on the species' habitat. Although land use is likely to impact *A. d.* var. *traskiae* habitat, the Navy has demonstrated its commitment to help conserve and manage listed species on the island. Land use appears to pose a high-magnitude threat to the habitat of a small percentage of the occurrences of *A. d.* var. *traskiae* on San Clemente Island.

Erosion

Erosion and associated soil loss caused by browsing of feral goats and rooting of feral pigs likely modified the island's habitat (Navy 2002, p. 1–14). Defoliation from overgrazing increased erosion over much of San Clemente Island. In the INRMP, erosion was identified as a threat to the canyon woodland habitat and maritime desert scrub where *Acmispon dendroideus* var. *traskiae* occurs (Navy 2002, p. 4–3). Gullying and other processes may concentrate surface runoff to unnatural levels, leading to accelerated erosion in the canyons below (Tierra Data Inc. 2007, p. 6). *Acmispon dendroideus* var. *traskiae* occurs within steep canyon areas where such concentration of flows may be a threat to its habitat or range.

Although more vegetative cover is now present than at the time of listing, erosion is still a threat to the recovery of *Acmispon dendroideus* var. *traskiae,* especially in areas where it grows in close proximity to roads. The Navy studied the potential for erosion from several proposed military activities (Tierra Data Inc. 2007, pp. 1–45, Appendices). Increased military activities, especially where the taxon is located within training area boundaries (IOA), are expected to cause erosion through soil compaction or other soil disturbances in occupied habitat areas associated with roadways or vehicle maneuver areas (Tierra Data Inc. 2007, p. 12). Four of 29 *A. d.* var. *traskiae* occurrences (14 percent; Middle Island Plateau, Canchalagua Canyon, North Mosquito Cove, and Eagle Canyon) are within or partially within the IOA, and are likely to be further impacted by erosion (Table 1). Three of these occurrences (Canchalagua Canyon, North Mosquito Cove, and Eagle Canyon) are along the eastern escarpment, which has recently been closed to biological monitoring due to

unexploded ordnance. The threat of erosion to this area will be difficult to assess if the closure remains into the future. Nine of 29 occurrences (31 percent; Upper Middle Ranch Canyon, Warren Canyon, Horton Canyon, Upper Wallrock Canyon, Tota Canyon, Lemon Tank Canyon, Larkspur Canyon, Chamish Canyon, and Northern Island Terraces) are near the IOA (within 1,000 ft (305 m)), and could experience erosion from nearby training activities.

Roads can concentrate water flow causing incised channels and erosion of slopes (Forman and Alexander 1998, pp. 216–217). This increased erosion around roads can degrade habitat, especially along the steep canyons associated with the eastern escarpment of the island. Nine of 29 *Acmispon dendroideus* var. *traskiae* occurrences (31 percent; Eel Cove Canyon, Seal Cove Terraces, Lemon Tank Canyon, Wilson's Cove, North Wilson's Cove, Upper Middle Ranch Canyon, Eagle Canyon, North Mosquito Cove, and Canchalagua Canyon) are within 500 ft (152 m) of a road on the island (Forman and Alexander 1998, p. 217). These occurrences could be subject to diffuse disturbance and road effects that degrade habitat quality. The largest known occurrence of *A. d.* var. *traskiae,* Wilson Cove, occurs on gradual or steep slopes where erosion is evident (USFWS 2008, p. 117). Military activities in this area have the potential to adversely affect the species habitat due to the species' proximity to Navy facilities and the level of human activity and traffic in the area.

The Navy incorporates erosion control measures into all site feasibility studies and project planning, design, and construction to minimize the potential to exacerbate existing erosion and avoid impacts to listed species (Munson 2011a, pers. comm.). The INRMP requires that all projects include erosion conservation work and associated funding (Navy 2002, p. 4–89). These conservation actions include best management practices for construction and engineering, choosing sites that are capable of sustaining disturbance with minimum soil erosion, and stabilizing disturbed sites with native plants (Navy 2002, pp. 4–89—4–91). Additionally, large-scale island-wide maneuvers with assault vehicles have been postponed until an erosion control plan is drafted and implemented. The erosion control plan for San Clemente Island is being developed to reduce the impacts of erosion to *Acmispon dendroideus* var. *traskiae* habitat in areas likely to experience increased and expanded military operations (Munson 2011a, pers. comm.). This erosion control plan will address military operations associated with the IOA, AVMA, and AFP; however, since the plan is not yet finalized, it does not currently ameliorate the noted threats from erosion.

The processes and results of erosion are threats to the habitat of *Acmispon dendroideus* var. *traskiae,* particularly to 17 of 29 occurrences (59 percent; Middle Island Plateau, Canchalagua Canyon, North Mosquito Cove, Eagle Canyon, Upper Middle Ranch Canyon, Warren Canyon, Horton Canyon, Upper Wallrock Canyon, Tota Canyon, Lemon Tank Canyon, Larkspur Canyon, Chamish Canyon, North Island Terraces, Eel Cove Canyon, Seal Cove Terraces, Wilson Cove, and North Wilson Cove) that are within an IOA, within 1,000 ft (305 m) of an IOA, or within 500 ft (152 m) of a road. Erosion may lead to overall habitat degradation and the loss of individuals or groupings of plants in a given area. However, this taxon has persisted despite current levels of erosion. The processes and results of erosion are island-wide threats to the habitat or range of *A. d.* var. *traskiae,* particularly to the 17 occurrences in or adjacent to military training areas or roads. Therefore, erosion is still considered a threat to the existence of *A. d.* var. *traskiae.*

Nonnative Species

One of the threats to *Acmispon dendroideus* var. *traskiae* identified in the final listing rule is the spread of nonnative plants into its habitat (42 FR 40682). Nonnative plants can diminish the abundance or survival of native species by altering natural ecosystem processes such as fire regimes, nutrient cycling, hydrology, and energy budgets, and competing with them for water, space, light, and nutrients (Zink *et al.* 1995, p. 307; Brooks 1999, pp. 16–17; Mack *et al.* 2000, p. 689). Nonnative species of particular concern include *Avena barbata* (slender oat), *Bromus* spp., *Foeniculum vulgare,* and *Brassica tournefortii,* which have already invaded the habitat of most *A. d.* var. *traskiae* occurrences. Another nonnative species, *Carpobrotus edulis* (iceplant), also appears to be hindering the recovery of *A. d.* var. *traskiae* (Allan 1999, p. 92). This nonnative species occupies large areas of Wilson Cove where it may alter the habitat (Allan 1999, p. 92) by changing vegetation structure and creating an environment less hospitable to *A. d.* var. *traskiae.* Annual grasses vary in abundance with rainfall, potentially changing the vegetative community from shrubs to grasses and increasing the fuel load in wet years (see *Factor A—Fire* section below).

Although previous invasions of nonnatives probably occurred through introductions in grazing fodder, current nonnative species invasions are typically introduced by military activities and training on the island. Nonnative plants constitute a rangewide threat to the habitat of all native plants on San Clemente Island, including all occurrences of *Acmispon dendroideus* var. *traskiae.* Nine of 29 occurrences (31 percent; Eel Cove Canyon, Seal Cove Terraces, Lemon Tank Canyon, Wilson's Cove, North Wilson's Cove, Upper Middle Ranch Canyon, Eagle Canyon, North Mosquito Cove, and Canchalagua Canyon) are within 500 ft (152 m) of roads on the island, and may be subject to diffuse disturbance and road effects that degrade habitat quality along the road (Forman and Alexander 1998, p. 217). Roadsides tend to provide conditions (high disturbance, seed dispersal from vehicles, ample light and water) preferable to nonnative species (Forman and Alexander 1998, p. 210).

Potential impacts from nonnative plants are minimized through annual implementation of the Navy's island-wide nonnative plant control program (O'Connor 2009b, pers. comm.; Munson 2011a, pers. comm.). The focus of the nonnative plant species program is to control plants on the island with the potential to adversely impact habitat of federally listed species (see above discussion on Nonnative Species under *Factor A—M. clementinus*). Although nonnative plants will continue to pose a risk to the habitat or range of *Acmispon dendroideus* var. *traskiae,* the Navy has taken steps to curtail habitat and plant community alteration from nonnative plants. To reduce the potential for transport of nonnative plants to the island, military and nonmilitary personnel inspect tactical ground vehicles and remove any visible plant material, dirt, or mud prior to going on San Clemente Island (USFWS 2008, p. 63). This precaution helps to control the movement of nonnative plants to the island, but once on the island, nonnative plants easily spread through the movement of vehicles from one area to another.

Acmispon dendroideus var. *traskiae* has persisted on the island and, despite the continued risk of encroachment to habitat by nonnatives, the range of this taxon has expanded from 6 to 29 occurrences since listing. Impacts from nonnative plants may be a persistent, but low-level, threat to *A. d.* var. *traskiae* habitat.

Fire

Fire was not considered a threat to habitat occupied by *Acmispon dendroideus* var. *traskiae* at the time of listing (42 FR 40682; August 11, 1977). Since that time, however, over 50 percent of the island has experienced at least one wildfire (Navy 2002, Map 3–3, p. 3–32), and some habitat has burned multiple times with very short intervals between fires (Navy 2002, Map 3–4, p. 3–33). The majority of fires are concentrated in SHOBA, potentially impacting habitat of 8 of 29 occurrences (28 percent; Eagle Canyon, Bryce Canyon, North Mosquito Cove, Canchalagua Canyon, Thirst Canyon, Cave Canyon, Horse Canyon, and Pyramid Head) where military training exercises within Impact Areas I and II employ live ordnance and incendiary devices. However, fires are occasionally ignited by activities north of SHOBA, such as training activities near Eel Point (possibly impacting Seal Cove Terraces and Eel Cove Canyon occurrences) (Navy 2002, Map 3–4, p. 3–33).

Increased fire frequency resulting from intensified military uses could lead to localized changes in vegetation on San Clemente Island. The Navy recently approved a significant expansion in the number of locations where live fire and demolition training will take place (Navy 2008a, pp. 2–3—2–38), including TAR north of SHOBA (TAR 17—Eel Cove Canyon and Seal Cove Terraces, and TAR 14 and 15—Larkspur and Chamish Canyon). These higher levels of training have not occurred in recent history, and will likely expand from current levels. In addition to demolitions, certain proposed munitions exercises involve the use of incendiary devices, such as illumination rounds, white phosphorous, and tracer rounds, which pose a high risk of fire ignition. Additionally, smoke, flares, and pyrotechnics are proposed for use within TAR 11 (Wilson's Cove) towards the eastern shore, and expanded live fire and demolition training is proposed within TAR 16 (Middle Island Plateau) towards the center of the island. It is likely that the fire pattern on the island will change in response to this increase in ignition sources, with fires becoming more common within and adjoining the training areas north of SHOBA.

At the time of listing, fire was not identified as a habitat threat because of lack of fire history and the low intensity of military training on the island. Since that time, military training has significantly increased, and we have better records of the fire frequency on the island. Approximately 14 of the 29 occurrences (48 percent) (Wilson's Cove, Middle Island Plateau, Eagle Canyon, Bryce Canyon, North Mosquito Cove, Canchalagua Canyon, Thirst Canyon, Cave Canyon, Horse Canyon, Pyramid Head, Eel Cove Canyon, Seal Cove Terraces, Larkspur Canyon, and Chamish Canyon) of *Acmispon dendroideus* var. *traskiae* fall within areas that may be subject to recurrent fire associated with military training (Table 1). This includes locations that fall within 1,000 ft (305 m) of TAR where the Navy conducts live fire and demolition training, and occurrences within SHOBA (SHOBA serves as a buffer for Impact Areas I and II). Fires that escape designated training areas may threaten habitat on other parts of the island, though, because of the broad distribution of the species, it is unlikely that one fire could spread throughout the entire range. The Navy's implementation of the MOFMP will limit the frequency with which fires escape impact areas and TAR. Through the annual review process, the Navy identifies mechanisms to reduce fire return intervals within areas where this taxon is concentrated (USFWS 2008, pp. 91–122). The Navy's implementation of an MOFMP will help to reduce the risk of habitat conversion by fire, although the habitat of *A. d.* var. *traskiae* could be altered by increased fire frequency and spread of nonnative grass. Although the threat is ameliorated through the MOFMP, fire remains an island-wide threat to *A. d.* var. *traskiae,* particularly to the 14 occurrences that fall within areas that may be subject to recurrent fire associated with military training.

Summary of Factor A

San Clemente Island was used for sheep ranching, cattle ranching, goat grazing, and pig farming from 1850 until 1934 (Navy 2002, pp. 3–4). The effects of these grazers, which were not completely removed from the island until 1992, on the habitat and plants were one of the original reasons for classifying *Acmispon dendroideus* var. *traskiae* as endangered in the 1977 listing rule (42 FR 40682). Currently, the habitat of *A. d.* var. *traskiae* is threatened by destruction and modification caused by land use, erosion, nonnative plants, and fire. To help ameliorate these threats, the Navy is implementing an MOFMP, an INRMP, and an island-wide nonnative species control program (Navy 2002, pp. 1–1–8–12; USFWS 2008, pp. 1–237). The MOFMP has been helpful in informing strategic decisions for training using live fire or incendiary devices. The Navy has postponed major troop and assault vehicle maneuvers across the island until an erosion control plan is completed. Natural resource managers have been successful in decreasing the prevalence of particularly destructive nonnatives, such as *Foeniculum vulgare.* Though increased impacts associated with military training could threaten the species, 24 of 29 occurrences (83 percent) of *A. d.* var. *traskiae* fall outside of training areas (IOA or TAR) where the most intensive habitat disturbances are likely to occur. While it is anticipated that military training activities, erosion, nonnatives, and fire will have ongoing impacts to the taxon's habitat, based on its distribution and current and anticipated conservation efforts, impacts from these threats are reduced and minimized for *A. d.* var. *traskiae.* Therefore, the threats to the habitat of *A. d.* var. *traskiae* will not likely impact most of the known occurrences both now and into the future.

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

In the listing rule (42 FR 40682; August 11, 1977), the Service did not identify any threats from overutilization, and there is no new information to indicate that overutilization is a threat to *Acmispon dendroideus* var. *traskiae.* Although voucher herbarium specimens of *A. d.* var. *traskiae* and seeds have been collected for research and seed banking, overutilization of *A. d.* var. *traskiae* for any purpose is not currently considered a threat nor is expected to be in the future.

Factor C. Disease or Predation

Grazing of feral goats and rooting of feral pigs were considered a direct threat to *Acmispon dendroideus* var. *traskiae* in the final listing rule (42 FR 40682; August 11, 1977). As stated above, however, nonnative mammalian herbivores were removed from San Clemente Island in 1992, and this threat was ameliorated, as recognized in our 2007 status review (USFWS 2007b, p. 13). Currently, no other predators or diseases on San Clemente Island are known to pose a significant threat to *A. d.* var. *traskiae* both now and in the future.

Factor D. Inadequacy of Existing Regulatory Mechanisms

The Act requires us to examine the adequacy of existing regulatory mechanisms with respect to those existing and foreseeable threats that may affect *Acmispon dendroideus* var. *traskiae.* The inadequacy of existing regulatory mechanisms was not

considered a threat to *A. d.* var. *traskiae* at listing (42 FR 40682; August 11, 1977). Since it was listed as endangered, the Act has been and continues to be the primary Federal law that affords protection to *A. d.* var. *traskiae.* The Service's responsibilities in administering the Act include sections 7, 9, and 10 (see above discussion in the *Malacothamnus clementinus—Factor D* section for more information on the Service's responsibilities for all three species that are the subject of this Finding). Critical habitat has not been designated or proposed for this taxon. Listing *A. d.* var. *traskiae* provided a variety of protections, including the prohibitions against removing or destroying plants within areas under Federal jurisdiction and the conservation mandates of section 7 for all Federal agencies. If *A. d.* var. *traskiae* were not listed, these protections would not be provided. Thus, we must evaluate whether other regulatory mechanisms would provide adequate protections absent the protections of the Act.

Other Federal Protections

National Environmental Policy Act (NEPA)

All Federal agencies are required to adhere to the National Environmental Policy Act (NEPA) of 1970 (42 U.S.C. 4321 *et seq.*) for projects they fund, authorize, or carry out. The Council on Environmental Quality's regulations for implementing NEPA (40 CFR parts 1500–1518) state that agencies shall include a discussion on the environmental impacts of the various project alternatives (including the proposed action), any adverse environmental effects that cannot be avoided, and any irreversible or irretrievable commitments of resources involved (40 CFR part 1502). The NEPA itself is a disclosure law, and does not require subsequent minimization or mitigation measures by the Federal agency involved. Although Federal agencies may include conservation measures for *Acmispon dendroideus* var. *traskiae* as a result of the NEPA process, any such measures are typically voluntary in nature and are not required by the statute. NEPA does not itself regulate activities that might affect *A. d.* var. *traskiae,* but it does require full evaluation and disclosure of information regarding the effects of contemplated Federal actions on sensitive species and their habitats. On San Clemente Island, the Navy must meet the NEPA requirements for actions significantly affecting the quality of the human environment. Typically, the Navy prepares Environmental Assessments and Environmental Impact Statements on operation plans and new or expanding training actions. Absent the listing of *A. d.* var. *traskiae,* we would expect the Navy to continue to meet the procedural requirements of NEPA for its actions, including evaluating the environmental impacts to rare plant species and other natural resources. However, as explained above, NEPA does not itself regulate activities that might affect *A. d.* var. *traskiae.*

Sikes Act Improvement Act (Sikes Act)

The Sikes Act (16 U.S.C. 670) authorizes the Secretary of Defense to develop cooperative plans with the Secretaries of Agriculture and the Interior for natural resources on public lands. The Sikes Act Improvement Act of 1997 requires Department of Defense installations to prepare INRMPs that provide for the conservation and rehabilitation of natural resources on military lands consistent with the use of military installations to ensure the readiness of the Armed Forces. An INRMP is a plan intended ''* * * to guide installation commanders in managing their natural resources in a manner that is consistent with the sustainability of those resources while ensuring continued support of the military mission'' (Navy 2002, p. 1–1). INRMPs are developed in coordination with the State and the Service, and are generally updated every 5 years. Although an INRMP is technically not a regulatory mechanism because its implementation is subject to funding availability, it is an important guiding document that helps to integrate natural resource protection with military readiness and training.

San Clemente Island Integrated Natural Resources Management Plan (INRMP)

Pursuant to the Sikes Act, the Navy adopted an INRMP for San Clemente Island that identifies multiple objectives for protecting *Acmispon dendroideus* var. *traskiae* and its habitat to help to reduce threats to this taxon (Navy 2002). The INRMP discloses actions through the NEPA process and to comply with such legislation and regulations as the Endangered Species Act, Federal Noxious Weed Act of Act of 1974 (7 U.S.C. 2801), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601), the Resources Conservation and Recovery Act (42 U.S.C. 6901), and Soil Conservation Act (16 U.S.C. 3B) (see above discussion on INRMPs under *Malacothamnus clementinus—Factor D).* Natural resource objectives of relevance to the protection of *A. d.* var. *traskiae* in the INRMP include: ''Protect, monitor, and restore plants and cryptograms in order to manage for their long-term sustainability on the island'' (Navy 2002, p. 4–39). The INRMP specifically includes the following objectives for *A. d.* var. *traskiae* management: removal of nonnatives, restoration of native grasses and scrub species, monitoring of the species, studies of response to fire, and studies and inventory of insect pollinators (Navy 2002, p. D–11). To date, multiple INRMP management strategies have been implemented for the conservation of *A. d.* var. *traskiae.* Other INRMP strategies that target the plant communities within which this species occurs include: Controlling erosion, with priority given to locations where erosion may be affecting listed species; producing a new vegetation map; reducing nonnative plant cover from 1992–1993 baseline levels; managing the size and intervals of fires; experimenting with fire management to improve native plant dominance while protecting sensitive plant occurrences; and conducting genetic and biological studies of *A. d.* var. *traskiae.*

The MOFMP, Erosion Control Plan, and nonnative plant species control conducted on the island are discussed above under *Acmispon dendroideus* var. *traskiae—Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range.* Absent listing under the Act, the Navy would still be required to develop and implement INRMPs under the Sikes Act. However, as noted under the other factors, while the INRMP helps to ameliorate threats and provides some protection for *A. d.* var. *traskiae* occurrences, those occurrences within Impact Areas or operationally closed areas may not benefit from the conservation measures. While the INRMP has reduced the severity of threats and contributed to conservation of the species, it still allows for land use consistent with military readiness and training. Thus, Navy activities will continue to impact *A. d.* var. *traskiae* as described under Factor A.

State Protections

Since the time of listing, *Acmispon dendroideus* var. *traskiae* has benefited from additional State protections under the Native Plant Protection Act (NPPA) and California Endangered Species Act (CESA; listed 1982). However, the range of *A. d.* var. *traskiae* is restricted to a Federal military installation, so listing under NPPA and CESA may only afford protection to this species in rare instances when the lead agency is a

non-Federal agency or when proposed activities fall under other State laws.

Summary of Factor D

The regulatory mechanisms outlined above provide for adequate conservation of *Acmispon dendroideus* var. *traskiae.* In continuance of a long history of cooperative conservation efforts, the Navy also implements several conservation actions that benefit this plant taxon. The Navy has implemented a MOFMP to reduce the risk of fire on the island and a nonnative plant species control program. In response to the conservation actions proposed and the current status of the listed taxon, we issued a non-jeopardy biological opinion on the Navy's MOFMP. The provisions included in the San Clemente Island INRMP provide protection of *A. d.* var. *traskiae* occurrences and adaptive management of its habitat in order to help address threats to the plant from military activities and nonnative plants, although implementation may not be extended to occurrences in operationally closed areas. *A. d.* var. *traskiae* occurrences are afforded protection through Federal and military mechanisms, and thus the inadequacy of existing regulatory mechanisms is not considered a current threat to the species. However, in the absence of the Act, the existing regulatory mechanisms are not adequate to conserve *A. d.* var. *traskiae* throughout its range both now and in the future.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

The 1977 listing rule identified nonnatives as a threat to *Acmispon dendroideus* var. *traskiae* under Factor E (42 FR at 40684; August 11, 1977). In this 5-factor analysis, impacts from nonnative plants are discussed above under *Factor A* as a threat to habitat. Other threats attributable to Factor E that have been identified since listing include: (1) Movement of vehicles and troops, (2) fire, (3) climate change, and (4) hybridization. Factor E addresses threats to individuals of the species, rather than the habitat modification threats that are discussed in Factor A. Therefore, while some threats are discussed in both sections, in this section we are focusing on the direct impacts to individuals of *A. d.* var. *traskiae.*

Movement of Vehicles and Troops

Military training activities within SWAT, TAR, and the IOA often entail the movement of vehicles and troops over the landscape, which has the potential of trampling or crushing individual plants (for discussion of SWAT, TAR, and IOA, see above under *Malacothamnus clementinus—Factor E*). Based on the distribution of *Acmispon dendroideus* var. *traskiae* occurrences, and type of troop movements likely to occur, impacts due to trampling and crushing are considered a low-level threat to its long-term persistence, and are most likely to occur occasionally within the IOA and TAR. Approximately 13 of 29 occurrences (45 percent; Wilson Cove, Canchalagua Canyon, Middle Island Plateau, North Mosquito Cove, Eagle Canyon, Larkspur Canyon, Chamish Canyon, Lemon Tank Canyon, Seal Cove Terraces, Eel Cove Canyon, Middle Wallrock Canyon, Warren Canyon, and North Island Terraces) of *A. d.* var. *traskiae* are partially or wholly within the boundaries of a training area (IOA, TAR, or SWAT). Many of these occurrences are in areas that are not readily accessible to vehicles and troops. Loss of individual plants from proposed increases in troop and vehicle movements within SWAT, TAR, and the IOA is likely to increase, though this will not significantly impact the survival and recovery of this taxon because of the diffuse nature of this threat and the location of much of the species along the eastern escarpment, away from military training activities (USFWS 2008, pp. 113–122).

Fire

Although not specifically mentioned in the listing rule, intense or frequent fires threaten individuals at 14 of 29 (48 percent) of *Acmispon dendroideus* var. *traskiae* occurrences. In the *Factor A* discussion above, we addressed impacts of fire on the habitat. This section covers the discrete threat to individuals or occurrences of *A. d.* var. *traskiae.* As discussed in the Background section, it is unknown if *A. d.* var. *traskiae* is adapted to periodic fires, though it is likely that this taxon is resilient to occasional fires (Navy 2002, p. D–10; Tierra Data Inc. 2005, p. 80). Adult plants have been lost in fires, but subsequent recruitment from the seed bank resulted in replacement numbers of juvenile plants (Tierra Data Inc. 2005, p. 80). Aside from this observation, the relationship between fire and the life history of *A. d.* var. *traskiae* has not been adequately studied. Additionally, the species' tolerance to fire frequency is unknown. In areas that burn more frequently, the seed bank may become depleted if individuals burn before they produce seeds. Although an individual plant has the ability to produce vast amounts of seed, the seed bank must be replenished regularly for the species to persist (Junak and Wilken 1998, p. 257).

Acmispon dendroideus var. *traskiae* occurs in some areas of the island that may experience elevated fire frequency, such as in SHOBA and surrounding Eel Point (Eagle Canyon, Bryce Canyon, North Mosquito Cove, Canchalagua Canyon, Thirst Canyon, Cave Canyon, Horse Canyon, Pyramid Head, Seal Cove Terraces, and Eel Cove Canyon) (discussed in *A. d.* var. *traskiae—Factor A*). Increased fire frequency from intensified military use could also lead to localized changes in vegetation, resulting in indirect adverse effects on *A. d.* var. *traskiae.* The potential for frequent fire at many of the occurrences within SHOBA is reduced by their location on the eastern escarpment of the island, away from Impact Areas I and II. This threat may become difficult to assess with the recent closure of the eastern escarpment area due to unexploded ordnance. The Navy's fire management practices are anticipated to minimize frequency of ignitions as well as the spread of fires (as described above in *Factor A*).

The Navy conducts annual reviews of fire management and fire occurrence that allow for adaptive management. These measures should minimize loss of individuals or occurrences of *A. d.* var. *traskiae* due to fire. At the present time, fire management does not pose a threat as fuelbreak locations have not been proposed in the vicinity of this taxon. Although the Navy has planned and implemented fire management, fire threatens 14 occurrences of *Acmispon dendroideus* var. *traskiae*. Due to the continued impacts of fire within SHOBA, fire remains a Factor E threat to the existence of *A. d.* var. *traskiae*.

Climate Change

For general information regarding climate change impacts, see the climate change discussion under *Malacothamnus clementinus—Factor E* above. Since listing of *Acmispon dendroideus* var. *traskiae,* the potential impact of ongoing, accelerated climate change has become a recognized threat to the flora and fauna of the United States (IPCC 2007a, pp. 1–52; PRBO 2011, pp. 1–68). San Clemente is located in a Mediterranean climatic regime, but with a significant maritime influence. Climate change models indicate an increase in average temperature for southern California (see above discussion on climate change under *Malacothamnus clementinus—Factor E).* San Clemente Island typically receives less rainfall than neighboring mainland areas (Tierra Data Inc. 2005, p. 4). Therefore, the models may

understate the effects to vegetation on the island. Less rainfall and warmer air temperatures could limit the range of *A. d.* var. *traskiae,* although there is no direct research on the effects of climate change on the species. Additionally, changes in sea level and temperature may be more acute on small islands, due to their high vulnerability (surrounded by ocean) and low adaptive capacity (from limited size) (IPCC 2007b, p. 1). The impacts of future climate change to *A. d.* var. *traskiae* remain unclear. The most recent literature on climate change predicts hydrological changes, higher temperatures, and expansion of drought areas (IPCC 2007a, pp. 1–18). While we recognize that climate change is an important issue with potential effects to listed species and their habitats, the best available information does not facilitate accurate predictions regarding the effects to *A. d.* var. *traskiae* at this time.

Hybridization

As discussed above in the Background section, *Acmispon dendroideus* var. *traskiae* is known to hybridize with *Acmispon argophyllus* var. *argenteus*. In 1990, Liston *et al.* (p. 240) confirmed hybridization between co-occurring populations of *A. d.* var. *traskiae* and *A. argophyllus* var. *argenteus* in Wilson Cove. At that time, they detected only four hybrid individuals out of 38 individuals tested, and failed to detect hybridization in another area of co-occurrence at the southern end of the island. Although hybrid individuals seem to be restricted to Wilson Cove (Liston 1990, p. 240; Allan 1999, p. 91), other unconfirmed hybrids (no genetic testing done) have been observed elsewhere on the island (Howe 2009b, pers. comm.; Braswell 2011, pers. obs.).

Liston *et al.* (1990, pp. 240–243) offered three hypotheses for the scarcity of confirmed hybrid individuals. First, hybrids may have reduced fitness and be selected against, or be sterile and thus unable to produce viable seed even if backcrossed to the parent taxa. In this situation, hybridization would not be a threat to the genetic integrity of *A. dendroideus* var. *traskiae*. Second and conversely, if the fertile hybrids are recent in origin (within the last 20 years), and because both parental taxon are long-lived, woody perennials, few hybrid individuals would be expected due to the slower development and lifespan of the species. If this is correct, the genetic integrity of the largest-known occurrence of *A. d.* var. *traskiae* in Wilson Cove might be at risk of introgressive hybridization (introduction of genes from one species to another resulting in fertile hybrids). Introgressive hybridization could lead to the loss of genetic variation and lower fitness of *A. d.* var. *traskiae*. Finally, the limited number of hybrid plants (four) might be an artifact of the genetic testing method used by the study.

Liston *et al.* (1990, p. 243) suggested that there be further investigation of these hypotheses before management recommendations are made to the Navy. Allan (1999, p. 91) stated that *A. d.* var. *traskiae* should be ''closely monitored.'' Although the species has expanded its range and numbers, hybridization with *A. a.* var. *argenteus* remains a concern at the largest of the 29 occurrences (Wilson's Cove), although unconfirmed hybrids have been observed in other areas of the island (e.g., Norton Canyon). Hybridization may threaten, and could diminish, the genetic diversity of the species, especially in the already disturbed occurrence of Wilson Cove (Allan 1999, pp. 91–92). Additional study is needed to determine the extent and magnitude of this threat to *A. d.* var. *traskiae*.

Summary of Factor E

Threats associated with military activities, fire, climate change, and hybridization continue to impact *Acmispon dendroideus* var. *traskiae* at 18 of 29 occurrences (62 percent; Wilson Cove, Canchalagua Canyon, Middle Island Plateau, North Mosquito Cove, Eagle Canyon, Larkspur Canyon, Chamish Canyon, Lemon Tank Canyon, Seal Cove Terraces, Eel Cove Canyon, Middle Wallrock Canyon, Warren Canyon, North Island Terraces, Bryce Canyon, Thirst Canyon, Cave Canyon, Horse Canyon, and Pyramid Head) on San Clemente Island. Trampling and crushing of individual plants are probably incidental, but are likely to increase with increases in training levels on the island. However, the Navy is implementing conservation measures that will improve conditions for *A. d.* var. *traskiae,* which has expanded its distribution on the island. Military training activities have the potential to ignite fires that can spread to habitat supporting this species, though the majority of the occurrences are outside of the areas designated for live fire and demolition. In preparation for these training efforts, the Navy implemented a fire management plan within the MOFMP that will limit the frequency of fires escaping the Impact Areas.

Climate change may also likely impact *Acmispon dendroideus* var. *traskiae,* though the magnitude of this threat is largely unknown. The genetic integrity of *A. d.* var. *traskiae* may be threatened by hybridization with *A. adsurgens* var. *argenteus* at one of the largest occurrences and requires further investigation. However, the extent and prevalence of this threat is unknown, and only confirmed in one of 29 occurrences. Overall, the threats described under Factor E are either of low magnitude, low likelihood, or adequately managed, while the potential overall threat of climate change remains unknown across this taxon's range. Although these threats could directly impact individuals of this taxon, we are of the view that they will not impede the recovery of *A. d.* var. *traskiae* now or in the future.

Combination of Factors—Acmispon dendroideus var. traskiae

A species may be affected by more than one threat in combination. Within the preceding review of the five listing factors, we have identified multiple threats that may have interrelated impacts on the species (see also above discussion on combination of factors—*Malacothamnus clementinus*). The species' productivity may be reduced because of these threats, either singularly or in combination. However, it is not necessarily easy to determine (nor is it necessarily determinable) whether a particular threat is the primary threat having the greatest effect on the viability of the species, or whether it is exacerbated by or working in combination with other potential threats to have cumulative or synergistic effects on the species. While the combination of factors is a threat to the existence of *Acmispon dendroideus* var. *traskiae,* we are unable to determine the magnitude or extent of cumulative or synergistic effects of the combination of factors on the viability of the species at this time.

Castilleja grisea (San Clemente Island Paintbrush)

In the 2007 status review, we stated that the predominant threat at listing (nonnative herbivores) was removed from San Clemente Island in 1992 (USFWS 2007c, pp. 1–19). Additional threats to *Castilleja grisea* identified in 2007 include: (1) Erosion, (2) nonnative species, (3) fire, (4) land use, and (5) access to SHOBA. The first four of these threats are discussed below under *Factor A.* As discussed previously, access to SHOBA is not considered a threat, though it limits our ability to assess all occurrences of the taxon reviewed here.

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

Under this listing factor in the final listing rule, we identified habitat modification by browsing feral goats

and rooting feral pigs as threats to *Castilleja grisea* and other island taxa (42 FR 40682). As discussed above, the Navy removed the last of the remaining feral goats and pigs from San Clemente Island in 1992 (Kellogg and Kellogg 1994, p. 5), which resulted in improved habitat conditions, and led to changes in the cover of native and nonnative plants on the island (Tierra Data Inc. 2005, pp. i–96; Kellogg 2006, pers. comm.). The Recovery Plan identified habitat alteration and disturbance from the Navy's use of the island for military operational and training needs as additional threats to the habitats occupied by *C. grisea* (USFWS 1984, pp. 58–63). Additional threats identified since listing include alteration of San Clemente Island habitats by military training activities, fire, and fire management. As outlined below, we discuss the impacts of the following threats that affect the habitat or range of *C. grisea:* (1) Land use, (2) erosion, (3) nonnative plants, (4) fire, and (5) fire management.

Land Use

The distribution of *Castilleja grisea* includes a single occurrence in the north of the island at West Cove, with the remaining 28 occurrences distributed across the southern 15.5 mi (25 km) of the island, particularly along the eastern escarpment. Training activities approved in the MOFMP would include substantial increases in vehicle and foot traffic in the IOA, leading to habitat modification. Ten of the 29 occurrences (34 percent; plain northeast of Warren Canyon, Larkspur Canyon, Lemon Tank Canyon, Eagle Canyon, Bryce Canyon, Horse Beach Canyon, China Canyon, Knob Canyon, Canchalagua Canyon, and Pyramid Head) are within or partially within the IOA and experience direct habitat impacts, while three of 29 occurrences (10 percent; Thirst Canyon, SHOBA Boundary Occurrence, and Upper Horse Canyon) are near the IOA (within 1,000 ft (305 m)) and could experience diffuse or accidental impacts to *C. grisea* habitat. Recent area closures due to unexploded ordnance could make habitat impacts from training difficult to assess for several occurrences (34 percent; Nanny Canyon, Lemon Tank Canyon, Eel Point, Eagle Canyon, Bryce Canyon, Horse Beach Canyon, China Canyon, Knob Canyon, Canchalagua Canyon, and Pyramid Head) in the future. Additionally, one occurrence (West Cove) is within an Assault Vehicle Maneuver Area (AVMA) and could be subject to habitat disturbance from vehicles.

The southern portion of *Castilleja grisea*'s distribution extends through SHOBA where impacts to the habitat are likely. Certain munitions exercises involve the use of incendiary devices, such as illumination rounds, white phosphorous, and tracer rounds, which pose a high risk of fire ignition (USFWS 2008, p. 11–13). Because of the elevated risk of fire associated with training activities, live and inert munitions fire are targeted towards Impact Areas I and II within SHOBA where bombardments and land demolition are concentrated. Four of 29 occurrences (14 percent; China Canyon, Red Canyon, Upper Chenetti Canyon and Horse Beach Canyon) are within or partially within Impact Areas. Currently, the Impact Areas are closed to nonmilitary personnel, so the plant's status at these four occurrences is unknown, as well as the status of any conservation action that would otherwise be expected to be implemented in these areas (USFWS 2008, p. 50).

Also within SHOBA, an occurrence of *C. grisea* is located in lower Horse Beach Canyon, above Horse Beach. Horse Beach (TAR 21) is used for special warfare training activities that include the use of live fire, illumination rounds, and tracers. Training activities within parts of SHOBA pose a direct threat to habitat due to associated ground disturbance and land demolition. Sixteen of 29 *C. grisea* occurrences (55 percent) are located outside of heavily impacted training areas, and 13 occurrences (45 percent; West Cove, Plain northeast of Warren Canyon, Larkspur Canyon, Lemon Tank Canyon, Eagle Canyon, Bryce Canyon, China Canyon, Knob Canyon, Canchalagua Canyon, Pyramid Head, Red Canyon, Upper Chenetti Canyon and Horse Beach Canyon) are at least partially within the boundaries of a training area (IOA, TAR, AVMA, or Impact Area). Although, within training areas, many of the impacts to these 13 occurrences would be diffuse and are unlikely to have a high impact on the species. The Navy has demonstrated their efforts to help conserve and manage listed species on the island through amelioration of habitat impacts by military activities through implementation of the MOFMP and INRMP. Land use appears to pose a high-magnitude threat to the habitat of a small number of occurrences of *C. grisea* on San Clemente Island.

Erosion

Erosion and associated soil loss caused by browsing of feral goats and rooting of feral pigs likely modified the island's habitat (Navy 2002, p. 1–14). Defoliation from overgrazing on San Clemente Island resulted in increased erosion over much of the island, especially on steep slopes where denuded soils can be quickly washed away during storm events (Johnson 1980, p. 107; Navy 2002, pp. 1–14, 3–9; Tierra Data Inc. 2007, pp. 6–7). There may be residual impacts from historical grazing, and vegetation may be slow to recover and hold soil. In the INRMP, erosion was identified as a threat to the canyon woodland habitat and maritime desert scrub, which is habitat for *Castilleja grisea* (Navy 2002, pp. 4–3, 4–12). The process of soil erosion can lead to destruction of terraces, steep slopes, and canyons that support the growth and reproduction of *C. grisea*. *Castilleja grisea* plants occur within steep canyon areas where such concentration of water flows may be a threat (Navy 2002, p. D–23).

Increased military activities where *Castilleja grisea* occurs within training area boundaries are expected to increase erosion associated with roadways, through soil compaction and other soil disturbances. The impacts from erosion are anticipated along the ridgeline of the eastern escarpment, affecting eight occurrences (Pyramid Head, Knob Canyon, Canchalagua Canyon, Bryce Canyon, Eagle Canyon, Thirst Canyon, SHOBA Boundary occurrence, and Horton Canyon) (Tierra Data Inc 2007, pp.12–18; Navy 2008a, p. G–8). Closure of the eastern escarpment within SHOBA due to unexploded ordnance could make assessing this threat and implementing conservation measures in these eight occurrences difficult in the future.

The Navy studied the potential for erosion from several proposed military activities (Tierra Data Inc. 2007, pp. 1–45, Appendices). Approximately 13 of 29 *Castilleja grisea* occurrences (45 percent; West Cove, Plain northeast of Warren Canyon, Larkspur Canyon, Lemon Tank Canyon, Eagle Canyon, Bryce Canyon, China Canyon, Knob Canyon, Canchalagua Canyon, Pyramid Head, Red Canyon, Upper Chenetti Canyon, and Horse Beach Canyon) fall partially or wholly within the boundaries of a designated training area (IOA, TAR, AVMA, or Impact Area), and are likely to be impacted by erosion. Fifteen occurrences of *C. grisea* are at least partially within 500 ft (152 m) of a road (paved or unpaved) (China Canyon, Horse Beach Canyon, Pyramid Head, Knob Canyon, Canchalagua Canyon, Bryce Canyon, Eagle Canyon, Upper Horse Canyon, Plain northeast of Warren Canyon, Horton Canyon, Seal Cove Terraces, Lemon Tank Canyon, Larkspur Canyon, Terrace Canyon, and West Cove) (Forman and Alexander

1998, p. 217). These occurrences could be subject to diffuse disturbance and road effects that degrade the habitat quality. Roads can concentrate water flow, causing incised channels and erosion of slopes (Forman and Alexander 1998, pp. 216–217). This increased erosion near roads can degrade habitat, especially along the steep canyons and ridges.

Along the eastern escarpment, *Castilleja grisea* is found in steep canyons in proximity to roads where it may be vulnerable to runoff during storm events (Navy 2008a, pp. G–4, G–8). At the southern end of the species' range, one occurrence is downslope from Horse Beach Canyon Road along a poorly maintained dirt road that is proposed to serve as part of the Assault Vehicle Maneuver Corridor. This location is likely to have an elevated risk from erosion (USFWS 2008, p. 99).

The Navy incorporates erosion control measures into all site feasibility studies and project design to minimize the potential to exacerbate existing erosion and avoid impacts to listed species (Munson 2011a, pers. comm.). The INRMP requires that all projects include erosion conservation work (Navy 2002, p. 4–89). These conservation actions include best management practices, choosing sites that are capable of sustaining disturbance with minimum soil erosion, and stabilizing disturbed sites (Navy 2002, pp. 4–89–4–91). An erosion control plan for San Clemente Island is in the development stage, with expectations to reduce impacts of erosion where *Castilleja grisea* occurs in areas with increased and expanded military operations (Munson 2011a, pers. comm.). This erosion control plan will address military operations associated with the IOA, AVMA and AFP; however, since the plan is not yet finalized, it does not currently ameliorate the noted threats from erosion.

In areas that will not be covered under the erosion control plan, erosion control measures are already being incorporated into project designs to minimize the potential to exacerbate existing erosion and avoid impacts to listed species (Munson 2011a, pers. comm.). Additionally, large-scale island-wide maneuvers with assault vehicles have been postponed until the erosion control plan is enacted. The processes and results of erosion are island-wide threats to *C. grisea,* particularly to the occurrences in or adjacent to military training areas or roads. Seventeen of 29 occurrences (55 percent; West Cove, Plain northeast of Warren Canyon, Larkspur Canyon, Lemon Tank Canyon, Eagle Canyon, Bryce Canyon, China Canyon, Knob Canyon, Canchalagua Canyon, Pyramid Head, Red Canyon, Upper Chenetti Canyon, Horse Beach Canyon, Upper Horse Canyon, Horton Canyon, Seal Cove Terraces, and Terrace Canyon) of *C. grisea* are in areas that could be subject to, and threatened by, erosion from training activities or road use. Occurrences in operationally closed areas may not be afforded the conservation measures outlined by the Navy.

Erosion can lead to overall habitat degradation and loss of individuals or groupings of plants. However, despite existing levels of erosion on the island, the distribution of *Castilleja grisea* has increased since listing. The Navy incorporates erosion control measures into all projects to minimize the potential to exacerbate existing erosion and avoid impacts to habitat and listed species. Although the Navy tries to ameliorate erosion, management efforts are not possible in areas that are closed to natural resource personnel. The processes and results of erosion are island-wide threats to *C. grisea,* particularly to the 17 occurrences in or adjacent to military training areas or roads. Therefore, erosion is still considered a threat to the existence of *C. grisea.*

Nonnative Plants

One of the threats to *Castilleja grisea* identified in the final listing rule was the spread of nonnative plants into its habitat (42 FR 40682, 40684). Nonnatives can alter habitat structure, ecological processes such as fire regimes, nutrient cycling, hydrology, and energy budgets, and compete for water, space, light, and nutrients (for discussion of nonnatives on San Clemente Island, see above discussion on Nonnative Species under *Malacothamnus clementine—Factor A*). *Castilleja grisea* is often associated with native maritime desert scrub vegetation types, where nonnative grasses are present but not a dominant component of the plant community (Tierra Data Inc. 2005, pp. 29–42).

Although previous invasions of nonnative species were probably introduced in grazing fodder, current invasions are typically introduced and spread around the island by military activities and training (see above discussion on Nonnative Species under *Malacothamnus clementinus—Factor A*). Nonnative plants constitute a rangewide threat to all native plants on San Clemente Island, including all occurrences of *Castilleja grisea.* A total of 9 of 29 occurrences (31 percent; China Canyon, Horse Beach Canyon, Pyramid Head, Knob Canyon, Canchalagua Canyon, Bryce Canyon, Eagle Canyon, Plain northeast of Warren Canyon, and Lemon Tank Canyon) are within 500 ft (152 m) of Ridge Road or China Point Road, and may be subject to diffuse disturbance and road effects that degrade the habitat quality along the road (Forman and Alexander 1998, p. 217). Roadsides tend to create conditions (high disturbance, seed dispersal from vehicles, ample light and water) preferred by nonnative species (Forman and Alexander 1998, p. 210). Nonnatives, including *Foeniculum vulgare* and *Mesembryanthemum crystallinum* (crystalline iceplant), have been found in the disturbed shoulders along the road between Ridge Road and China Point in SHOBA (Braswell 2011, pers. obs.).

Potential impacts from nonnative plants are expected to be minimized by annual implementation of the Navy's island-wide nonnative plant control program (O'Connor 2009b, pers. comm.; Munson 2011a, pers. comm.; see above discussion on Nonnative Species under *Malacothamnus clementine—Factor A*). This program targets nonnative species for elimination using herbicide and mechanical removal, prioritizing species that are new to the island or are particularly destructive. The program has been successful at isolating and limiting some species, such as *Foeniculum vulgare,* to a few locations (Howe 2011b, pers. comm.). To reduce the potential for transport of nonnative plants to San Clemente Island, military and nonmilitary personnel inspect tactical ground vehicles, and remove any visible plant material, dirt, or mud prior to going onto the island (USFWS 2008, p. 63). This precaution helps to control the movement of nonnative plants onto the island, but once on the island nonnatives are easily spread by the movement of vehicles from one area to another. Although nonnative plants will continue to pose a rangewide risk to *C. grisea,* it is a threat of low intensity, and the Navy has taken steps to curtail habitat conversion from nonnative plants.

Nonnative plant species are an island-wide threat to the native vegetative community. The Navy has taken preventative and conservation measures through funding and implementing nonnative plant species control on the island. Management and control of nonnative plants is not in place at the four occurrences (14 percent; China Canyon, Red Canyon, Upper Chenetti Canyon, and Horse Beach Canyon) that are closed to natural resource managers. However, outside of these areas, *Castilleja grisea* has persisted on the

island. Despite the continued risk of encroachment by nonnatives, *Castilleja grisea* remains on the island, and its range has continued to expand. Impacts from nonnative plants are a persistent, but low-level, threat to *C. grisea* habitat.

Fire

Fire was not considered a threat to *Castilleja grisea* habitat at the time of listing (42 FR 40682; August 11, 1977). Since that time, however, over 50 percent of the island has experienced at least one wildfire (Navy 2002, Map 3–3, p. 3–32). The majority of fires are concentrated in SHOBA, potentially impacting 15 of 29 occurrences (52 percent; Thirst Canyon, Eagle Canyon, Bryce Canyon, Canchalagua Canyon, Knob Canyon, Pyramid Head, Snake Canyon, Upper Chenetti Canyon, Horse Beach Canyon, China Canyon, Red Canyon, Kinkipar Canyon, Cave Canyon, Horse Canyon, and Upper Horse Canyon). Seven occurrences occur within the eastern escarpment in SHOBA (Thirst Canyon, Eagle Canyon, Bryce Canyon, Canchalagua Canyon, Knob Canyon, Pyramid Head, and Snake Canyon), where impacts from fire are less likely. Recent closure of this area limits the ability to assess the status and manage habitat at these occurrences.

Because of the elevated risk of fire associated with training activities, live and inert munitions fire is targeted towards two delineated Impact Areas. The risk of frequent fire is higher in Impact Areas I and II, potentially affecting the habitat at four of 29 occurrences (14 percent; Upper Chenetti Canyon, Horse Beach Canyon, China Canyon, and Red Canyon). The effects of fire, and the state of plants within the Impact Areas, are currently unknown due to closure of the area (USFWS 2008, p. 50). Fires are occasionally ignited by activities north of SHOBA, posing a low-magnitude threat to the habitat at 14 of the 29 occurrences (48 percent; SHOBA Boundary, Horton Canyon, Lemon Tank Canyon, Nanny Canyon, Larkspur Canyon, Box Canyon, Upper Norton Canyon, Middle Ranch Canyon, Waymuck Canyon, Plain northeast of Warren Canyon, Seal Cove Terraces, Eel Cove Canyon, Terrace Canyon, and West Cove) (Navy 2002, Map 3–4, p. 3–33).

Increased fire frequency from intensified military use could lead to localized changes in vegetation (see above discussion on fire frequency under *Malacothamnus clementinus—Factor A*). The Navy has significantly expanded the number of locations where live fire and demolition training will take place (USFWS 2008, pp. 21–37), including TAR north of SHOBA (TAR 17—Eel Cove Canyon and Seal Cove Terraces, and TAR 14 and 15—Larkspur Canyon). In addition to demolitions, certain proposed munitions exercises involve the use of incendiary devices, such as illumination rounds, white phosphorous, and tracer rounds, which pose a high risk of fire ignition. Expanded live fire and demolition training is also approved within TAR 16 (Lemon Tank Canyon) toward the center of the island. It is likely that the fire pattern on the island will change due to this increase in ignition sources, with fires becoming more common within and adjoining the training areas north of SHOBA.

At the time of listing, fire was not identified as a threat because of lack of fire history and the low intensity of military training on the island. Since that time, military training has significantly increased, and we have better records of the fire frequency on the island. Approximately 19 of 29 occurrences (65 percent) of *Castilleja grisea* fall within areas that may be subject to recurrent fires associated with military training. This includes locations that fall within SHOBA that serve as a buffer for Impact Areas I and II, and occurrences near live fire and demolition training areas. As described in the Background section, occurrences of *C. grisea* have been discovered within and outside of the impact areas in SHOBA (Junak and Wilken 1998, p. 298; Navy 2002, p. D–20), indicating that the species is tolerant of at least occasional fire. High fire frequency may be a potential threat that could limit the distribution of *C. grisea* by overwhelming its tolerance threshold (Brooks *et al.* 2004, p. 683; Jacobson *et al.* 2004, p. 1). Frequent fire may exceed a plant taxon's capacity to persist by depleting seed banks and reducing reproductive output when fire occurs at higher than natural frequencies in *C. grisea* habitat (Zedler *et al.* 1983, pp. 811–815).

Within the Impact Areas or operationally closed zones, fire suppression and firefighting are not being implemented because of safety hazards from the presence of unexploded ordnance. Fires that escape designated training areas threaten other parts of the island, though it is unlikely that one fire is capable of spreading throughout the entire range of the species due to its broad distribution across the island. The Navy's implementation of the MOFMP will limit the frequency with which fires escape Impact Areas and TAR. Through the annual review process, the Navy will identify mechanisms to reduce fire return intervals within areas and habitats where this taxon is concentrated (USFWS 2008, pp. 91–122). Although the threat is ameliorated through the MOFMP, fire remains an island-wide threat to *C. grisea,* particularly to the habitat at the 19 occurrences that fall within areas that may be subject to recurrent fire associated with military training.

Fire Management

A fire management plan within the MOFMP was developed by the Navy to provide flexibility for the timing of military training and to ensure that adequate fire suppression resources were present with an increased level of training activities (see above discussion on Fire Management under *Malacothamnus clementinus—Factor A).* The Navy constructed fuelbreaks around the Impact Areas for safety purposes and to manage the spread of fire from the Impact Areas. Maintenance of these fuelbreaks reduces the likelihood and frequency of fires spreading to sensitive areas and habitats, such as those occupied by *Castilleja grisea.* Fuelbreaks on San Clemente Island are created using herbicides and strip burning, and maintained using herbicides and fire retardant (Phos-Chek D75F) (USFWS 2008, pp. 97–98) (see above discussion on Fire Management (including fire retardant use) under *Malacothamnus clementinus—Factor A*).

Four occurrences (Red Canyon, China Canyon, Horse Beach Canyon, and Upper Chenetti Canyon) of *C. grisea* have been documented within the Impact Areas, and are likely exposed to impacts from higher intensity training, such as bombardment and fire. Some of these occurrences are near fuelbreaks and may be impacted by a change in the vegetation community from fuelbreak maintenance, resulting in an increase in erosion or invasive nonnative plants. Additionally, occurrences on the eastern escarpment near the firebreaks on Ridge Road (Canchalagua Canyon, Knob Canyon) might be impacted by the creation and maintenance of firebreaks (USFWS 2008, p. 57). The Navy has committed to studying the effects of Phos-Chek on San Clemente Island vegetation, and has avoided application of Phos-Chek within 300 ft (91.4 m) of mapped listed species to the extent allowable with fuelbreak installation (USFWS 2008, pp. 97–98). In the MOFMP, the Navy committed to conducting preseason briefings for firefighting personnel on the guidelines for fire suppression and limitations associated with the use of Phos-Chek and saltwater drops (USFWS 2008, pp. 97–98). The impact of saltwater on the habitat of *C. grisea* has not yet been

assessed. However, if salt persists, the composition in the plant community could change to favor more salt-tolerant taxa.

It is anticipated that the Navy will construct additional fuelbreaks to minimize the risk of fire spreading from areas proposed for expansion of live fire and demolition training north of SHOBA (USFWS 2008, p. 98). To minimize the potential for effects to listed species, the Navy considers the documented locations of listed species on the island as fuelbreak lines are developed. The majority of *Castilleja grisea* habitat is not impacted by fire management, and only 6 of 29 occurrences (21 percent) are associated with fuelbreaks. Even if expanded in conjunction with increased levels of training activities, the benefits of fuelbreaks outweigh the detrimental impacts of recurrent fire to *C. grisea* habitat. The threat of fire management to *C. grisea* habitat is restricted mainly to occurrences within SHOBA, and particularly to occurrences in the Impact Areas. Because of the isolated nature of this threat and its role in prevention of fire, fire management is a low-magnitude threat to *C. grisea* in the future.

Summary of Factor A

The habitat of *Castilleja grisea* is threatened by destruction and modification of habitat associated with land use, erosion, the spread of nonnatives, fire, and fire management. To help ameliorate these threats, the Navy is implementing a MOFMP, an INRMP, and the island-wide control of nonnative plants. (Navy 2002, pp. 1–1—8–12; USFWS 2008, pp. 1–237). The MOFMP has been helpful in informing strategic decisions for training using live fire or incendiary devices. The Navy has postponed major troop and assault vehicle maneuvers across the island until an erosion control plan is completed (Navy 2008b, pp. 5–29, 5–30; USFWS 2008, pp. 62, 87). Natural resource managers have been successful at decreasing the prevalence of particularly destructive nonnatives, such as *Foeniculum vulgare.* In recent years, access to Impact Areas I and II within SHOBA for biological monitoring and conservation actions has been strictly prohibited (USFWS 2008, p. 50), so the status of four occurrences (Red Canyon, China Canyon, Horse Beach Canyon, and Upper Chenetti Canyon) remains unknown. Recently, closures along the eastern escarpment in SHOBA have also limited the monitoring and management of four occurrences (Knob Canyon, Canchalagua Canyon, Bryce Canyon, and Eagle Canyon). However, 16 of 29 occurrences (55 percent) of *C. grisea* fall outside Impact Areas, IOA, AVMA, TAR, and fuelbreaks, where the most intensive habitat disturbances are likely to take place. While it is anticipated that military training activities will likely increase, based on the current range of *C. grisea* and conservation efforts, the threats to the habitat of *C. grisea* posed by land use, erosion, nonnatives, fire and fire management are decreasing in magnitude.

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

In the listing rule (42 FR 40682; August 11, 1977), the Service did not identify any threats from overutilization, and there is no new information to indicate that overutilization is a threat to *Castilleja grisea.* Although voucher herbarium specimens of *C. grisea* and seeds have been collected for research and seed banking, overutilization of *C. grisea* for any purpose is not currently considered a threat nor expected to be in the future.

Factor C. Disease or Predation

Grazing of feral goats and rooting of feral pigs were considered a direct threat to *Castilleja grisea* in the final listing rule (42 FR 40682; August 11, 1977). As stated above, this threat was ameliorated by the removal of all goats and pigs from San Clemente Island in 1992, as recognized in our 2007 status review (USFWS 2007c, p. 11). Currently, no other predators or diseases on San Clemente Island are known to pose a significant threat to *C. grisea,* nor are they expected to become a threat in the future.

Factor D. Inadequacy of Existing Regulatory Mechanisms

The Act requires us to examine the adequacy of existing regulatory mechanisms with respect to those existing and foreseeable threats that may affect *Castilleja grisea.* The inadequacy of existing regulatory mechanisms was not indicated as a threat to *C. grisea* at listing (42 FR 40682; August 11, 1977). Since it was listed as endangered, the Act has been and continues to be the primary Federal law that affords protection to *C. grisea.* The Service's responsibilities in administering the Act include sections 7, 9, and 10 (for more information on the Service's responsibilities, see above discussion under *Malacothamnus clementinus—Factor D*). Critical habitat has not been designated or proposed for this taxon. Listing *C. grisea* provided a variety of protections, including the prohibitions against removing or destroying plants within areas under Federal jurisdiction and the conservation mandates of section 7 for all Federal agencies. If *C. grisea* were not listed, these protections would not be provided. Thus, we must evaluate whether other regulatory mechanisms would provide adequate protections absent the protections of the Act.

Other Federal Protections

National Environmental Policy Act (NEPA)

All Federal agencies are required to adhere to the National Environmental Policy Act (NEPA) of 1970 (42 U.S.C. 4321 *et seq.*) for projects they fund, authorize, or carry out. The Council on Environmental Quality's regulations for implementing NEPA (40 CFR parts 1500–1518) state that agencies shall include a discussion on the environmental impacts of the various project alternatives (including the proposed action), any adverse environmental effects that cannot be avoided, and any irreversible or irretrievable commitments of resources involved (40 CFR part 1502). The NEPA itself is a disclosure law, and does not require subsequent minimization or mitigation measures by the Federal agency involved. Although Federal agencies may include conservation measures for *Castilleja grisea* as a result of the NEPA process, any such measures are typically voluntary in nature and are not required by the statute. NEPA does not itself regulate activities that might affect *C. grisea,* but it does require full evaluation and disclosure of information regarding the effects of contemplated Federal actions on sensitive species and their habitats.

On San Clemente Island, the Navy must meet the NEPA requirements for actions significantly affecting the quality of the human environment. Typically, the Navy prepares Environmental Assessments and Environmental Impact Statement on operational plans and new or expanding training actions. Absent the listing of *Castilleja grisea,* we would expect the Navy to continue to meet the procedural requirements of NEPA for its actions, including evaluating the environmental impacts to rare plant species and other natural resources. However, as explained above, NEPA does not itself regulate activities that might affect *C. grisea.*

Sikes Act Improvement Act (Sikes Act)

The Sikes Act (16 U.S.C. 670) authorizes the Secretary of Defense to develop cooperative plans with the

Secretaries of Agriculture and the Interior for natural resources on public lands. The Sikes Act Improvement Act of 1997 requires Department of Defense installations to prepare INRMPs that provide for the conservation and rehabilitation of natural resources on military lands consistent with the use of military installations to ensure the readiness of the Armed Forces. An INRMP is a plan intended ''* * * to guide installation commanders in managing their natural resources in a manner that is consistent with the sustainability of those resources while ensuring continued support of the military mission'' (Navy 2002, p. 1–1). INRMPs are developed in coordination with the State and the Service, and are generally updated every 5 years. Although an INRMP is technically not a regulatory mechanism because its implementation is subject to funding availability, it is an important guiding document that helps to integrate the military's mission with natural resource protection.

San Clemente Island Integrated Natural Resources Management Plan (INRMP)

Pursuant to the Sikes Act, the Navy adopted an INRMP for San Clemente Island that identifies multiple objectives for protecting *Castilleja grisea* and its habitat to help reduce threats to this taxon (Navy 2002). The INRMP also disclosed actions through the NEPA process, and to comply with such legislation and regulations as the Endangered Species Act, the Federal Noxious Weed Act of 1974 (7 U.S.C. 2801), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601), the Resources Conservation and Recovery Act (42 U.S.C. 6901), and the Soil Conservation Act (16 U.S.C. 3B) (see INRMP section above under *Malacothamnus clementinus—Factor D).* Natural resource objectives of relevance to the protection of *C. grisea* in the INRMP include an objective to: ''Protect, monitor, and restore plants and cryptograms in order to manage for their long-term sustainability on the island'' (Navy 2002, p. 4–39). The INRMP specifically includes the following objectives for *C. grisea* management: recovery of native shrub communities that are host plants for the species, the removal of nonnatives, monitoring of the species, studies of preferred host plants, study of plant's response to fire, and studies and inventory of insect pollinators (Navy 2002, pp. D–20, D–21). Multiple INRMP management strategies have been implemented for the conservation of *C. grisea.* Other INRMP strategies that target the plant communities within which this species occurs include: Controlling erosion, with priority given to locations where erosion may be affecting listed species; producing a new vegetation map; reducing nonnative plant cover from 1992–1993 baseline levels; managing the size and intervals of fires; experimenting with fire management to improve native plant dominance while protecting sensitive plant occurrences; and conducting genetic and biological studies of *C. grisea* across the island.

The MOFMP, Erosion Control Plan, and nonnative plant species control conducted on the island are discussed above under *Castilleja grisea—Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range.* Absent listing under the Act, the Navy would still be required to develop and implement INRMPs under the Sikes Act. However, as noted under the other factors, while the INRMP helps to ameliorate threats and provides some protection for *C. grisea* occurrences, those occurrences within Impact Areas or operationally closed areas may not benefit from the conservation measures. While the INRMP has reduced the severity of threats and contributed to conservation of the species, it still allows for land use consistent with military readiness and training. Thus, Navy activities will continue to impact *C. grisea* as described under Factor A and E.

State Protections

Since the time of listing, *Castilleja grisea* has benefited from additional State protections under the Native Plant Protection Act (NPPA) and California Endangered Species Act (CESA; listed 1982). However, the range of *C. grisea* is restricted to a Federal military installation, so listing under NPPA and CESA may only afford protection to this species in rare instances when the lead agency is a non-Federal agency or when proposed activities fall under other State laws.

Summary of Factor D

The regulatory mechanisms outlined above provide for adequate conservation of *Castilleja grisea.* In continuance of a long history of cooperative conservation efforts, the Navy also implemented several conservation actions that benefit this plant taxon. The Navy has implemented an MOFMP to reduce the risk of fire on the island and a nonnative plant species control program. In response to the conservation actions proposed and the current status of the listed taxon, we issued a non-jeopardy biological opinion on the Navy's MOFMP. The provisions included in the San Clemente Island INRMP provide protection to all *C. grisea* occurrences and adaptive management of its habitat in order to help address threats to the plant from military activities and nonnative plants. However, as indicated in the discussion under Factor A, not all management tools described in the INRMP are in place, and conservation management may not be implemented at several of the known occurrences that have been closed to natural resource managers. *Castilleja grisea* occurrences are afforded protection through Federal and military mechanisms, and thus the inadequacy of existing regulatory mechanisms is not considered a threat to the species now or in the future. However, in the absence of the Act, the existing regulatory mechanisms are not adequate to conserve *C. grisea* throughout its range both now and in the future.

Factor E. Other Natural or Manmade Factors Affecting Their Continued Existence

The 1977 listing rule identified nonnatives as a threat to *Castilleja grisea* under *Factor E:* competition from nonnative plants (42 FR 40682; August 11, 1977). In this 5-factor analysis, impacts from nonnative plants are discussed above under *Factor A* as a threat to habitat. Other Factor E threats identified since listing that currently impact *C. grisea* plants include: (1) Movement of vehicles and troops, (2) fire, and (3) climate change. Factor E addresses threats to individuals of the species, rather than the habitat modification threats that are discussed in Factor A. Therefore, while some threats are discussed in both sections, in this section we are focusing on the direct impacts to individuals of *C. grisea.*

Movement of Vehicles and Troops

Military training activities within training areas often entail the movement of vehicles and troops over the landscape with the potential of trampling or crushing individual plants (for discussion of SWAT, TAR, and IOA, see above discussion for *Malacothamnus clementinus—Factor E*). Based on the distribution of *Castilleja grisea* occurrences and type of troop movements likely to occur, impacts due to trampling and crushing are likely to occur within the IOA or AVMA, along roads, and in the Impact Areas. Specifically, major troop movements and vehicle landings are planned through Horse Beach and the Horse Beach Canyon occurrence, with troops and assault vehicles moving

north along Horse Beach Road from the beach (USFWS 2008, pp. 30, 41). These operations could affect the Horse Beach Canyon and China Canyon occurrences (USFWS 2008, pp. 85–86). The status of these plants is currently unknown because of closure of the Impact Areas (USFWS 2008, p. 50).

Sixteen of 29 occurrences (approximately 55 percent; West Cove, Terrace Canyon, Larkspur Canyon, Nanny Canyon, Lemon Tank Canyon, Seal Cove Canyon, Eel Cove Canyon, Plain northeast of Warren Canyon, Eagle Canyon, Bryce Canyon, Horse Beach Canyon, China Canyon, Red Canyon, Knob Canyon, Canchalagua Canyon, and Pyramid Head) are partially or wholly within the boundaries of a training area (IOA, TAR, AVMA, SWAT, or Impact Area), and may be impacted by trampling. Recent documentation of *C. grisea* within these training areas suggests that, while the individual plants have the potential to be impacted by the activities described above, they are able to sustain themselves under the recent levels of traffic from vehicles and troops associated with training activities (SERG 2009–2011, GIS data). Steep slopes along the eastern escarpment may also afford the eight *C. grisea* occurrences there some topographic protection from vehicle and troop movements. The anticipated loss of individual plants from proposed increases in troop and vehicle movement is likely to increase, though this will likely be a low-level impact to the survival and recovery of *C. grisea* because it is diffuse and managed by the Navy (USFWS 2008, pp. 91–102).

Fire

Although not specifically mentioned in the listing rule, intense or frequent fires could threaten *Castilleja grisea.* In the *Factor A* discussion above, we addressed impacts of fire on the habitat; this section covers the discrete threats to individuals of *C. grisea.* As discussed in the Background section, it is unknown if *C. grisea* is adapted to periodic fires, though it is likely that this taxon is resilient to occasional fires (Navy 2002, p. D–10; Tierra Data Inc. 2005, p. 80). *Castilleja grisea* has recently been documented in portions of Horse Beach Canyon that burned up to three times since 1979, and a large occurrence was discovered in Pyramid Cove the year following a fire (Navy 1996, p. 5–2). The mechanisms and conditions under which *C. grisea* can tolerate fire, and at what frequency, are unknown. At higher than natural fire frequencies, fire has the potential to exceed a plant's capacity to persist by depleting seed banks and reducing reproductive output (Zedler *et al.* 1983, pp. 811–815). The response of *C. grisea* to fire may also be governed by the response of its host species to fire.

Castilleja grisea occurs in some areas of the island that may experience elevated fire frequency, such as SHOBA and especially the Impact Areas (Red Canyon, China Canyon, Horse Beach Canyon, Upper Chenetti Canyon) (discussed in *Factor A* above). The potential for frequent fire at many of the occurrences within SHOBA is reduced by their location on the eastern side of the island, away from Impact Areas I and II. In conjunction with its expansion of training activities, the Navy implemented a fire management plan within the MOFMP that is focused on fire prevention, fuels management, and fire suppression. These measures should minimize the frequency and spread of fires that could result in loss of *C. grisea* individuals.

Cu astilleja grisea is likely to withstand occasional fires, as demonstrated through its stability on the island since listing. Although fire ignition points are concentrated in the military training areas, fires that escape these areas can spread to most other areas of the island. However, fires that escape from training areas are not likely to disturb the entire distribution of *C. grisea* at one time because this taxon is widely distributed across San Clemente Island, and associated with steep canyon areas where fires are less likely to impact the plant. Nine of 29 *C. grisea* occurrences (31 percent; Eel Cove Canyon, Seal Cove Terraces, Red Canyon, China Canyon, Horse Beach Canyon, Upper Chenetti Canyon, Larkspur Canyon, Lemon Tank Canyon, and Snake Canyon) are more vulnerable to the spread of fire associated with military training. These occurrences include locations that fall within 0.5 mi (805 m) of TAR, or within Impact Areas where live fire and demolition training will be performed.

The Navy's fire management practices minimize ignitions as well as the spread of fires (as described above in Factor A). The Navy is conducting annual reviews of fire management and fire occurrences that will allow for adaptive management. These measures should minimize the frequency and spread of fires that could result in loss of individuals of *C. grisea.* Although, in areas operationally closed to natural resource managers, conservation actions may not be implemented, and the plant's status remains unknown. We anticipate that the Navy's implementation of the MOFMP will limit the frequency with which fires escape Impact Areas and TAR and that, through the annual review process, the Navy will identify mechanisms to reduce fire return intervals in areas not designated for incendiary use (USFWS 2008, pp. 91–122). Therefore, the impact of fire on individual *C. grisea* plants is likely a low-level threat to long-term persistence of this taxon.

Climate Change

For general information regarding climate change impacts, see above discussion on climate change under *Malacothamnus clementinus—Factor E.* Since listing of *Castilleja grisea* (USFWS 1977, p. 40684), the potential impacts of ongoing, accelerated climate change have become a recognized threat to the flora and fauna of the United States (IPCC 2007a, pp. 1–52; PRBO 2011, pp. 1–68) (for discussion of climate change scenarios in California, see *Malacothamnus clementinus—Factor E* above). San Clemente is located within a Mediterranean climatic regime, but with a significant maritime influence. Climate change models predict an increase in average temperature for southern California. There is substantial uncertainty in precipitation projections, and relatively little consensus concerning precipitation patterns and projections for southwestern California (PRBO 2011, p. 40). Less rainfall and warmer air temperatures could limit the range of *C. grisea,* although there is no direct research on the effects of climate change on the species. *Castilleja grisea* occurs in great numbers on the eastern side of the island, where fog contributes to a wetter climate. This area could become drier if fog is less frequent, possibly affecting moisture availability for *C. grisea.* The impacts of predicted future climate change to *C. grisea* remain unclear. While we recognize that climate change is an important issue with potential effects to listed species and their habitats, information is not available to make accurate predictions regarding its effects to *C. grisea* at this time.

Summary of Factor E

Castilleja grisea continues to be impacted by military activities and fire at 17 of the 29 (59 percent) occurrences on San Clemente Island. Military training activities have the potential to ignite fires within *C. grisea* habitat, though the majority of occurrences are outside of the Impact Areas and TAR where the highest impacts are recognized. The threat from fire is reduced by implementation of the Navy's MOFMP, which should limit the frequency of fires escaping from the Impact Areas, although suppression will not likely occur within the boundaries of the Impact Areas. Threats from

trampling and crushing of individual plants are likely to increase due to increases in training on the island. However, *C. grisea* has expanded its distribution on the island, and the Navy is implementing conservation measures that will continue to improve conditions for this taxon. Finally, climate change may likely influence this taxon, though the magnitude of this rangewide threat or how it may affect this taxon is unknown at this time. Given the distribution of the species and the conservation measures that will be implemented by the Navy, the threats described here currently and in the future are either of limited extent or adequately managed to reduce and minimize impacts to the species, while the potential overall threat of climate change remains unknown across this taxon's range.

Combination of Factors—Castilleja grisea

A species may be affected by more than one threat in combination. Within the preceding review of the five listing factors, we have identified multiple threats that may have interrelated impacts on the species (see above discussion on Combination of Factors under *Malacothamnus clementinus—Factor E*). The species' productivity may be reduced because of these threats, either singularly or in combination. However, it is not necessarily easy to determine (nor is it necessarily determinable) whether a particular threat is the primary threat having the greatest effect on the viability of the species, or whether it is exacerbated by or working in combination with other potential threats to have cumulative or synergistic effects on the species. While the combination of factors is a threat to the existence of *Castilleja grisea,* we are unable to determine the magnitude or extent of cumulative or synergistic effects of the combination of factors on the viability of the species at this time.

Finding

An assessment of the need for a species' protection under the Act is based on threats to that species and the regulatory mechanisms in place to ameliorate impacts from these threats. As required by section 4(a)(1) of the Act, we conducted a review of the status of these taxa and assessed the five factors in consideration of whether *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea* are threatened or endangered throughout all of their range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by the species. We reviewed information presented in the May 18, 2010, petition, information available in our files, and through our 90-day finding in response to this petition, and other available published and unpublished information. We also consulted with species experts and Navy staff, who are actively managing for the conservation of *M. clementinus, A. d.* var. *traskiae,* and *C. grisea* on San Clemente Island.

In considering what factors might constitute threats, we must look beyond the mere exposure of the species to the factor to determine whether the exposure causes actual impacts to the species. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine how significant the threat is. If the threat is significant, it may drive, or contribute to, the risk of extinction of the species such that the species warrants listing as threatened or endangered as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely impacted could suffice. The mere identification of factors that could impact a species negatively is not sufficient to compel a finding that listing is appropriate; we require evidence that these factors are operative threats that act on the species to the point that the species meets the definition of threatened or endangered under the Act.

A direct threat identified in the listing rule (42 FR 40682), grazing from feral herbivores, was eliminated by 1992 through the complete removal of goats and pigs from the island (Factors A and C). This action also fulfilled one of the primary goals of the Recovery Plan under Objective 2 (USFWS 1984, p. 107). However, as a result of years of grazing, impacts from nonnative plants and erosion have continued to increase on the island. Our review of the status of *Malacothamnus clementinus, Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea* determined that threats to these species under Factors A, D, and E are present. The Navy's natural resource management and INRMP for the island have helped to ameliorate many of the threats to these species. The Navy implements natural resource management through the control of nonnative species, execution of the fire management plan, and avoidance of federally listed species. Despite current impacts from these threats to the habitat and individuals of these taxa, surveys indicate that the range of each taxon has increased since the time of listing. Increased survey efforts and survey accuracy have also shown that these taxa occupy significantly more sites than were known at listing. The extent to which this represents the detection of previously unknown occurrences, recruitment from the existing seed bank, or recolonization associated with dispersal events, or positive response to management and conservation efforts is not known. Regardless, the increase of both the range and number of occurrences for all species indicates an overall improved status for these species since listing.

The surveys and discoveries of new occurrences also contribute to the achievement of objectives in the Recovery Plan (Objective 6; USFWS 1984, p. 107). The Navy has taken measures to locate the heaviest impacts of military operations away from the species to the extent feasible while meeting operational needs, which will minimize, but not fully eliminate, the damage or destruction of individuals or occurrences of *M. clementinus, A. d.* var. *traskiae,* and *C. grisea,* partially fulfilling Objective 1 of the Recovery Plan (USFWS 1984, p. 107; USFWS 2008, pp. 90, 101, 121). However, the largest and most diverse occurrences of *Malacothamnus clementinus* are closed to natural resource monitoring and management, and their status remains unknown.

Malacothamnus clementinus

Since the removal of feral goats and pigs, the distribution of *Malacothamnus clementinus* has expanded from 3 to 11 occurrences on San Clemente Island. However, there are still significant threats to the species, including threats to habitat from military training activities directly related to land use, erosion, nonnative plants, fire, and fire management (see *Malacothamnus clementinus*—Factor A). Habitat impacts are caused by the movement of troops and vehicles over the landscape, as well as by the use of live fire, demolitions, and bombardments. Six of the 11 known occurrences of *M. clementinus* are within SHOBA, much of which serves as a buffer from military training impacts for the rest of the island. Three *M. clementinus* occurrences are directly within the Impact Areas, where frequent fire, habitat disturbance (bombardment), and troop and vehicle movement occur. This includes the occurrence at Horse Beach Canyon that comprises the greatest number of point localities and one of the two occurrences with the greatest genetic variability (Helenurm

1999, p. 39). Through implementation of the INRMP, the Navy developed an MOFMP and a nonnative plant management plan to help minimize or ameliorate these threats to the species. However, the status of *M. clementinus* at Lemon Tank Canyon and the three occurrences in Impact Areas within SHOBA remains unknown at this time, because these areas are closed to natural resource personnel (USFWS 2008, p. 50).

Threats to individual *Malacothamnus clementinus* plants also affect the species and include: Movement of vehicles and troops, fire, climate change, and low genetic diversity (see *Malacothamnus clementinus*—Factor E). The steps that the Navy has taken to minimize impacts and avoid endangered species to the extent practicable have helped ameliorate the threats caused by training to the individual *M. clementinus* plants. Climate change may impact *M. clementinus,* though the effect is largely unknown. The genetic makeup of the species has been studied (fulfilling Objective 4 of the Recovery Plan), revealing that genetic variation within the species is low. Combined with a low seed production rate and vegetative reproduction, low genetic diversity puts the species at risk of low genetic fitness and extinction by stochastic events.

The Navy implemented an INRMP to coordinate the management of natural resources on the island. Providing a framework for military operations, this plan helps to ameliorate threats to the endangered species on the island, and provides for long-term conservation planning within the scope of military readiness. Provisions included in the INRMP provide some protection for *Malacothamnus clementinus* occurrences (including *Acmispon dendroideus* var. *traskiae,* and *Castilleja grisea*), and allows adaptive management of the habitat in order to help address threats from military activities and nonnative plants. Occurrences within Impact Areas or operationally closed areas may not benefit from the conservation measures associated with the MOFMP due to lack of access for natural resources personnel. Existing regulatory mechanisms, absent the protections of the Act, provide insufficient certainty that efforts needed to address long-term conservation of the species will be implemented, or that they will be effective in reducing the level of threats to *M. clementinus* throughout its range. Under the INRMP, occurrences of *M. clementinus,* including the largest and most genetically diverse occurrences, will continue to be impacted by military activities necessary for military readiness and training, and the closure of some areas creates uncertainty as to the status of the occurrences within those areas and whether those occurrences will benefit from conservation measures.

As discussed in the Factor Analysis, a species may be affected by more than one threat in combination. For example, fires (Factors A and E) may be more intense or frequent in the habitat if there are greater amounts of nonnative grasses (Factor A) present in the vegetative community. Additionally, military activities or erosion may lead to increased nonnatives in an area. Thus, the species' viability may be reduced because of synergistic effects when multiple threats are present at one time. Therefore, the combination of factors is a threat to the existence of *Malacothamnus clementinus,* but we are unable to determine the magnitude or extent of any synergistic effects of the various factors and their impact at this time.

In conclusion, we have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species. Our review of the information pertaining to the five threat factors does not support a conclusion that the threats have been sufficiently removed, or that their imminence, intensity, or magnitude have been reduced to the extent that the species no longer requires the protections of the Act. Four of the 11 known occurrences of the species have been closed to nonmilitary personnel, such that we are unable to assess the impacts of the threats described under the five listing factors above, nor are we able to document the status of a substantial portion of the occurrences of *Malacothamnus clementinus.* This includes one occurrence with the highest number of point localities and the greatest genetic variability. Under provision of section 4(a)(1) of the Act, we must assess the status in order to list or change the status of a species from endangered to threatened.

The 2007 status review listed land use, fire, nonnative species, erosion, natural factors, fire management, and access to SHOBA as threats to the species (USFWS 2007, p. 1–23). Although we recommended downlisting in our 2007 status review, at this time we conclude that *Malacothamnus clementinus* continues to be in danger of extinction throughout its range because of the change in intensity of training and associated impacts enacted in the 2008 MOFMP. These changes include the escalation in frequency and intensity of bombardments in Impact Areas I and II and the movement of large groups of troops and vehicles through *M. clementinus* habitat. The threats to *M. clementinus,* coupled with low genetic fitness, place this taxon at risk of extinction throughout all of its range, and reclassification from endangered to threatened is not warranted at this time.

Acmispon dendroideus var. traskiae

Since listing and the removal of feral goats and pigs on San Clemente Island, the distribution of *Acmispon dendroideus* var. *traskiae* has expanded from 6 to 29 occurrences, mainly along the western terraces and eastern escarpment. These significant gains demonstrate alleviation of threats from feral ungulates and that the species is persisting despite existing and remaining threats across the landscape. The taxon faces impacts from military training activities and land use, erosion, nonnative plants, and fire (see *Acmispon dendroideus* var. *traskiae—Factor A*). Impacts from land use include movement of troops and vehicles over the landscape, as well as the use of live fire, demolitions, and bombardments. Much of this activity is concentrated in training areas within the range of *A. d.* var. *traskiae.* However, many of these occurrences are along the eastern escarpment that is more protected from fire and military activity. Additionally, the majority of locations occupied by *A. d.* var. *traskiae* (24 of 29 occurrences, or 83 percent) fall outside of training areas, and thus do not receive intensive habitat disturbance. Access to the eastern escarpment, within SHOBA and east of Ridge Road, was recently closed for safety concerns. As a result, the status of 4 of 29 occurrences (14 percent) could be difficult to monitor in the future.

The Navy implemented a nonnative plant management plan and an MOFMP to ameliorate habitat threats to the species. Erosion control measures are incorporated into all project designs to minimize the potential to exacerbate existing erosion and avoid impacts to listed species (Munson 2011a, pers. comm.). Additionally, large-scale island-wide maneuvers with assault vehicles have been postponed until an erosion control plan is drafted and implemented. While it is anticipated that military training activities, erosion, nonnatives, and fire will have ongoing impacts to the taxon's habitat, based on the current distribution of this taxon and existing conservation efforts, impacts from these threats are reduced and minimized for *Acmispon dendroideus* var. *traskiae.*

Under the Sikes Act, the Navy has implemented an INRMP to organize the management of natural resources on the island (also see above discussion in the Finding section for *Malacothamnus clementinus*). Existing regulatory mechanisms, absent the protections of the Act, provide insufficient certainty that efforts needed to address long-term conservation of the species will be implemented, or that they will be effective in reducing the level of threats to *Acmispon dendroideus* var. *traskiae* throughout its range. Under the INRMP, occurrences of *A. d.* var. *traskiae* will continue to be impacted by military activities necessary for military readiness and training.

Individual *Acmispon dendroideus* var. *traskiae* plants also face threats on the island. Movement of vehicles and troops, fire, climate change, and hybridization with related species all impact the status of the species (see *Acmispon dendroideus* var. *traskiae—Factor E*). The steps that the Navy has taken to minimize impacts and avoid endangered species to the extent practicable are ameliorating the threat of trampling individual *A. d.* var. *traskiae* plants caused by training. Hybridization has also been studied (fulfilling Objective 4 of the Recovery Plan), with confirmed hybrids occurring in Wilson Cove (Wilson Cove). The genetic integrity of *A. d.* var. *traskiae* may be threatened by hybridization with *A. argophyllus* var. *argenteus* at one of the largest occurrences, and requires further investigation. The threats described here (*Factor E*) are either of limited or undetermined magnitude, or reduced to the extent that we anticipate they will not impede the recovery of *A. d.* var. *traskiae.*

As discussed above in the Factor Analysis, a species may be affected by more than one threat in combination. For example, fires (Factors A and E) may be more intense or frequent in the habitat if there are greater amounts of nonnative grasses (Factor A) present in the vegetative community. Thus, the species' viability may be reduced because of threats in combination. Therefore, the combination of factors is a threat to the existence of *Acmispon dendroideus* var. *traskiae,* but we are unable to determine the magnitude or extent of any synergistic effects of the various factors and their impact at this time.

In conclusion, we have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species. After review of the information pertaining to the five threat factors, we find that the ongoing threats are not of sufficient imminence, intensity, or magnitude to indicate that *Acmispon dendroideus* var. *traskiae* is presently in danger of extinction throughout its range and does not, therefore, meet the definition of an endangered species. While *A. d.* var. *traskiae* will continue to be impacted by military training activities and land use, erosion, nonnative plants, and fire, the expanded number of occurrences reduces the severity and magnitude of threats and the likelihood that any one event would affect all occurrences of the species. The extent of hybridization within the species is also not known and could affect the genetic integrity of the plant. Additionally, the plant occurs in recently closed areas, and these occurrences will not be able to be accessed or managed in the future with these closures.

Though these threats to *Acmispon dendroideus* var. *traskiae* still exist and will continue into the foreseeable future, the range of this taxon has substantially increased since listing, and the Navy is implementing conservation actions through their INRMP to reduce threats impacting *A. d.* var. *traskiae.* Therefore, we find that the petitioned action to downlist *A. d.* var. *traskiae* to threatened is warranted. Please see the Significant Portion of the Range Analysis section below for our evaluation as to whether this species may or may not be in danger of extinction in a significant portion of its range.

Castilleja grisea

The known distribution of *Castilleja grisea* has expanded from 19 to 29 known occurrences since listing, likely due to the removal of feral goats and pigs from the island in 1992. These significant gains demonstrate some alleviation of threats from feral ungulates and that the species is persisting despite existing and remaining threats across the landscape. *Castilleja grisea* faces impacts from military training activities and land use, erosion, nonnative plants, fire, and fire management (see *Castilleja grisea—Factor A*). The movement of troops and vehicles over the landscape, as well as use of live fire, demolitions, and bombardments, results in destruction and degradation of habitat occupied by *C. grisea.* Much of this activity is concentrated in SHOBA within training areas and Impact Areas. Four occurrences are within the Impact Areas, where frequent fire, habitat disturbance (bombardment), and troop and vehicle movement take place in the heavily used ranges. Access to parts of SHOBA, including the eastern escarpment and east of Ridge Road, was recently closed for safety concerns. The status of the four occurrences may be difficult to assess in the future, although these areas may be more protected from fire and military activity and are likely less impacted by habitat threats. A large proportion of *C. grisea* occurrences fall outside Impact Areas, TAR, and fuelbreaks, where the most intensive habitat disturbances are likely to take place.

Threats impacting individual plants of *Castilleja grisea* on the island include: movement of vehicles and troops, fire, and potentially climate change (see *Castilleja grisea—Factor E*). The Navy has ameliorated the threats to individual plants by taking steps to minimize training impacts and measures to avoid endangered species to the extent practicable. The threats described under Factor E are either of limited extent or adequately managed and are not likely to impede the recovery of *C. grisea.*

Under the Sikes Act, the Navy has implemented an INRMP to organize the management of natural resources on the island (also see above discussion in the Finding section for *Malacothamnus clementinus*). Existing regulatory mechanisms, absent the protections of the Act, provide insufficient certainty that efforts needed to address long-term conservation of the species will be implemented, or that they will be effective in reducing the level of threats to *Castilleja grisea* throughout its range. Under the INRMP, occurrences of *C. grisea* will continue to be impacted by military activities necessary for military readiness and training.

As discussed above in the Factor Analysis, a species may be affected by more than one threat in combination. For example, fires (Factors A and E) may be more intense or frequent in the habitat if there are greater amounts of nonnative grasses (Factor A) present in the vegetative community. Thus, the species' viability may be reduced because of threats in combination. Therefore, the combination of factors is a threat to the existence of *Castilleja grisea,* but we are unable to determine the magnitude or extent of any synergistic effects of the various factors and their impact at this time.

In conclusion, we have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species. After review of the information pertaining to the five threat factors, we find the ongoing threats are not of sufficient imminence, intensity, or magnitude to indicate that *Castilleja grisea* is

presently in danger of extinction across its range. While *C. grisea* will continue to be impacted by military training activities and land use, erosion, nonnative plants, and fire, the expanded number of occurrences reduces the severity and magnitude of threats and the likelihood that any one event would affect all occurrences of the species. Additionally, the plant occurs in operationally closed areas, such as the Impact Areas, where threats are concentrated and occurrences cannot be accessed or managed with these closures.

Though threats to *Castilleja grisea* still exist and will continue into the foreseeable future, the range of this taxon has substantially increased since listing, and the Navy is implementing conservation actions through their INRMP to reduce threats impacting *C. grisea.* Therefore, we find that the petitioned action to downlist *C. grisea* to threatened is warranted at this time. Please see the Significant Portion of the Range Analysis section below for our evaluation as to whether this species may or may not be in danger of extinction in a significant portion of its range.

Significant Portion of the Range Analysis

The Act defines ''endangered species'' as any species which is ''in danger of extinction throughout all or a significant portion of its range,'' and ''threatened species'' as any species which is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The definition of ''species'' is also relevant to this discussion. The Act defines the term ''species'' as follows: ''The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment [DPS] of any species of vertebrate fish or wildlife which interbreeds when mature.'' The phrase ''significant portion of its range'' (SPR) is not defined by the statute, and we have never addressed in our regulations: (1) The consequences of a determination that a species is either endangered or likely to become so throughout a significant portion of its range, but not throughout all of its range; or (2) what qualifies a portion of a range as ''significant.''

Two recent district court decisions have addressed whether the SPR language allows the Service to list or protect less than all members of a defined ''species'': *Defenders of Wildlife* v. *Salazar,* 729 F. Supp. 2d 1207 (D. Mont. 2010), concerning the Service's delisting of the Northern Rocky Mountain gray wolf (74 FR 15123, Apr. 12, 2009); and *WildEarth Guardians* v. *Salazar,* 2010 U.S. Dist. LEXIS 105253 (D. Ariz. Sept. 30, 2010), concerning the Service's 2008 finding on a petition to list the Gunnison's prairie dog (73 FR 6660, Feb. 5, 2008). The Service had asserted in both of these determinations that it had authority, in effect, to protect only some members of a ''species,'' as defined by the Act (i.e., species, subspecies, or DPS), under the Act. Both courts ruled that the determinations were arbitrary and capricious on the grounds that this approach violated the plain and unambiguous language of the Act. The courts concluded that reading the SPR language to allow protecting only a portion of a species' range is inconsistent with the Act's definition of ''species.'' The courts concluded that once a determination is made that a species (i.e., species, subspecies, or DPS) meets the definition of ''endangered species'' or ''threatened species,'' it must be placed on the list in its entirety and the Act's protections applied consistently to all members of that species (subject to modification of protections through special rules under sections 4(d) and 10(j) of the Act).

Consistent with that interpretation, and for the purposes of this finding, we interpret the phrase ''significant portion of its range'' in the Act's definitions of ''endangered species'' and ''threatened species'' to provide an independent basis for listing; thus there are two situations (or factual bases) under which a species would qualify for listing: A species may be endangered or threatened throughout all of its range; or a species may be endangered or threatened in only a significant portion of its range. If a species is in danger of extinction throughout an SPR, it, the species, is an ''endangered species.'' The same analysis applies to ''threatened species.'' Therefore, the consequence of finding that a species is endangered or threatened in only a significant portion of its range is that the entire species shall be listed as endangered or threatened, respectively, and the Act's protections shall be applied across the species' entire range.

We conclude, for the purposes of this finding, that interpreting the SPR phrase as providing an independent basis for listing is the best interpretation of the Act because it is consistent with the purposes and the plain meaning of the key definitions of the Act; it does not conflict with established past agency practice (i.e., prior to the 2007 Solicitor's Opinion), as no consistent, long-term agency practice has been established; and it is consistent with the judicial opinions that have most closely examined this issue. Having concluded that the phrase ''significant portion of its range'' provides an independent basis for listing and protecting the entire species, we next turn to the meaning of ''significant'' to determine the threshold for when such an independent basis for listing exists.

Although there are potentially many ways to determine whether a portion of a species' range is ''significant,'' we conclude, for the purposes of this finding, that the significance of the portion of the range should be determined based on its biological contribution to the conservation of the species. For this reason, we describe the threshold for ''significant'' in terms of an increase in the risk of extinction for the species. We conclude that a biologically based definition of ''significant'' best conforms to the purposes of the Act, is consistent with judicial interpretations, and best ensures species' conservation. Thus, for the purposes of this finding, a portion of the range of a species is ''significant'' if its contribution to the viability of the species is so important that, without that portion, the species would be in danger of extinction.

We evaluate biological significance based on the principles of conservation biology using the concepts of redundancy, resiliency, and representation. *Resiliency* describes the characteristics of a species that allow it to recover from periodic disturbance. *Redundancy* (having multiple populations distributed across the landscape) may be needed to provide a margin of safety for the species to withstand catastrophic events. *Representation* (the range of variation found in a species) ensures that the species' adaptive capabilities are conserved. Redundancy, resiliency, and representation are not independent of each other, and some characteristic of a species or area may contribute to all three. For example, distribution across a wide variety of habitats is an indicator of representation, but it may also indicate a broad geographic distribution contributing to redundancy (decreasing the chance that any one event affects the entire species), and the likelihood that some habitat types are less susceptible to certain threats, contributing to resiliency (the ability of the species to recover from disturbance). None of these concepts is intended to be mutually exclusive, and a portion of a species' range may be determined to be ''significant'' due to its contributions under any one of these concepts.

For the purposes of this finding, we determine if a portion's biological contribution is so important that the portion qualifies as ''significant'' by

asking whether, without that portion, the representation, redundancy, or resiliency of the species would be so impaired that the species would have an increased vulnerability to threats to the point that the overall species would be in danger of extinction (i.e., would be ''endangered''). Conversely, we would not consider the portion of the range at issue to be ''significant'' if there is sufficient resiliency, redundancy, and representation elsewhere in the species' range that the species would not be in danger of extinction throughout its range if the population in that portion of the range in question became extirpated (extinct locally).

We recognize that this definition of ''significant'' establishes a threshold that is relatively high. On the one hand, given that the consequences of finding a species to be endangered or threatened in an SPR would be listing the species throughout its entire range, it is important to use a threshold for ''significant'' that is robust. It would not be meaningful or appropriate to establish a very low threshold whereby a portion of the range can be considered ''significant'' even if only a negligible increase in extinction risk would result from its loss. Because nearly any portion of a species' range can be said to contribute some increment to a species' viability, use of such a low threshold would require us to impose restrictions and expend conservation resources disproportionately to conservation benefit: listing would be rangewide, even if only a portion of the range of minor conservation importance to the species is imperiled. On the other hand, it would be inappropriate to establish a threshold for ''significant'' that is too high. This would be the case if the standard were, for example, that a portion of the range can be considered ''significant'' only if threats in that portion result in the entire species' being currently endangered or threatened. Such a high bar would not give the SPR phrase independent meaning, as the Ninth Circuit held in *Defenders of Wildlife* v. *Norton,* 258 F.3d 1136 (9th Cir. 2001).

The definition of ''significant'' used in this finding carefully balances these concerns. By setting a relatively high threshold, we minimize the degree to which restrictions will be imposed or resources expended that do not contribute substantially to species conservation. But we have not set the threshold so high that the phrase ''in a significant portion of its range'' loses independent meaning. Specifically, we have not set the threshold as high as it was under the interpretation presented by the Service in the *Defenders* litigation. Under that interpretation, the portion of the range would have to be so important that current imperilment there would mean that the species would be *currently* imperiled everywhere. Under the definition of ''significant'' used in this finding, the portion of the range need not rise to such an exceptionally high level of biological significance. (We recognize that if the species is imperiled in a portion that rises to that level of biological significance, then we should conclude that the species is in fact imperiled throughout all of its range, and that we would not need to rely on the SPR language for such a listing.) Rather, under this interpretation we ask whether the species would be endangered everywhere without that portion, *i.e.,* if that portion were completely extirpated. In other words, the portion of the range need not be so important that even being in danger of extinction in that portion would be sufficient to cause the remainder of the range to be endangered; rather, the complete extirpation (in a hypothetical future) of the species in that portion would be required to cause the remainder of the range to be endangered.

The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that have no reasonable potential to be significant and threatened or endangered. To identify only those portions that warrant further consideration, we determine whether there is substantial information indicating that: (1) The portions may be ''significant,'' and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. Depending on the biology of the species, its range, and the threats it faces, it might be more efficient for us to address the significance question first or the status question first. Thus, if we determine that a portion of the range is not ''significant,'' we do not need to determine whether the species is endangered or threatened there; if we determine that the species is not endangered or threatened in a portion of its range, we do not need to determine if that portion is ''significant.'' In practice, a key part of the portion status analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the species' range that clearly would not meet the biologically based definition of ''significant,'' such portions will not warrant further consideration.

Having determined that *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* are no longer endangered throughout their ranges as a consequence of the threats evaluated under the five factors in the Act, we must next consider whether there are any significant portions of these two species' ranges where they are currently endangered. A portion of a species' range is significant if it is part of the current range of the species and is important to the conservation of the species as evaluated based upon its representation, resiliency, or redundancy.

Acmispon dendroideus var. *traskiae*

Applying the process described above, we evaluated the range of *Acmispon dendroideus* var. *traskiae* to determine if any units could be considered a significant portion of its range. This taxon is an island endemic restricted to a single, small island, with no natural division in its range. Because of its limited range and number of occurrences in close proximity to one another, no portion is likely to have a greater contribution to representation, resiliency, or redundancy than other portions. Furthermore, the existing and potential primary direct and indirect threats from military training activities, nonnative plant species, fire, and erosion are relatively uniform across San Clemente Island, indicating that no portions of its range are experiencing a greater severity or magnitude of threats. We conclude that there are no portions that warrant further consideration under this analysis.

In summary, the primary threats to *Acmispon dendroideus* var. *traskiae* are relatively uniform throughout its range. We determined that none of the existing or potential threats, either alone or in combination with others, currently place *A. d.* var. *traskiae* in danger of extinction throughout all or a significant portion of its range. However, without the continued protections of the Act, this taxon is likely to become endangered throughout its range in the foreseeable future. Threatened status is therefore appropriate for *A. d.* var. *traskiae* throughout its entire range.

Castilleja grisea

Applying the process described above, we evaluated the range of *Castilleja grisea* to determine if any units could be considered a significant portion of its range (also see the Significant Portion of the Range

Analysis section above for *Acmispon dendroideus* var. *traskiae*). This island endemic is restricted to a single, small island with no natural division in its range. Because of its limited range and number of occurrences in close proximity to one another, no portion is likely to have a greater contribution to its representation, resiliency, or redundancy than other portions. The primary threats to *C. grisea,* military training activities, nonnative plant species, fire, and erosion, are relatively uniform throughout its range (San Clemente Island), indicating that no portion is experiencing a greater severity or magnitude of threats. We conclude that there are no portions that warrant further consideration under this analysis. We determined that none of the existing or potential threats, either alone or in combination with others, currently place *C. grisea* in danger of extinction throughout all of its range. However, without the continued protections of the Act, this taxon is likely to become endangered throughout its range in the foreseeable future. Threatened status is therefore appropriate for *C. grisea* throughout its entire range.

Effects of This Rule

If this proposed rule is made final, it would revise 50 CFR 17.12(h) to reclassify *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* from endangered to threatened on the List of Endangered and Threatened Plants and to correct the scientific and common names for *Acmispon dendroideus* var. *traskiae.* However, this reclassification does not significantly change the protections afforded these species under the Act. The regulatory protections of section 9 and section 7 of the Act (see *Factor D,* above) would remain in place. Pursuant to section 7 of the Act, all Federal agencies must ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of *A. d.* var. *traskiae* and *C. grisea.* Whenever a species is listed as threatened, the Act allows promulgation of special rules under section 4(d) that modify the standard protections for threatened species found under section 9 of the Act and Service regulations at 50 CFR 17.31 and 17.71, when it is deemed necessary and advisable to provide for the conservation of the species. There are no 4(d) rules in place or proposed for *A. d.* var. *traskiae* and *C. grisea,* because there is currently no conservation need to do so for these species.

Recovery actions directed at *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* will continue to be implemented as outlined in the Recovery Plan for the Endangered and Threatened Species of the California Channel Islands (USFWS 1984). This recovery plan addresses 10 plants (including *Malacothamnus clementinus, A. d.* var. *traskiae,* and *C. grisea*) and animals distributed among three of the Channel Islands (USFWS 1984).

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule to reclassify *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* from endangered to threatened. The purpose of peer review is to ensure that our proposed rule is based on scientifically sound data, assumptions, and analyses. We have invited these peer reviewers to comment during this public comment period on our proposed downlisting.

We will consider all comments and information we receive during this comment period on this proposed rule during our preparation of the final determination. Accordingly, the final decision may differ from this proposal.

Public Hearings

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. We must receive your request within 45 days after the date of this **Federal Register** publication. Send your request to the address shown in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the names of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Executive Order 13211

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Paperwork Reduction Act of 1995

Office of Management and Budget (OMB) regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), require that Federal agencies obtain approval from OMB before collecting information from the public. This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

National Environmental Policy Act

We determined we do not need to prepare an Environmental Assessment or an Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Author(s)

The primary authors of this package are the staff members of the Carlsbad Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

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

2. Amend § 17.12(h) under ''Flowering Plants'' by removing the entry for *''Lotus dendroideus* var. *traskiae''* and adding an entry for *''Acmispon dendroideus* var. *traskiae''* and revising the entry for ''*Castilleja grisea''* to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*		*
Acmispon dendroideus var. *traskiae*.	San Clemente Island lotus.	U.S.A. (CA)	Fabaceae	T	26	NA	NA
*	*	*	*	*	*		*
Castilleja grisea	San Clemente Island Paintbrush.	U.S.A. (CA)	Orobanchaceae	T	26	NA	NA
*	*	*	*	*	*		*

Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: May 1, 2012.

David L. Cottingham,

Acting Director, Fish and Wildlife Service.

[FR Doc. 2012–11339 Filed 5–15–12; 8:45 am]

BILLING CODE 4310–55–P

FEDERAL REGISTER

Vol. 77 Wednesday,

No. 95 May 16, 2012

Part VI

Small Business Administration

13 CFR Parts 121, 124, 125 et al.
Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation; Proposed Rule

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 124, 125, 126, and 127

[Docket No.: SBA–2011–011]

RIN 3245–AG20

Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation

AGENCY: Small Business Administration.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to amend its regulations governing small business contracting procedures. This proposed rule would amend SBA's regulations to implement the following sections of the Small Business Jobs Act of 2010: section 1311 (definition of multiple award contract); section 1313 (consolidation of contracts definitions, policy, limitations on use, determination on necessary and justified); and section 1331 (reservation and set-aside of multiple award contracts and orders against multiple award contracts for small businesses). In addition, the proposed rule revises 13 CFR part 125 by reorganizing the part for clarity and creating a definition section.

DATES: You must submit your comments on or before July 16, 2012.

ADDRESSES: You may submit comments, identified by RIN: 3245–AG20, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail, Hand Delivery/Courier:* Dean Koppel, Assistant Director, Office of Policy and Research, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416.

All comments will be posted on *http://www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *http://www.regulations.gov,* please submit the comments to Dean Koppel and highlight the information that you consider to be CBI and explain why you believe this information should be held confidential. SBA will make a final determination as to whether the comments will be published or not.

FOR FURTHER INFORMATION CONTACT: Dean Koppel, Assistant Director, Office of Policy and Research, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416, (202) 205–7322.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

This proposed rule seeks to ensure the increased consideration of small businesses in connection with the establishment and use of multiple award contracts and acquisitions that consolidate contracts, consistent with sections 1311, 1313, and 1331 of the Jobs Act. Over the past 15 years, Federal agencies have increasingly used multiple award contracts—including the Multiple Award Schedules (MAS) contracts managed by the General Services Administration (GSA), governmentwide acquisition contracts, multi-agency contracts, and agency-specific indefinite-delivery indefinite-quantity (IDIQ) contracts—to acquire a wide range of products and services. They have also consolidated acquisitions, often through the use of multiple award contracts, to eliminate duplicative efforts, save money by pooling their buying power, and reduce administrative costs. While these actions provide an important foundation for achieving greater fiscal responsibility, they have also created challenges for agencies seeking to take full advantage of the many benefits that small business provide to our taxpayers: creativity, innovation, cost-effective technical expertise, and job growth and economic expansion, as well as maximizing awards to small businesses as both prime and subcontractors in fulfilling the Government's statutory small business goals.

In September 2010, the President's Interagency Task Force on Small Business Contracting made a series of recommendations to increase procurement opportunities for small businesses in the federal marketplace. These recommendations included a strengthened policy on set-asides that ''rationalizes and appropriately balances the need for efficiency with the need to maximize opportunities for small businesses.'' The Task Force further recommended guidance to clarify practices and strategies to prevent unjustified contract bundling and mitigate any negative effects of justified contract bundling on small businesses. The same month these recommendations were issued, the President signed the Jobs Act which included provisions that address both of these issues. Both actions recognize the significant opportunities that exist to increase small business participation on multiple award contracts and the ability of set asides—the most powerful small business contracting tool—to unlock these opportunities. These actions also recognize the continued attention that is required to ensure agencies avoid unjustified bundling and mitigate the negative effects of justified bundling. This proposed rule is designed to address these important issues and implement the provisions of the Jobs Act that deal with them.

A. Multiple Award Contracts and the Use of Set-Asides, Partial Set-Asides and Reserves

Section 1331 of the Jobs Act requires the Administrator for the Office of Federal Procurement Policy (OFPP) and the Administrator for the Small Business Administration (SBA), in consultation with the Administrator of GSA, to establish regulations under which Federal agencies may: (1) Set-aside part or parts of a multiple award contract for small business, (2) reserve one or more awards on multiple award contracts that are established through full and open competition, and (3) set aside orders under multiple award contracts awarded pursuant to full and open competition that have not been set aside, partially set aside, or include a reserve for small businesses. Section 1331 of the Jobs Act does not revise or repeal the requirement for a contracting officer to set aside a *contract* for exclusive small business participation if the contracting officer determines that capable small businesses can meet the *contract's requirements.*

Last November, SBA and OFPP, in consultation with GSA, requested that the Department of Defense (DOD), GSA, and the National Aeronautics and Space Administration (NASA) publish an interim rule in order to provide agencies with initial guidance that they can use to take advantage of the authorities addressed in section 1331. Among other things, the interim rule makes clear that set-asides may be used in connection with the placement of orders under multiple award contracts, notwithstanding the requirement to provide each contract holder a fair opportunity to be considered, and further makes clear that order set-asides may be used in connection with the placement of orders and blanket purchase agreements under Multiple Award Schedule contracts. While the interim rule amends existing solicitation provisions and contract clauses to provide notice of set-asides, it does not define terms, such as ''reserve''; nor does it provide guidance for how to apply the various section 1331 authorities.

This proposed rule provides more specific guidance to ensure both that meaningful consideration of set-asides and reserves is given in connection with the award of multiple award contracts

and task and delivery orders placed against them, and that these tools are used in a consistent manner across agencies. To achieve these results, including the requirement in section 1331 that use of the tools be left to the discretion of agencies, SBA's proposed rule takes the following four steps:

1. *Definition of terms and processes.* As stated above, section 1331 covers three authorities: (i) Partial set-asides, (ii) contract reserves, and (iii) order set-asides for small businesses. The proposed rule provides guidance on each of these authorities, defining key terms and laying out processes for each tool.

(i) *Partial set-asides.* The proposed rule explains at § 125.1(n) that the term ''partial set-aside'' for a multiple award contract means a contracting vehicle that can be used when market research indicates that a total set-aside is not appropriate but the procurement can be broken up into smaller discrete portions or categories (such as contract line items) and two or more small business concerns, including 8(a) Business Development (BD) Participants, Historically Underutilized Business Zone (HUBZone) small business concerns, Service Disabled Veteran-Owned small business concerns (SDVO SBCs) and Women-Owned Small businesses concerns (WOSBs) or Economically Disadvantaged WOSBs are expected to submit an offer on the set-aside part or parts of the requirement at a fair market price. The rule would allow for small businesses to submit an offer on the set-aside portion, non-set aside portion, or both. *See* proposed § 125.2(e)(3). This approach would replace the more cumbersome process currently found at Federal Acquisition Regulation (FAR) § 19.502–3 that requires small businesses to first submit responsive offers on the non-set-aside portion in order to be considered for the set-aside portion. The FAR's partial set-aside process has proven to be unnecessarily complicated, which has resulted in its underutilization over time.

(ii) *Contract reserves.* The proposed rule establishes a process, at § 125.2(e)(4), for agencies to reserve awards for small businesses (including Small Business Teaming Arrangements) under a multiple award contract awarded pursuant to full and open competition if the requirement cannot be broken into discrete components to support a partial set-aside and market research shows that either at least two small businesses could perform on a part of the contract or at least one small business could perform all of the contract. Reserves have been used by a number of agencies, but there has not been a common understanding of what the term means or a uniform approach to its application. Many agencies have reserved awards for small businesses only to make them compete on an unrestricted basis with other-than-small business contract holders because of the statutory requirement to provide a fair opportunity for all multiple award contract holders to be considered. Small businesses were especially vocal in providing feedback to SBA during its 2011 Jobs Tour about their frustration at having to expend resources to become contract holders only to find themselves repeatedly competing against large businesses for work when two or more small businesses were available under the contract and could have competed effectively under a set-aside to perform work at a fair and reasonable price. To address this concern, the rule provides that orders must be set-aside aside for small businesses if the rule-of-two or any alternative set-aside requirements provided in SBA's small business program have been met.

(iii) *Order set-asides.* The proposed rule also lays out processes, at § 125.2(e)(6), that permit agencies, when awarding multiple award contracts pursuant to full and open competition without either partial set-asides or reserves, to make commitments to set aside orders, or preserve the right to consider set-asides, when the rule of two is met. The contracting officer would state in the solicitation and resulting contract what process would be used—*e.g.,* automatic application of set-asidesor preservation of right to consider set-asides. These alternatives maximize agencies' flexibility in exercising their discretion to determine when and how best to use set-asides under multiple award contracts.

Finally, the proposed rule states at § 125.1(k) that the term ''multiple award contract'' includes MAS contracts issued by GSA—or agencies to which GSA has delegated authority. This clarification is consistent with the interim FAR rule which, as explained above, states (at FAR 8.405–5(a)) that order set-asides may be used in connection with the placement of orders and BPAs under MAS contracts. The MAS Program provides an important contracting gateway to help agencies reach small businesses. It is the largest acquisition program in the Federal Government built on MACs; nearly $40 billion in sales went through the MAS contracts managed by GSA in FY 2011. As a general matter, SBA anticipates that Schedule orders would be conducted using a modified version of the process set forth at 125.2(e)(6). A contracting officer, at his or her discretion, may set aside a Schedule order by including language in its request for quote that the order is a set aside for small business and only quotes submitted by a small business concern (or a specific category of small businesses) will be accepted. GSA's Federal Acquisition Service is modifying its schedules to include all appropriate set-aside clauses and has developed both written and webinar training for agency customers. For additional information on using set-asides on orders, agencies should go to *www.gsa.gov.*

2. *Documentation of consideration given to section 1331 authorities.* SBA seeks to ensure that agencies give meaningful consideration to the tools provided by section 1331 without either prescribing use of any specific tool in any given circumstance or imposing significant new burdens. The proposed rule recognizes that consideration of these tools, which can open up new and previously untapped opportunities for small businesses, is especially important for agencies that have not met their small business goals. For this reason, the proposed rule would require at § 125.2(e)(1)(iii) that the contracting officer document the contract file to provide an explanation if the contracting officer decided not to use any of the 1331 tools in connection with the award of a multiple-award contract when at least one of these authorities could have been used—i.e., partial contract set-aside, contract reserve, or contract clause that commits the agency to setting aside orders, or preserving the right to set aside orders, when the rule of two is met. In addition, where an agency commits to using or preserving the right to use set-asides for orders under multiple award contracts that have not been set-aside, partially set-aside or reserved, the agency must document the file whenever a task order or delivery order is not set-aside for a small business.

Although these documentation requirements are spelled out in the proposed rule, SBA does not view them as creating new burdens for agency contracting officers. To the contrary, SBA believes these requirements reinforce responsibilities which serve the purpose of increasing opportunities for small businesses that already are in the FAR, such as FAR 19.501(c), which states, as a general matter, that ''the contracting officer shall perform market research and document why a small business set-aside is inappropriate when an acquisition is not set aside for small business.''

3. *Preservation of agency discretion.* The proposed rule preserves the discretion that section 1331 vests in agencies to decide whether or not to use any of the enumerated set-aside and reserve tools. *See* proposed § 125.2(e)(1)(ii). There is nothing in the rule that compels an agency to award a multiple award contract with a partial set-aside, contract reserve, or contract clause that commits (or preserves the right) to set aside orders when the rule of two is met. The rule only requires that agencies consider these tools before awarding the multiple award contract and, if they choose not to use any of them, document the rationale. This discretion would not apply to total set-asides, which, as explained above, are not addressed by section 1331. Consistent with current policies in SBA's regulations and the FAR, agencies are required to set aside a multiple award contract if the requirements for a set-aside are met. This includes set-asides for small businesses, 8(a) Participants, HUBZone SBCs, SDVO SBCs, WOSBs, or EDWOSBs.

Agencies have the discretion to forego using the section 1331 tools even if the rule of two could be met; they simply need to explain how their planned action is consistent with the best interests of the agency (*e.g.,* agency met its small business goal in the last year; agency has a history of successfully awarding significant amounts of work to small businesses for the stated requirements under multiple award contracts without set-asides, and has received substantial value from being able to select from among small and other than small businesses as needs arise; agency can get better overall value by using the fair opportunity process without restriction for the stated requirements and has developed a strategy with the help of its Office of Small Disadvantaged Business Utilization (OSDBU) or Office of Small Business Programs (OSBP) that involves use of order set asides whenever the rule of two is met on a number of multiple award contracts for other requirements). Once an agency has exercised its discretion to use one of the § 1331 tools, it must honor the commitment when placing orders. For example, if an agency inserts a clause in a multiple award contract awarded pursuant to full and open competition stating that it will set-aside orders when the rule of two is met, it must do so. Alternatively, if the agency preserves the right to set aside orders, they would not be required to set aside an order every time the rule of two can be met, but should document the file with an explanation when they do not do so.

SBA's procurement center representatives (PCRs) may review acquisitions involving the award of multiple award contracts or orders issued against such contracts that are not set-aside for small businesses or where no awards have been reserved for small businesses. *See* proposed § 125.2(b). This review process is consistent with PCRs' longstanding responsibility to assist small business concerns in obtaining a fair share of Federal Government contracting opportunities. As these authorities are implemented, PCRs may look to work more closely with agencies that have not met their small business goals in the prior year. However, the ultimate decision of whether to apply a § 1331 tool to any given procurement action is a decision of the contracting officer, as expressly stated in proposed § 125.2(e)(1)(ii).

In issuing their interim rule, the FAR signatories (*i.e.,* DoD, GSA, and NASA) made clear that agencies are expected to consider using the 1331 tools. SBA joins in this expectation for careful and meaningful consideration. While use of the 1331 tools is discretionary, the responsibility to give small businesses maximum practicable opportunity is mandatory and agencies will be held accountable for taking all reasonable steps to meet their small business goals. This means that each agency must figure out how best to use these tools with others already available to increase awards to small businesses and help the Federal Government meet and exceed its government-wide small business contracting goals year over year.

SBA seeks to strike the best balance to maximize small business participation on multiple award contracts without compromising the greater flexibility and leverage agencies gain in conducting procurements through multiple award contracts. Throughout the preamble, SBA poses a number of questions to draw attention to particular aspects of the rule on which it is particularly interested in receiving comment to evaluate if the proposed rule has achieved this balance, such as:

- Whether the proposed definitions and processes make sense, including the proposal to require set-asides of orders under reserves if the rule of two can be met; and
- Whether the proposed documentation requirements are adequate, too stringent, or too weak. For respondents who believe the documentation requirements are too weak, they are encouraged to comment on how they should be strengthened (e.g., by requiring higher level approval and/or posting online concurrent with the issuance of the solicitation, similar to steps that agencies will need to take in the context of explaining decisions to consolidate contracts). For respondents who believe the documentation requirements are too stringent, they are encouraged to offer views on what changes might be considered.

4. *Application of size standards to multiple award contracts.* Under SBA's current rules, a North American Industry Classification System (NAICS) code and size standard is required for all contracts, and for all orders under long-term contracts greater than five years. In some instances, SBA has seen that an agency will assign multiple NAICS codes to a multiple award contract where a business may be small for one or more of the NAICs codes, but not all, and the agency receives credit for an award to a small business even though the business is not small for the NAICs code assigned or that should have been assigned to that particular order. The proposed rule provides several alternatives at § 121.402(c)(i)(A) and (B) to ensure every contract and every order issued against a contract contains a NAICS code with a corresponding size standard and that coding for orders more accurately reflects the size of the business for the work being performed. For example, a contracting officer may divide a multiple award contract for divergent goods and services into discrete categories (which could be by contract line item numbers, special item numbers, functional areas, sectors, or any other means for identifying various parts of a requirement identified by the contracting officer), each of which is assigned a NAICS code with a corresponding size standard. The NAICS code assigned to the order would be the same as the NAICS code assigned to the category in the contract. It is SBA's intention in proposing these changes that only small businesses receive the benefits afforded to small business concerns and that agencies receive credit only for awards to small businesses.

B. Consolidation of Contract Requirements

Section 1313 of the Jobs Act amends the Small Business Act to require that agencies address contract consolidation, which is defined as use of a solicitation to obtain offers for a single contract or a multiple award contract to satisfy two or more requirements of the Federal agency with a total value over $2 million for goods or services that have

been provided to or performed for the Federal agency under two or more separate contracts each lower in cost than the total cost of the contract for which the offers are solicited. For a number of years, DoD has had responsibilities, set forth in 10 U.S.C. 2383, to address contract consolidation. The proposed rule builds on much of DoD's existing guidance and explains that an agency may not conduct an acquisition that is a consolidation of contract requirements unless the senior procurement executive (SPE) or chief acquisition officer (CAO): (1) Justifies the consolidation by showing that the benefits of the consolidated acquisition substantially exceed the benefits of each possible alternative approach that would involve a lesser degree of consolidation and (2) identifies the negative impact on small businesses. The proposed rule also requires SBA's PCR to work with the agency's small business specialist and OSDBU or OSBP to identify bundled or consolidated requirements and promote set-asides and reserves.

Additional detail about the proposed rule and the various considerations that have shaped it is set forth below.

II. Background

On September 27, 2010, the President signed into law the Small Business Jobs Act of 2010 (Jobs Act), Public Law 111–240, which was designed to protect the interests of small businesses and boost their opportunities in the Federal marketplace. The law not only makes significant improvements to the Small Business Act's procurement programs, it creates new programs and new initiatives. This proposed rule addresses two important parts of the Jobs Act: (1) Application of the SBA's small business programs to multiple award contracts, and (2) limitations on contract consolidation and bundling.

A. Multiple Award Contracts

The FAR permit agencies to issue several awards to different offerors that submitted an acceptable response to the same solicitation for an IDIQ contract.*See* FAR subpart 16.5 (publicly available at *www.acquisition.gov/far/index.html*). In fact, the FAR states that the contracting officer must give preference to making ''multiple awards'' of IDIQ contracts under a single solicitation for the same or similar supplies or services to two or more offerors. FAR § 16.504(c). Hence, these types of contracts are referred to as multiple award contracts. Agencies issue either task orders (order for services) or delivery orders (order for supplies) for competition against the multiple award contract. Multiple award contracts are often used to support interagency contracting through: (1) Multi-agency contracts (MACs), which are established by one agency for use by it or other Government agencies to obtain supplies and services, and (2) governmentwide acquisition contracts for information technology requirements, which are established for governmentwide use and operated by an executive agent designated by the Office of Management and Budget (OMB). FAR § 2.101.

Multiple award contracts are used by Federal agencies because they provide greater flexibility and leverage for the agency in conducting their procurements and obtaining competition. However, until recently, there had been no clear guidance in regulations on the application of the SBA's small business programs to multiple award contracts, including the GSA's MAS Program (which includes Federal Supply Schedules and other Multiple Award Schedules), although there has been much discussion on this issue. For example, in *Delex Systems, Inc.,* B–400403, Oct. 8, 2008, 2008 CPD ¶ 181 (publicly available at *www.gao.gov/decisions/bidpro/40043.htm*), the GAO held that the small business set-aside provisions of FAR § 19.502–2(b) applied to competitions for task and delivery orders issued under certain multiple award contracts. Despite this opinion, many agencies had been reluctant to set-aside such task and delivery orders for small businesses without specific procurement guidance or regulations.

On April 26, 2010, the President issued Presidential Memorandum on the Interagency Task Force on Federal Contracting Opportunities for Small Businesses, which established an Interagency Task Force on Federal Contracting Opportunities for Small Business (Interagency Task Force), co-chaired by the Director of OMB, the SBA Administrator, and the Secretary of Commerce. The report issued by the task force outlined several recommendations to further increase opportunities for small businesses in Federal contracting. In particular, the task force recommended the following as it relates to multiple award contracts:

- That OFPP lead an effort, in close collaboration with SBA and GSA, as well as the DoD and other contracting agencies, to determine which steps are (or should be) permitted and encouraged, and which are required with respect to reserving individual orders for small businesses under task-and-delivery-order and GSA Multiple Award Schedule (GSA Schedules) contracts.
- In conducting the analysis, OFPP should reach out to interested stakeholders, including agency CAOs, SPEs, and Small Business Directors; OSDBU, including the Department of Defense Directors, OSBP; Procurement Technical Assistance Centers; Congress; small and large businesses; and professional and trade associations.
- When appropriate (taking into account possible statutory and regulatory changes), OFPP should issue guidance addressing the use of set-asides and related authorities for limiting consideration for task and delivery orders to small businesses. Guidance should also address existing set-aside and related policies, as necessary. General guidance should be drafted jointly with SBA, and with GSA as to guidance affecting the Schedules.

Report on Small Business Federal Contracting Opportunities, at pages 9–10 (publicly available at *http://www.sba.gov/sites/default/files/contracting_task_force_report_0.pdf*).

Prior to this, the Acquisition Advisory Panel (Advisory Panel), which was authorized by section 1423 of the Services Acquisition Reform Act of 2003 (Section 843 of Title VIII of the National Defense Authorization Act for Fiscal Year 2006 (Pub. L. 109–163)) also addressed this issue in its Final Report. By law, the Panel was tasked with reviewing laws, regulations, and Governmentwide acquisition policies regarding the use of commercial practices, performance-based contracting, performance of acquisition functions across agency lines of responsibility, and the use of Governmentwide contracts. In its final report, which devoted an entire chapter to small business contracting, the Panel noted that ''[t]he passage of FASA [Federal Acquisition Streamlining Act of 1994], the enactment of the Clinger-Cohen Act two years later, and the expansion of the GSA Schedules [MAS] Program has led to a marked increase in the use of multiple award indefinite delivery, indefinite quantity (IDIQ) contracting vehicles.'' Final Report, Chapter 4 at 297 (publicly available at *https://www.acquisition.gov/comp/aap/documents/Chapter4.pdf*).

The report explained that agencies have used innovative means to ensure small businesses receive some of these multiple award contracts, such as by ''reserving'' one or more awards for small businesses in an otherwise full and open competition. The report further explained that there was no specific statutory authority for such reserves.

Both reports demonstrated that agency officials needed clear guidance and they wanted specific statutory authority to apply the authorities of the SBA's small business programs to multiple award contracts. The Jobs Act provides the needed guidance and specific statutory authority on this issue. With respect to multiple award contracts, the Jobs Acts does two things—it defines the term and it establishes a framework to address the application of SBA's small business programs when awarding such a contract, or orders issued against a multiple award contract. In fact, the Jobs Act broadly defines the term multiple award contract to include all task and delivery contracts, which necessarily includes the GSA Multiple Award Schedules Program and other MACs. The Schedules is the largest governmentwide program in the Federal government relying on the use of multiple award contracts. Thus, the Jobs Act provides a needed tool to further assist agencies in contracting with small businesses.

In addition, the Jobs Act amended the Small Business Act (Act) to permit Federal agencies to:

- Set-aside part or parts of multiple award contracts for small business concerns, including small business concerns owned and controlled by socially and economically disadvantaged individuals that are 8(a) Business Development (BD) Participants, HUBZone small business concerns, SDVO SBCs, WOSBs, and EDWOSBs;
- Set-aside orders placed against multiple award contracts (notwithstanding the fair opportunity requirements set forth in 10 U.S.C. 2304c and 41 U.S.C. 253j) for small business concerns, including 8(a) BD Participants, HUBZone small business concerns, SDVO SBCs, and WOSBs or EDWOSBs; and
- Reserve one or more contract awards for small business concerns under full and open competition, when the agency intends to make multiple contract awards, including reserves for 8(a) BD Participants, HUBZone small business concerns, SDVO SBCs, and WOSBs or EDWOSBs.

The legislative history for a precursor bill to the Jobs Act explains that the purpose of such provisions is to ''correct'' the mixed level of participation of small businesses in multiple award contracts since small businesses have had trouble securing contract awards through the multiple award contract system. *See* S. Rep. 111–343 at 7 (publicly available at *http://thomas.loc.gov/cgi-bin/cpquery/R?cp111:FLD010:@1(sr343)*). As an example, the Senate Report explains that in FY 2007, although small businesses represented about 80.8% of the contractors under the GSA Multiple Award Schedules Program, they received only about 37.33% of the sales dollars (*i.e.,* task or delivery orders). *Id.* It further explains that although the Small Business Act and the FAR require Federal agencies to set contracts aside for small businesses if there is a reasonable expectation that two or more small businesses would submit offers at reasonable prices, as noted above, many agencies have not applied these small business set-aside requirements to multiple award contracts and even fewer have considered application of these requirements to orders issued against such contracts

In addition to providing statutory authority to further assist small businesses in obtaining awards of multiple award contracts and orders against such contracts, the Jobs Act mandates that SBA and OFPP, in consultation with the Administrator of GSA, issue regulations implementing § 1331. The regulatory guidance issued in response to § 1331 will help agencies leverage opportunities for small businesses under multiple award contacts that can be secured through the use of partial contract set-asides, order set-asides, and contract reserves. The SBA met with OFPP and representatives of GSA and other major contracting agencies several times over the course of the last year in an attempt to produce a draft proposed regulation that took into account the concerns of the various affected parties. In late 2011, SBA and OFPP held the required statutory consultations with senior GSA officials to further refine the proposed rule.

As a first step to implement § 1331, both SBA and OFPP requested DoD, GSA, and NASA publish an interim FAR rule so that agencies could begin taking advantage of this important tool. On November 2, 2011, the FAR issued an interim final rule that amended the following FAR subparts:

- FAR subpart 8.4 to clarify that agencies may set-asides orders and blanket purchase agreements for small business concerns under the Schedule;
- FAR subpart 16.5 to clarify that agencies may set-aside orders for small business concerns in connection with multiple award contracts, notwithstanding the statutory requirement to provide each contract holder a fair opportunity to be considered.
- FAR subpart 19.5 to add a new section, based on Section 1331, authorizing agencies to: (1) Set aside part or parts of a multiple-award contract for small business concerns, including set-asides for small business concerns under the 8(a) Program, the HUBZone Program, the SDVOSB Program, and the WOSB Program; (2) set-aside orders placed against multiple-award contracts for small business concerns, including small businesses in the 8(a), HUBZone, SDVOSB, and WOSB Programs; and (3) reserve one or more contract awards for small business concerns, including small businesses in the 8(a), HUBZone, SDVOSB, and WOSB Programs, under full and open multiple-award procurements.

See 76 FR 68032.

Although the FAR interim final rule permits agencies to begin using the Jobs Act authority, there are several issues that still remain to be addressed. This proposed rule attempts to address those issues as they relate to the application of SBA's programs to multiple award contracts. In drafting the rule, the SBA has taken into consideration all of the above, as well as information obtained from meetings with various stakeholders concerning these issues.

In sum, this rule seeks to provide adequate tools and assurances that agencies will maximize small business participation on multiple award contracts without compromising the greater flexibility and leverage agencies have in conducting procurements through multiple award contracts. For example, although the MAS Program already affords opportunities for small businesses competing for orders, SBA, OFPP, and GSA hope this rule, which specifically authorizes the use of small business order set-asides in connection with the MAS Program, will provide agencies further means to reach more small businesses and increase awards to small businesses. SBA and OFPP, after consultation with GSA, have attempted to strike the right balance and seek comments regarding the proposed rule. The discussion that follows explains in detail the specific changes the SBA proposes to its regulations to address this issue.

B. Contract Consolidation/Bundling

The Jobs Act amended the Small Business Act to include provisions relating to contract consolidation and bundling. Contract bundling and consolidation have been used in the Federal government for many years now. Agencies generally consolidate or bundle two or more requirements into one solicitation in order to streamline the procurement process, reduce administrative functions (fewer number of contracts for a contracting officer to administer) and leverage buying power.

See U.S. Government Accountability Office, GAO–04–454, *Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain,* at 4 (May 2004) (publicly available at *http://www.gao.gov/new.items/d04454.pdf*). Although such contract consolidation and bundling may provide efficiency for the Federal government, the end result often precludes small business participation at the prime contractor level and generally provides for awards to a fewer number of contractors. *See* 15 U.S.C. 631(j); *see also* S. Rep. No. 105–62, at 21 (1997) (''Often bundling results in contracts of a size or geographic dispersion that small businesses cannot compete for or obtain. As a result, the government can experience a dramatic reduction in the number of offerors. This practice, intended to reduce short term administrative costs, can result in a monopolistic environment with a few large businesses controlling the market supply.'')

The Small Business Act contains provisions defining bundling and limiting the use of bundling and its effect on small businesses. 15 U.S.C. 632(o). Bundling as defined by the Small Business Act is not *per se* prohibited; rather, bundling is permissible where an agency can adequately justify the projected bundled contract.

Despite the provisions in the Small Business Act and implementing regulations, bundling contracts and orders is still having harmful effects on the ability of small business concerns to compete for and receive contracting opportunities and, therefore, mitigation is necessary. Thus, the Jobs Act has amended the Small Business Act to provide for certain policies to further reduce contract bundling, including requiring that agencies publish on Web sites a list of bundled contracts and rationale for each such bundled contract. It also requires agencies that bundle requirements to include in their solicitation for any multiple award contract above the substantial bundling threshold a provision soliciting offers from any responsible source, including responsible small business concerns and teams or joint ventures of small business concerns.

The Small Business Act, however, had never addressed contract consolidation (although contract consolidation is addressed in 10 U.S.C. 2383 for DoD). Consequently, the Jobs Act has now amended the Small Business Act to address and define contract consolidation in a broader manner than bundling. As it is now defined, contract consolidation occurs when an agency uses a single solicitation to obtain offers to satisfy two or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under two or more separate contracts lower in cost than the total cost of the contract for which the offers are solicited in the single solicitation. Thus, a consolidated contract combines contracts performed by small or large businesses into one solicitation while a bundled procurement combines work previously performed only by small businesses or work that could have been performed only by small businesses. As with bundling, the statute permits an agency to justify the consolidation.

We note that the Interagency Task Force also addressed this issue and outlined several recommendations to increase opportunities for small businesses in Federal contracting. In particular, the Interagency Task Force recommended that SBA strengthen the regulations addressing the reviews of contract bundling to prevent unjustified bundling and ensure the use of appropriate mitigation strategies. *Report on Small Business Federal Contracting Opportunities,* at 10 (publicly available at *http://www.sba.gov/sites/default/files/contracting_task_force_report_0.pdf*).

Likewise, the Advisory Panel addressed contract bundling and consolidation and noted that reports by OFPP and the SBA's Office of Advocacy indicated that the use of bundled and consolidated contracts had resulted in a decline of awards to small businesses. The Panel determined that the contracting community does not properly apply and follow the governing contract bundling definition and requirements in planning acquisitions because there is a general misunderstanding of contract bundling. Final Report, Chapter 4 at 289–90 (publicly available at *https://www.acquisition.gov/comp/aap/documents/Chapter4.pdf*).

The proposed rule addresses the statutory amendments to the Small Business Act as they relate to mitigation of bundling and contract consolidation. SBA has taken into consideration all of the above when drafting these rules. The supplementary information below explains in detail the specific changes the SBA proposes to each of its regulations to address this issue.

C. Public and Federal Outreach

Last spring, the SBA conducted a Small Business Jobs Act Tour that covered 13 cities, including: Albuquerque, Miami, Atlanta, Boston, Chicago, San Antonio, Seattle, Columbus, New York, Huntsville, Denver, San Diego and Washington, DC. *See* 76 FR 12395 (March 7, 2011); 76 FR 16703 (March 25, 2011); 76 FR 26948 (May 10, 2011). The objective of the tour was to provide information and receive input on significant Jobs Act provisions. In its **Federal Register** notice announcing the tour, the SBA set forth some key questions concerning multiple award contracts, bundling and consolidation, on which it specifically sought public input. During the tour, the SBA gained valuable information and insight on small businesses in Federal contracting that it utilized when drafting the following proposed regulations. The SBA also requested and received written comments from the public on these provisions.

Further, the SBA met with various agencies that are members of the Federal Acquisition Regulatory Council (FAR Council) to discuss the provisions of the Jobs Act. The input provided during these meetings was also utilized in drafting these proposed regulations, especially as they relate to set-asides of multiple award contracts.

Finally, as discussed above, the Jobs Act requires that SBA and OFPP, after consultation with GSA, issue regulations relating to partial set-asides, reserves and set-asides of orders against multiple award contracts. The SBA has met with GSA several times over the course of the last year, including recently in the latter half of 2011. Many of GSA's comments have been incorporated into this proposed rule.

III. Proposed Amendments

The SBA is proposing to amend its regulations to address small business contracting as it relates to multiple award contracts and to address and clarify the regulations on bundling and contract consolidation. Because these issues affect the various SBA programs, the SBA must propose amendments to several sections of its regulations. In addition, because these two issues require changes to the same sections of SBA's regulations and some of the issues are interconnected, the SBA determined it would be best to propose amendments relating to the two issues in one rule. The proposed amendments are set forth in a part-by-part analysis below.

A. Part 121—Size

The SBA is proposing to amend its size regulations to address both bundling and contract consolidation as well as multiple award contracts. The Small Business Act, 15 U.S.C. 644(e)(4), specifically states that for bundled

contracts, a small business concern may submit an offer that provides for use of a particular team of subcontractors for the performance of the contract and the agency must evaluate the offer in the same manner as other offers. Further, the Act states that if a small business concern forms a team for this purpose (*i.e.,* enters into a formal written Small Business Teaming Arrangement), it must not affect its status as a small business concern for any other purpose. The purpose of this section is to encourage small businesses to form teams to compete on larger contracts for which, by definition, a small business is not on its own able to compete. Therefore, the SBA proposes to amend § 121.103 by creating an exception to affiliation for teams of small businesses for bundled contracts.

The SBA proposes to amend § 121.402 to explain how small business size standards are assigned to multiple award contracts and orders issued against such contracts. Under SBA's current regulations, a NAICS code and size standard is required for contracts, and all orders under long-term contracts (*i.e.,* contract greater than five years). SBA has seen instances where an agency assigns a NAICS code to a multiple award contract and then issues orders using a different NAICS code with a different, lower size standard or issues an order with no NAICS code or size standard assigned. The agency then counts each of the orders as an award to a small business even if the business represented it was small for the higher size standard corresponding to the NAICS code assigned to the contract and not for the lower size standard assigned to the order. In other instances, SBA has seen that an agency will assign multiple NAICS codes to a multiple award contract where a business concern may be small for one or more of the NAICS codes, but not all, and the agency receives credit on an order for an award to a ''small business'' even though the business is not small for the NAICS code assigned or that should have been assigned to that particular order.

To address this situation, the proposed rule provides a contracting officer with two different alternatives in assigning NAICS codes on multiple award contracts. First, a contracting officer may assign one NAICS code and corresponding size standard to the multiple award contract if all of the orders issued against that contract can also be classified under that same NAICS code and corresponding size standard.

Second, the contracting officer may divide a multiple award contract for divergent goods and services into discrete categories, each of which is assigned a NAICS code with a corresponding size standard. The contracting officer is vested with the discretion to decide how to assign the requirements to the various categories—whether it is by contract line item numbers (CLINs), special item numbers (SINs), functional area (FA), sectors, or other method of identifying various parts of a requirement. Thus, an agency would assign multiple NAICS codes to a multiple award contract only if the agency can divide the contract into different categories and can then compete or award orders in that category, notwithstanding the nomenclature the procuring agency utilizes to describe the category (*e.g.,* CLIN, SIN, FA). The NAICS code assigned to the order would be the same as the NAICS code assigned to the category (*e.g.* CLIN) in the contract.

Regardless of which method the contracting officer uses to assign a NAICS code, the proposed rule requires that every contract and every order issued against a contract must contain a NAICS code with a corresponding size standard. With respect to assigning a NAICS code to an order in cases like the GSA Schedule where an agency can issue an order against multiple categories on a multiple award contract, the contracting officer would be required to select the single NAICS code that best represents the principal nature of the acquisition (*i.e.,* usually the component that accounts for the greatest percentage of contract value) for that order. That would mean if the agency is buying services and supplies with the order, but the greatest percentage of the order value is for services, the agency would assign a services NAICS code for the order. The purpose of this proposal is twofold: to ensure that agencies receive credit only for awards to small businesses and to ensure that only small businesses receive the benefits afforded to such business concerns.

The SBA notes that it considered one alternative to this proposed rule where an order contains items/services from multiple NAICS codes and size standards assigned to a multiple award contract. Specifically, the SBA considered requiring that a business meet only the smallest size standard corresponding to any NAICS code of any of the items/services (line items) to be procured under the contract. Any order issued against the contract, regardless of the NAICS code assigned to the order, would then be considered an order placed with a small business. If the contract contained size standards that were receipts-based and employee-based, the business would have to meet the smallest receipts-based size standard to be considered small for the contract and each order.

The SBA welcomes comments on its proposed amendments to § 121.402 explaining how small business size standards are assigned to multiple award contracts and orders issued against such contracts. SBA requests comments on the alternatives afforded to contracting officers under the proposed rule, including whether they offer a workable alternative and give sufficient discretion to contracting officers. Specifically, the SBA would like comments addressing any burden that may be imposed by requiring the contracting officer to divide the requirement into multiple categories with associated NAICS codes and size standards on a multiple award contract and placing a NAICS code on each order that flows down from the underlying contract. The SBA would also like the comments to address whether this burden is outweighed by the purpose of the proposed rule—to more effectively capture true small business participation. Finally, SBA would welcome comments on the alternative described in the prior paragraph, which was not adopted in the proposed rule.

Next, the SBA proposes to amend § 121.404, which addresses when the size status of a small business concern is determined. In order to provide certainty in the procurement process, SBA's regulations require that size generally be determined at one specific point in time—size is determined as of the date a business concern self-certifies its size status as part of its initial offer including price. When a business represents that it is small, it is then considered small for the life of that specific contract, and the concern is not required to again certify that it qualifies as small for that contract unless the contract is a long term contract (*i.e.,* the contract exceeds five years) or there is a merger, acquisition, or novation. If the contract is greater than five years, then the contractor must recertify its small business size status no more than 120 days prior to the end of the fifth year of the contract or prior to exercising any option thereafter. Similarly, a contractor must also recertify its size status whenever there has been a contract novation, or merger or acquisition and no novation has been required.

SBA is proposing to clarify two issues that have been raised under this recertification rule that SBA issued in 2006. First, while the regulations clearly required a business that was bought by another entity to recertify its size status after the acquisition, such a requirement

was not as clear where a business that had previously certified itself to be small acquired another business. SBA believes that re-certification should be required in either case since the acquisition may render the concern other than small for the particular contract. As such, the proposed rule clarifies that recertification is required from both the acquired concern and the acquiring concern. Second, SBA proposes to clarify that recertification is required when a participant in a joint venture is involved in a merger or acquisition, regardless of whether the participant is the acquired concern or the acquiring concern.

In addition, the SBA is proposing that, in general, all of these same rules concerning when size is determined apply to multiple award contracts. For multiple award contracts, SBA will determine size at the time of initial offer of the contract based upon the size standard set forth in the solicitation for that contract. If the contract is divided into categories (CLINs, SINs, FAs, sectors or the equivalent), then each such category will have a NAICS code and corresponding size standard. A business will have to represent its status for each of those NAICS codes at the time of initial offer of the multiple award contract. When the agency places an order against the contract, it must assign a NAICS code with the corresponding size standard to the order using one of the NAICS codes assigned to the contract which best describes the principal purpose of the good or service being acquired. If the business concern represented it was small for that NAICS code at the time of contract award, then it will be considered small for that order with the same NAICS code. Of course, a contracting officer may always, on his or her own initiative, require a business concern to recertify its size status with respect to each order, but the regulations do not require that in every instance.

The following examples demonstrate how this would work:

- An agency issues a multiple award contract and assigns a single NAICS code to the contract. A business concern has represented it is small for that NAICS code. The business concern is small for the life of the contract and for each order issued against that contract with the same NAICS code. If the contract exceeds five years or there has been a contract novation, or merger or acquisition and no novation has been required, the business concern would be required to recertify its size status.
- An agency issues a multiple award contract that has been separated into two categories by CLINs—graphic design services and computer systems design services. The agency assigns two NAICS codes to the contract, one for the CLIN for graphic design services (with a $7 million size standard) and one for the CLIN for computer systems design services (with a $25 million size standard). A business concern has represented that it is small for the NAICS code assigned to the CLIN for computer systems design services and other-than-small for the NAICS code assigned to the CLIN for graphic design services. If the agency issues an order that is predominately for computer systems design services, it must assign to the order the same NAICS code used in the contract for computer systems design services. Because the business represented that it was small for that NAICS code at the time of initial offer for the contract CLIN for computer systems design services, it would be considered small for the order. Similarly, if the agency issues an order that is predominantly for graphic design services, it must assign to the order the same NAICS code used in the contract for graphic design services. Because the business represented that it was other-than-small at the time of initial offer for the contract CLIN for graphic design services, it would be considered other-than-small for the order. If the contract exceeds five years or there has been a contract novation, or merger or acquisition and no novation has been required, the business concern would be required to recertify its status for both NAICS codes.
- An agency issues an order against the GSA Schedule Contract. The ordering agency has assigned a single NAICS code to the order, which corresponds to a NAICS code assigned to the Schedule category (*e.g.,* SIN). A business concern has represented that it is small for that NAICS code assigned to the SIN on the GSA Schedule Contract. The business concern is then considered small for the order. If the contract exceeds five years or there has been a contract novation, or merger or acquisition and no novation has been required, the business concern would be required to recertify its status for the NAICS code.

The SBA notes that in drafting this proposed rule it considered requiring businesses to recertify their size for long term orders (*i.e.*—orders greater than five years). The SBA is concerned that if an agency issues a long term order just prior to a business recertifying its status as other-than-small on a multiple award contract, then the long term order will be counted as an award to a small business for an indefinite amount of time. However, the SBA is unsure of how often this situation occurs and is requesting comments specifically on whether small businesses should be required to recertify their size and status for long term orders. The SBA also welcomes comments on all of these proposed amendments as they relate to size and multiple award contracts.

In addition to the above, the SBA has proposed amending its regulations at § 121.404 to address ''Agreements,'' such as Blanket Purchase Agreements (BPAs), Basic Agreements (BAs) or Basic Ordering Agreements (BOAs). These Agreements are not considered contracts under the FAR. *See* FAR § 16.702(a)(2) (a basic agreement is not a contract). However, the SBA has seen examples where agencies are setting aside such Agreements for small businesses. Consequently, the SBA is proposing an amendment to its regulations to address this practice.

Specifically, SBA proposes that if such an Agreement is set-aside, SBA will determine size at the time of the response to the solicitation for the Agreement, to ensure only small businesses receive the Agreement. In addition, because such an Agreement is not considered a contract, the business concern must also qualify as small at the time it submits its offer or otherwise responds to a solicitation for each order under the Agreement in order for the procuring agency to count the award of the order as an award to small business for purposes of goaling. If agencies were permitted to set aside BPAs, BOAs and other Agreements to small businesses without having to verify size, then it is not clear that small businesses would actually be receiving the awards and it is not clear that the small business would have to meet the Act's provisions, for example, subcontracting limitations requirements, which we believe creates a loophole.

The only exception to this proposed rule on Agreements is for BPAs issued against the GSA Schedule. Because the business will have represented its status at the time of award of the GSA Schedule contract, the SBA does not believe there is a need to represent its size again for the BPA.

The SBA has also proposed amending its size regulations to include multiple award contracts in the sections addressing who may initiate a size protest (13 CFR 121.1001) and what time limits apply to size protests (13 CFR 121.1004).

In addition, SBA proposes to amend § 121.1103 to specify that NAICS appeals may be filed at SBA's Office of Hearings and Appeals (OHA) by any concern seeking to be considered a small business for a challenged

procurement and regardless of whether the procurement is set aside for small businesses or unrestricted. This would change OHA's current policy of declining jurisdiction on NAICS code appeals related to unrestricted procurements or finding that appellants lack standing in such appeals. *See NAICS Appeal of McKissack & McKissack,* SBA No. NAICS–5154 (2010). Neither the FAR nor SBA's existing regulations place restrictions on the types of solicitations that may be challenged in a NAICS appeal. Thus, OHA's current policy prevents an avenue of relief that SBA intended to be available to a business that is denied the benefits of its small status by an incorrect NAICS designation. The proposed rule makes it clear that SBA will adjudicate NAICS appeals on unrestricted procurements, so long as the appellant is seeking to be considered a small business for the procurement.

The SBA welcomes comments on all of these proposed amendments to part 121.

B. Part 125—Small Business Programs

Part 125 of SBA's regulations covers SBA's small business prime contracting program, subcontracting, the Certificate of Competency (COC) program and the limitations on subcontracting requirements. Encompassed in these regulations are issues such as bundling and Procurement Center Representative (PCR) reviews. Thus, the greatest number of proposed amendments that address the issues relating to multiple award contracts and bundling/consolidation have been to part 125.

SBA first reviewed part 125 and determined that it needed better organization. In § 125.1, SBA has proposed a definitions section and has moved all of the definitions in part 125 (except for the definitions relating the SDVO SBC Program) into that one section. SBA also added all of the definitions and terms set forth in the Jobs Act to this one section in order to provide ease of use for the readers.

One important definition proposed relates to contract consolidation. The SBA has implemented the statute and defined that term to mean a solicitation for a single contract or a multiple award contract to satisfy two or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under two or more separate contracts each of which was lower in cost than the total cost of the contract for which the offers are solicited, the total cost of which exceeds $2 million (including options). The SBA notes that the $2 million price is a statutory threshold (see 15 U.S.C. 657q), not subject to amendment by the SBA. Based upon this definition, an example of a consolidated contract would include the following:

- An agency had two separate contracts for janitorial services. One was performed by a small business and had a contract value of $1 million and the other by a large business that had a contract value of $2 million. The agency places both those requirements into one solicitation for $3 million. This is a consolidated contract because it combines two separate contracts into one and the costs of each of the two contracts is less than the total cost of the consolidated contract. In addition, the consolidated contract's value exceeds $2 million.

Another important term SBA defined is ''multiple award contract.'' Section 1311 of the Jobs Act defines the term multiple award contract to mean: (1) A multiple award contract (either task or delivery order contract) entered into under the authority of 41 U.S.C. 253h (the authority for task and delivery order contracts), 41 U.S.C. 253(i) (the authority for task and delivery order contracts for advisory and assistance services), 41 U.S.C. 253(j) (issuance of orders off of task and delivery order contracts) and 41 U.S.C. 253k (definition of task order contract and delivery order contract); and (2) any other multiple award, indefinite delivery, indefinite quantity contract that is entered into by an agency.

The SBA believes that it is important to have a clearly understood definition of what a multiple award contract is because the Jobs Act permits those contracts to be conducted as a partial set-aside, or reserve and further permits the set-aside of orders against such contracts. In this regard, SBA's proposed rule expressly includes the GSA Multiple Award Schedules Program within the scope of the definition of the term ''multiple award contract.'' As noted above the Multiple Award Schedules Program is the largest contract program in the Federal Government relying on multiple award contracts. It is fully consistent with the Jobs Act to defining this term to be inclusive of the Schedules. Even though the Act does not specifically reference the GSA Multiple Award Schedules Program in its definition of multiple award contract, the definition set forth in statute clearly states that a multiple award contract is ''*any other multiple award, indefinite delivery, indefinite quantity contract that is entered into by an agency.*'' 15 U.S.C. 632(v)(2) (emphasis added). Further, the Jobs Act states that the Administrator of OFPP and SBA, ''*in consultation with the Administrator of General Services,*'' must establish guidance by regulation that addresses application of the SBA's programs to multiple award contracts. *Id.* § 644(r) (emphasis added). Congress' inclusion of GSA within the consultation process clearly signals its intent to allow small business set-asides within the context of the GSA Multiple Award Schedules Program. In addition, the legislative history for a prior version of a bill similar to the Jobs Act specifically included GSA Multiple Award Schedules Contracts as multiple award contracts as follows:

> The bill improves small business participation in the acquisition process. The bill also authorizes small business set-asides in multiple award multi-agency contracting vehicles in order to correct the very mixed record of small business participation in such contracts. These contract types were intended to reduce the administrative costs of contracting by reducing both the number of businesses and the types of terms and conditions which had to be completed for each task or delivery order. Under such contracts, the government negotiates an up-front agreement on future price discounts and delivery terms, but no actual work is performed or paid for until task and delivery orders are issued. In many instances, small businesses have had trouble securing business through the multiple-award contract system. *For example, within the GSA Federal Supply Schedules (FSS or Schedules), small businesses represented about 80.8 percent of Schedule holders, but only 37.33 percent of Schedule sales dollars in FY 2007.*

See S. Rep. 111–343 at 7 (publicly available at *http://thomas.loc.gov/cgi-bin/cpquery/R?cp111:FLD010:@1(sr343)*) (emphasis added). Further, we note that the Defense Federal Acquisition Regulation Supplement (DFARS) already includes GSA Schedule Contracts in its definition of multiple award contracts. *See* DFARS § 207.170–2.

We also note that the interim FAR rule, which is co-signed by GSA, the manager of the MAS Program, amends FAR subpart 8.4 to make clear that the Jobs Act provisions apply and states that order set-asides may be used in connection with the placement of orders and blanket purchase agreements under the MAS Program.

Moreover, the Interagency Task Force sought to determine which steps are (or should be) permitted and which are required with respect to reserving individual orders for small businesses under task-and-delivery-order and GSA Schedule Contracts. *Report on Small Business Federal Contracting Opportunities,* at 9 (publicly available at *http://www.sba.gov/sites/default/files/contracting_task_force_report_0.pdf*).

Likewise, the Advisory Panel's Final Report noted how inconsistently agencies were applying the small business regulations to the GSA Schedule Contracts and recommended that specific guidance be provided and that the FAR be amended to permit set-asides against the GSA Schedule. Final Report, Chapter 4 at 310 (publicly available at *https://www.acquisition.gov/comp/aap/documents/Chapter4.pdf*).

Finally, during the SBA's Jobs Act tour, the SBA received input from many small businesses that it would be beneficial if multiple award contracts under the Jobs Act included the GSA MAS Program. Those small businesses holding GSA Schedule Contracts stated that it was time consuming to attain the GSA Schedule Contract, and even more difficult to receive orders against the contract. They noted that if no orders are placed on the contract within a certain time frame, they would then lose the contract. Consequently, these small businesses supported the set-aside of orders against GSA Schedule Contracts. In fact, from the input received, it would appear that the Jobs Act would have a greater impact on small businesses if set-asides were permitted against the GSA Schedule since more small businesses have a GSA Schedule Contract than other types of multiple award contracts.

Based on all of these considerations, the SBA has proposed to define the term multiple award contract to mean: (1) A multiple award schedule contract issued by the GSA (*e.g.,* GSA Federal Supply Schedule contract) or agencies granted Multiple Award Schedule contract authority by GSA (*e.g.,* Department of Veterans Affairs) as described in FAR part 38 and subpart 8.4; (2) a multiple award task-order or delivery-order contract issued in accordance with FAR subpart 16.5, including Governmentwide acquisition contracts; and (3) any other IDIQ contract entered into with two or more sources pursuant to the same solicitation. SBA notes that although it is proposing to include a specific reference to GSA Schedules as part of the definition of multiple award contract, the proposed rule is not meant to infringe upon GSA's authority for the MAS Program pursuant to 41 U.S.C. 152(3). The SBA welcomes comments on this definition.

The proposed rule also defines the terms ''partial set-asides'' and ''reserve'' since those terms are used in the Jobs Act as it relates to multiple award contracts. The SBA has defined those terms in the definitions section of part 125 (§ 125.1), which is discussed next; however, it has also set forth the mechanics of how such partial set-asides and reserves work in § 125.2(e), which is discussed later in the preamble supplementary information to this proposed rule.

With respect to partial set-asides, currently the FAR requires partial set-asides for small businesses when a total set-aside is not appropriate; the requirement is severable into two or more economic production runs or reasonable lots; one or more small business concerns are expected to have the technical competence and productive capacity to satisfy the set-aside portion of the requirement at a fair market price; and the acquisition is not subject to simplified acquisition procedures. FAR § 19.502–3(a).

In general, the SBA's proposed rule has adopted this definition but has updated the procedures. For example, instead of dividing the requirement into production runs or lots, the SBA's proposed rule recommends severing the acquisition into discrete components or categories, similar to how SBA proposes NAICS codes can be assigned to a multiple award contract. Thus, according to the definition in the proposed rule, a partial set-aside occurs when market research indicates that the ''rule of two'' (*i.e.,* the contracting officer has a reasonable expectation that it will receive at least two offers from small businesses and award can be made at fair market price) will not be met for the entire requirement (*e.g., each* CLIN or SIN). However, the procurement can be broken into smaller, discrete portions such that the ''rule of two'' can be met and applied for some of those discrete components or categories (*e.g.,* one or more CLINs). Under a partial set-aside, orders placed against the multiple award contract must be set-aside and competed among only small businesses for the portion of the contract that has been set aside; however, the contracting officer may state in the solicitation that small businesses can also compete against other-than-small businesses for the non-set-aside portion if they also submitted an offer on the non-set-aside portion.

The SBA believes that with this proposed rule, the contracting officer would not be required to award the non-set-aside portion first and negotiate with eligible concerns on the set-aside portion only after all awards have been made on the non-set-aside portion, as required by the current FAR § 19.502–3(c). Further, small businesses would not be required to submit offers for both the set-aside and non-set-aside portions of the solicitation and the contracting officer would no longer be required to conduct negotiations only with those offerors who have submitted responsive offers on the non-set-aside portion, as currently required under the FAR; nor is there any statutory requirement to do so. The small business could submit an offer for both or either the set-aside and non-set-aside portions.

The SBA notes that it considered an additional definition for a partial set-aside. The SBA has seen instances where an agency issues one solicitation that is entirely set-aside for some or all of the various categories of small businesses. The solicitation is divided into categories where one is for HUBZone small businesses, another is for SDVO SBCs, etc. The agency then states an intention to issue orders against the various categories so that only the HUBZone small businesses would be competing against each other, etc. The SBA believes that this could be another type of partial set-aside, where the multiple award contract is set-aside in part for the different small business programs. The SBA requests comments on this alternative.

The SBA has also defined the term ''reserve,'' which is a term used in the Jobs Act, but not specifically defined. We understand that agencies have been ''reserving'' contract awards for small businesses for several years, but there has been no clear definition of that term or understanding of a ''reserve.'' For example, we have seen, and heard during the Jobs Act tour, that agencies ''reserve'' an award for small business participation, but do not require the small business to meet any contractor performance requirements (*e.g.,* limitations on subcontracting). Some agencies then require that the small business compete with other-than-small businesses for orders, which some small businesses stated during the Jobs Act tour is difficult to do. This rule proposes to amend that practice to afford small businesses more opportunities to compete on orders where a reserve has been used by the procuring agency for a multiple award contract.

The SBA proposes that a reserve is separate and distinct from a partial set-aside since the Jobs Act refers separately to both partial set-asides of multiple award contracts and reserves. In addition, the Jobs Act explains that an agency may reserve one or more awards for small businesses—a partial set-aside would require that the ''rule of two'' be met for the portion that is set-aside for small businesses.

Thus, as proposed, a reserve is used when an acquisition for a multiple award contract will be conducted using full and open competition and the contracting officer's market research and recent past experience evidence that:

• At least two small businesses could perform one part of the requirement, but the contracting officer was unable to divide the requirement into smaller discrete categories such that the solicitation could have been partially set-aside; or

• At least one small business can perform the entire requirement, but there is not a reasonable expectation of receiving at least two offers from small business concerns at fair market price for all the work contemplated throughout the term of the contract.

If either is the case, the contracting officer must then state an intention to make one or more awards to any one type of small business concern (*e.g.,* small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) for the portion of the requirements they can perform and compete any orders solely amongst the specified types of small business concerns in accordance with that program's specific procedures. In the alternative, the contracting officer can state an intention to make several awards to several different types of small businesses (*e.g.,* one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB) and compete the orders solely amongst all of the small businesses for the portion of the requirements they can perform.

The following sets forth two examples of how a set-aside, partial set-aside and reserve could be used for a multiple award contract:

TABLE 1

Supply requirement	Total set-aside	Partial set-aside	Reserve
Description of Requirement.	• Five year requirement for couches and modular office furniture. • No individual order expected to exceed 5 units. • Total requirement not expected to exceed 1000 units over 5 years.	• Five year requirement for couches and modular office furniture. • No individual order expected to exceed 5 units but orders for modular furniture could range from 5–50 units. • Total requirement not expected to exceed 1000 units over 5 years.	• Five year requirement for couches and modular office furniture. • Orders for couches and modular office furniture could range from 5–50 units per order. • Total requirement not expected to exceed 1000 units over 5 years
Market Research ...	Shows that many small businesses can meet the projected needs.	Shows that many small businesses can provide the couches, but none can provide the modular office furniture at the potential level of demand.	Shows that many small businesses can provide 5–15 units but none can provide more than 25 units at a time.
Action	Total set-aside of contract for small businesses.	Partial set-aside for small businesses—break the requirement into separate CLINS etc. and set-aside the requirement for couches for small businesses. Compete orders for couches only among small business awardees.	Reserve for small businesses—announce in solicitation that agency will make one or more awards to small businesses and if two or more awards to small businesses, apply the rule of two when placing orders.

TABLE 2

Service requirement	Total set-aside	Partial set-aside	Reserve
Description of Requirement.	• Five year requirement for IT services and IT supplies. • No individual order expected to exceed $250,000. • Total requirement not expected to exceed $10 million over 5 years.	• Five year requirement for IT services and IT supplies. • No orders expected to exceed $250,000 for IT services in certain geographic regions, but some orders for IT services could exceed $500,000 in other geographic regions and delivery of IT supplies must be accomplished in short period of time. • Total requirement not expected to exceed $100 million over 5 years	• Five year requirement for IT services and supplies. • Orders for IT services and supplies could range from $250,000 to $2 million. • Total requirement not expected to exceed $100 million over 5 years.
Market Research ...	Shows that many small businesses can meet the projected needs.	Shows that many small businesses can provide the services and supplies in certain geographic regions and in a certain time allotment, but none can provide the IT services and supplies in other regions in the abbreviated timeframe.	Shows that many small businesses can provide IT services and supplies at certain dollar thresholds, but none can provide IT services and supplies for all orders proposed to be issued up to $2 million.
Action	Total set-aside of contract for small businesses.	Partial set-aside for small businesses—break the requirement into separate CLINS for IT services and IT supplies in certain geographic regions. Compete orders for IT services and supplies in those regions only among small business awardees.	Reserve for small businesses—announce in solicitation that agency will make one or more awards to small businesses and if there are two or more awards to small businesses, apply the rule of two when placing orders.

In the examples above, the contracting officer can reserve one or more awards for a specific category of small businesses that can show they can perform some of the work (*e.g.,* an SDVO SBC reserve). In the alternative, the contracting officer can reserve one or more awards for several categories of small businesses (*e.g.,* one for 8(a), one for HUBZone, one for SDVO SBCs, and one for WOSBs or EDWOSBs), which would be known as a small business reserve. Under a small business reserve, an agency cannot state that an award will be made to a HUBZone small business concern only if no award is made to an 8(a) BD Participant or vice versa. In other words, unless the agency has specific statutory authority to ''cascade'' the awards as such, it cannot do so. Once awarded, certain orders will be competed amongst only small business awardees if the ''rule of two'' is met at the order level. All other orders will be competed amongst all of the awardees (which can include the small businesses if their contract includes those supplies or services).

In addition, the SBA has proposed that a reserve can occur on a bundled contract where a Small Business Teaming Arrangement will submit an offer or receive a contract award. In that case, the individual members of the Small Business Team Arrangement will not be affiliated for the bundled contract or other purposes, the small business subcontracting limitations or nonmanufacturer rule requirement will apply (as applicable) to each order, and the cooperative efforts of the team members will be able to meet the subcontracting limitations requirement. Under such a reserve, the Small Business Teaming Arrangement would be competing on the orders with all awardees.

The SBA is proposing this type of reserve because, as discussed above, there is a statutory exception to affiliation for the small business team members in a Small Business Teaming Arrangement for bundled contracts. Affiliation is important when size would be an issue, which is generally not the case for bundled contracts, which are competed using full and open competition. The SBA believes, therefore, that the purpose of this provision and the exception to affiliation (as well as the Jobs Act's Small Business Teaming Pilot Program, which will offer assistance to small business teams and joint ventures) is to permit such teams to compete on a bundled contract against large businesses and retain their small business size status for future federal acquisitions.

Some of the above are types of ''reserves'' SBA has seen used to promote small businesses as prime contractors when an acquisition is conducted using full and open competition. The SBA has also seen instances where agencies will issue a multiple award contract using full and open competition, but state in the solicitation that all orders valued at less than a certain dollar threshold (*e.g.,* $150,000) are ''reserved'' for small businesses. However, we believe that this could actually be a partial set-aside, since the agency could place into a separate category all orders at this dollar threshold, but welcomes comments on this issue.

The SBA understands that a reserve is a new type of procurement mechanism. Therefore, the SBA specifically requests comments on the proposed definition of the term ''reserve,'' including: (1) Whether the definition effectively implements the statutory intent of the Jobs Act; (2) whether there are other instances of ''reserves'' being used by Federal agencies that promote small businesses as prime contractors that would not be covered under the proposed definition; (3) how the agency should handle the situation where there is only one small business awardee under a reserve (*e.g.,* award certain task orders solely to the small business awardee); (4) whether there is a clear enough distinction between a partial set-aside and a reserve; and (5) whether the agency should require in the solicitation and contract that a certain percentage of the orders must be awarded to small businesses (*e.g.,* a minimum of 30% of total dollar value of contract will be awarded to small businesses) and, if so, whether this option could be used in connection with not requiring the agency to compete orders solely amongst small businesses if the ''rule of two'' is met.

SBA has also proposed adding a definition for a common term used by procurement professionals—''rule of two''. The ''rule of two'' is the commonly used phrase to identify the requirement that in order for an agency to proceed with a set-aside, the contracting officer must have a reasonable expectation that he or she will obtain offers from at least two small businesses and award will be made at fair market price. This basic premise—that at least two offers will be received at fair market price—serves as the foundation for a set-aside pursuant to the 8(a) BD, HUBZone, SDVO SBC and WOSB programs as well as small business set-asides in general. Because the term ''rule of two'' is referenced in the proposed regulations as it relates to reserves, the SBA believed it was necessary to propose a definition for the term. This definition of the ''rule of two'' is not meant in any way to change the set-aside requirements set forth in SBA's regulations or the FAR (*e.g.,* shall set aside for small businesses, may set-aside for SDVO SBC). It is simply meant to be a definition for the ''rule of two''.

SBA also proposed a definition for the term ''Small Business Teaming Arrangement'' in § 125.1. The Jobs Act requires that agencies encourage the participation of small business teams for bundled acquisitions, since by definition, a small business alone could not perform on a bundled contract. The FAR defines the term ''contractor team arrangements'' in FAR § 9.601 and GSA also permits Contractor Team Arrangements for orders competed against its Multiple Award Schedule contracts where two or more GSA Schedule contractors work together to meet the ordering activity's needs. In order to avoid confusion, the SBA has proposed the term ''Small Business Teaming Arrangement'' and set forth a specific definition for this term.

Under such an arrangement, two or more small businesses can form a joint venture or enter into a written agreement where one small business acts as the prime and the other small business or small businesses are the subcontractors. The SBA requires the agreement be in writing and submitted to the contracting officer as part of the proposal so that he/she understands that a small business team has submitted the proposal.

SBA is also proposing to amend its definition of the term subcontracting to clarify subcontracting costs. SBA has removed the language, ''or services'', in order to provide clarity on costs that should properly be considered subcontracting costs, and not cost for materials.

In addition to adding a definition section to § 125.1, the SBA has proposed amending § 125.2. Specifically, the SBA has reorganized this section by breaking it into specific parts to address SBA's and the procuring agency's responsibilities when providing small business contracting assistance. The SBA has not entirely re-written this section of the rule, but has generally reorganized it for easier reference.

Paragraph 125.2(a) addresses the general objective of SBA's contracting programs, which is to assist small businesses in obtaining a fair share of Federal Government prime contracts, subcontracts, orders, and property sales.

Proposed paragraph 125.2(b) sets forth SBA's responsibility during an agency's acquisition planning. At the earliest

stage possible, the SBA's PCRs work with the buying activity or agency by reviewing acquisitions and ensuring that it has complied with all applicable statutory and regulatory small business requirements. SBA's PCRs work with the procuring agency's small business specialist (SBS) and the procuring agency's OSDBU or OSBP to identify bundled or consolidated requirements, and promote set-asides and reserves. The PCRs may make recommendations to break up the procurement so that small businesses can compete as prime contractors or encourage small business prime contractor participation on justified, bundled contracts through Small Business Teaming Arrangements and through increased small business subcontracting goals. In addition, with respect to the new Jobs Act provision relating to multiple award contracts, PCRs may work more closely with agencies that have not met their small business goals in the prior year to identify small business opportunities on multiple award contracts. However, the ultimate decision of whether to apply a section 1331 Jobs Act tool (partial set-aside, reserve, or set-aside of an order) to any given procurement action is a decision of the contracting officer.

Proposed paragraph 125.2(c) addresses the procuring agency's responsibilities. This includes structuring the acquisition to ensure competition by small business concerns, avoiding unnecessary bundling and consolidation, and conducting sufficient market research to help determine the type of acquisition to be used. This paragraph also addresses the need for and requirement that the procuring agency work closely with SBA and its PCRs on acquisitions to promote the use of small businesses.

Proposed paragraph 125.2(d) addresses contract consolidation and bundling and adds new provisions set forth in the Jobs Act. Specifically, the proposed regulation explains that an agency may not conduct an acquisition that is a consolidation of contract requirements with a total value of more than $2 million unless the SPE or CAO justifies the consolidation and identifies the negative impact on small businesses. The Jobs Act states that the agency can justify the action if the benefits of the consolidated acquisition substantially exceed the benefits of each possible alternative approach that would involve a lesser degree of consolidation.

The Jobs Act does not define the terms ''substantially exceed'' or ''benefits''. The SBA has therefore proposed to use the definitions for those terms currently set forth in the bundling regulations in part 125. The SBA does not believe that those terms should be defined differently or inconsistently, but welcomes comments on this approach.

The SBA also sets forth the same requirements for bundling and substantial bundling that are currently set forth in § 125.2(d). However, the SBA reorganized those sections and proposed updates to all of the dollar values to be consistent with the FAR. Specifically, the FAR Council has the responsibility of adjusting each acquisition-related dollar threshold on October 1, of each year that is evenly divisible by five. The FAR Council publishes a notice of the adjusted dollar thresholds in the **Federal Register**. The adjusted dollar thresholds must take effect on the date of publication. In this case, the FAR Council adjusted the bundling thresholds on August 30, 2010 in 75 FR 53129. The proposed amendment seeks to ensure that the FAR and SBA's regulations will be consistent.

In addition, the SBA has proposed regulations to address the Jobs Act requirement that agencies post their rationale for any bundled requirement. The SBA actually published a direct rule implementing this Jobs Act requirement at 76 FR 63542 (Oct. 13, 2011), which was effective November 28, 2011. According to the Jobs Act and implementing rule, an agency must publish on its Web site a list and rationale for each bundled requirement on which the agency solicited offers or issued an award. With this proposed rule, however, SBA is encouraging agencies to post the list and rationale prior to the time the agency solicits offers, rather than wait until awards have been made.

The SBA believes that posting the bundling rationale and list prior to or at the same time the agency announces the solicitation should be easy for each agency to achieve, especially since the Act already requires agencies to notify every affected small business of its intent to bundle. In addition, we note that DoD is already posting such a notice at least 30 days prior to issuance of a bundled solicitation. Specifically, DFARS § 205.205–70, ''Notification of bundling of DoD contracts'' states that a contracting officer must publish in FedBizOpps.gov a notification of the intent to bundle all DoD funded acquisitions that involve bundling, including the measurably substantial benefits that are expected to be derived as a result of the bundling. The contracting officer must post the requirement at least 30 days prior to the release of the solicitation or 30 days before placing an order. 48 CFR 205.205–70. The SBA welcomes comments on this issue, and in particular comments on whether agencies should be required to post the rationale prior to the release of the solicitation.

The SBA has also proposed amendments to § 125.2(e), which addresses application of SBA's programs to multiple award contracts, and is one of the key provisions of the Jobs Act. SBA proposed to define certain terms relating to this key provision—such as multiple award contract, partial set-aside and reserve in § 125.1, which was discussed above. In § 125.2, the SBA proposes regulations to explain how and when such partial set-asides, reserves and set-asides of orders can be used in an acquisition involving multiple award contracts.

The SBA notes that on November 2, 2011, the FAR Council issued an interim rule to address the basic authorities of this provision. *See* 76 FR 68032. Proposed § 125.2(e) is intended to provide additional guidance to help contracting officers as they take advantage of the discretionary authorities in section 1331 to use a partial set-aside or reserve for a multiple award contract or set-aside of orders against a multiple award contract.

The proposed rule first addresses the contracting officer's authority to use these Jobs Act provisions. The Jobs Act states that agencies may, at their discretion, partially set-aside or reserve a multiple award contract, and may set-aside orders issued against a multiple award contract, for small businesses. Therefore, the contracting officer is not required to partially set-aside or reserve a multiple award contract, or set-aside an order against a full and openly competed multiple award contract for small businesses; rather, the contracting officer has the discretion to do so.

However, the Small Business Act, SBA's regulations, and the FAR state that small businesses ''shall'' receive awards for acquisitions valued above the micro-purchase threshold but below the simplified acquisition threshold (SAT) when the ''rule of two'' is met. In addition, the Act also states that small businesses ''shall receive any award or contract or any part thereof, * * * as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business

concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns; * * *.'' 15 U.S.C. 644(a) (emphasis added).

To ensure that agencies comply with this and other provisions relating to small businesses, the Act sets forth certain Governmentwide statutory goals, the percentages of which are based on the aggregate of all Federal procurement. *Id.* § 644(g)(1). The Act also requires that each Federal department and agency have an annual goal that presents, for that agency, the maximum practicable opportunity for small businesses. *Id.* This agency goal is separate from the Governmentwide goal. With respect to the agency goal, the Small Business Act explains that if an agency is not meeting its goals, it must explain to SBA why it did not meet its goals, and offer strategies to expand the award of contracts to small business concerns.

In consideration of the foregoing, this proposed rule explains that if the ''rule of two'' is met, then the contracting officer must set-aside the contract. If however, the ''rule of two'' is not met, then the contracting officer has the discretion to: (1) Set-aside part or parts of the multiple award contract for small business concerns, including the subcategories of small business concerns; (2) reserve one or more contract awards for small business concerns under full and open multiple award procurements, including the subcategories of small business concerns; or (3) set aside orders for small business concerns, including the subcategories of small business concerns, under multiple award contracts awarded that are full and openly competed where the rule of two is met for a specific order.

When exercising his or her discretion to decide among these options, there is no order of precedence—the contracting officer is not required to consider partial set-asides first, and then reserves and then the set-aside of orders. In other words, if an agency could do a partial set-aside or set-aside orders under a full an open competition, there is no preference for doing the former over the latter. Rather, all three should be considered as part of acquisition planning and, if more than one option is available (the circumstances fit the definition of more than one tool), the agency should give careful consideration to the option that works best for the agency. Whether the agency ultimately uses any of the three authorities is left to the agency's discretion, but the agency must keep in mind that it will be held accountable for taking all reasonable steps to meet their small business goals. In other words, when utilizing this discretion, the procuring agency and contracting officer should consider the statutory requirements and small business contracting goals that are designed to help ensure that small businesses receive a fair proportion of awards. All agencies, especially those that are not meeting their small business contracting goals, are to consider strategies that can expand opportunities for making contract awards to all categories of small businesses.

We believe that awarding multiple award contracts to small businesses is one strategy to improve the agency's ability to attain its small business goals. Consequently, the SBA has proposed that if the contracting officer decides not to partially set-aside or reserve a multiple award contract, or include a clause in the contract that commits the agency to set-aside or preserve the right to set-aside orders against a multiple award contract that is full and openly competed, then the contracting officer must explain the decision and document it in the contract file. The procuring agency contracting officer would need to document the contract file only if he/she decides not use any of these Jobs Act authorities. Of course, once an agency has exercised its discretion at the contract level to use one of the § 1331 tools, it must honor the commitment when placing orders. For example, if an agency inserts a clause in the contract awarded pursuant to full and open competition stating that it will set aside orders when the rule of two is met, it must do so.

SBA considered whether documentation requirement would create a chilling effect and prevent contracting officers from using these new Jobs Act authorities, which are discretionary. The SBA believes, that the requirement to document a decision to not utilize small businesses is already in the FAR and therefore not a new requirement.

When conducting acquisition planning, the contracting officer must consider small business utilization. In fact, FAR § 7.103 states that agencies shall ensure that acquisition planners structure their requirements to facilitate competition by and among small business concerns. Likewise, FAR § 7.105(b)(1) requires not only that the acquisition plan indicate the prospective sources of supplies or services that can meet the need, but must include consideration of small business and address the extent and results of the market research. Further, the acquisition plan must explain how the proposed action benefits the Government, including when ''[o]rdering through an indefinite delivery contract facilitates access to small disadvantaged business concerns, 8(a) contractors, women-owned small business concerns, HUBZone small business concerns, veteran-owned small business concerns, or service-disabled veteran-owned small business concerns.'' FAR § 7.105(b)(5)(B)(ii).

Finally, agencies must document their decision to not proceed with a set-aside pursuant to FAR § 19.501(c). FAR § 19.501(c) states that: ''The contracting officer shall perform market research and document why a small business set-aside is inappropriate when an acquisition is not set aside for small business, unless an award is anticipated to a small business under the 8(a), HUBZone, service-disabled veteran-owned, or WOSB programs.''

Thus, the SBA believes that this proposed rule requires no new FAR market research, acquisition planning or documentation requirements. Rather, it reinforces requirements that are already in the FAR, which is that contracting officers must give meaningful consideration to the utilization of small businesses, and serve the purpose of increasing opportunities for small businesses.

The SBA requests comments on this proposed implementation of section 1331 of the Jobs Act and whether there are more effective regulatory alternatives that might be considered. Specifically, the SBA requests comments on whether the contracting officer's documentation for deciding not to partially set-aside, reserve contracts or commit to setting aside or preserving the right to set aside orders on a multiple award contract should be approved at a higher level and/or posted online concurrent with the issuance of the solicitation. The SBA notes that under the Jobs Act, the Senior Procurement Executive or Chief Acquisition Officer must approve certain actions related to consolidation. Further, agencies are required to post online their bundling justifications.

In addition, the SBA requests comments on what the documentation in the file should demonstrate. The SBA believes that for example, the documentation could explain that the agency has met its small business goals for the prior year or that it is currently meeting some or all of its goals, and then explain the results of the market research. The documentation, like any other market research documentation, could explain the acquisition history for the requirement and whether there is

sufficient competition at the contract or order level for a partial set-aside, reserve, or set-aside of an order against a full and openly competed multiple award contract.

Since the § 1331 authority is discretionary, an agency has the discretion to forego using these tools even if the rule of two could be met; but would still need to explain how its planned action is consistent with the best interest of the agency (*e.g.,* agency has a history of successfully awarding significant amounts of work to small businesses for the stated requirements under multiple award contracts without set-asides, and has received substantial value from being able to select from among small and other than small businesses as needs arise; agency can get better overall value by using the fair opportunity process without restriction for the stated requirements and has developed a strategy with the help of its OSDBU or OSBP that involves use of order set asides whenever the rule of two is met on a number of multiple award contracts for other requirements).

In addition to the above, the SBA's proposed rule sets forth the mechanics of how a contracting officer would use one of these Jobs Act authorities (reserve, partial set-aside, set-aside of orders). The proposed definitions for these terms were discussed prior in the preamble. This part of the proposed rule explains that if the ''rule of two'' can be met at the contract level, the agency must set-aside the multiple award contract for small businesses (including a specific category of small businesses). Section 1331 does not change the requirements to set aside acquisitions at the contract level if the ''rule of two'' is satisfied.

This section of the proposed rule also explains that if the ''rule of two'' is not met at the contract level, an agency has other options. Pursuant to section 1331, it may partially set-aside or reserve the requirement, or set-aside (or preserve the right to set-aside) orders against a multiple award contract that was awarded pursuant to full and open competition. These options, although discretionary, allow procuring agencies to provide more prime contracting opportunities to small businesses.

For example, an agency may have a requirement for services that would cover different parts of the country. If market research indicates that two or more small businesses can perform some of the requirement (*e.g.,* can perform for some of the states but not all), and the solicitation can be separated into categories, the agency may partially set-aside the requirement for small business concerns (or 8(a) BD Participants, HUBZone small business concerns, SDVO SBCs, WOSBs or EDWOSBs, if the requirements for such a set-aside are met such as the dollar value thresholds). In other words, the agency could do a partial set-aside and set-aside part of the requirement for the services for one or more states for small businesses (by setting this forth in separate categories) and the rest of the requirement for services for the remaining states for all other business concerns (which can include the small businesses on the partial set-aside).

In the alternative, if the requirement cannot be broken into smaller, discrete components or categories and market research indicates that one small business can perform the entire requirement or two or more small businesses can perform part of the requirement, it may reserve one or more awards for small business (or 8(a) BD Participants, HUBZone small business concerns, SDVO SBCs, WOSBs or EDWOSBs).

Finally, irrespective of whether an agency could do a partial contract set-aside or contract reserve, the contracting officer may issue the solicitation using full and open competition and state that it intends to set-aside orders, or preserve the right to set-aside orders, if the ''rule of two'' is met.

For example, the agency may specifically state in the contract that if the ''rule of two'' is met, it is preserving the right to set-aside orders for small businesses (or any subcategory of small business). If it preserves this right and then opts not to set-aside an order when the ''rule of two'' is met, it must provide a written explanation for its actions in the contract file—namely how its action is consistent with the best interest of the agency.

In sum, an agency must first determine if it can set-aside the requirement. If it cannot, it must consider whether it should partially set-aside or reserve the multiple award contract for small businesses or set aside or preserve the right to set aside orders against multiple award contracts that were awarded in full and open competition. If the agency decides not to take any one of these actions when it otherwise could, it must explain its decision and document the decision in the contract file.

We note that when setting aside orders against the GSA Schedules, certain regulations in FAR Part 8.4 must be followed. For example, the FAR states that agencies must survey at least three schedule contractors through the GSA Advantage!, or request quotations from at least three schedule contractors for acquisitions valued below the simplified acquisition threshold. The SBA does not believe that this requirement conflicts with the set-aside ''rule of two'' requirement; rather, the two can be reconciled. The agency would first apply the ''rule of two'' to determine whether a set-aside is appropriate; however, the agency can request quotes from more than two small businesses. The same is true for acquisitions above the simplified acquisition threshold, where the FAR requires the ordering activity contracting officer to post a request for quotes (RFQ) on e-Buy or provide the RFQ to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances. Agencies would not be required to document the circumstances for restricting consideration to less than three small business schedule contractors based on one of the reasons at FAR § 8.405.

The SBA's proposed rule also addresses multiple award contracts and partial set-asides or reserves for 8(a) BD Program Participants. If the contracting officer partially set-aside or reserved awards for a multiple award contract solely for the 8(a) Program (*i.e.,* there was an offer and acceptance to the 8(a) Program), then orders could be issued on a sole source basis using 8(a) Program authority, if the requisite dollar thresholds are met. The SBA understands that there is at least one Governmentwide contract that has been set-aside for the 8(a) BD Program that permits 8(a) sole source awards on the order level and it has served as a useful tool for contracting officers. In order to continue to provide such flexibility to contracting officers, the SBA is proposing to permit this with the proposed rule.

In this rule, the SBA has also proposed that agencies consider the use of ''on and off ramp'' provisions when using set-asides, partial set-asides or reserves for multiple award contracts. These provisions, which are relatively new to contracting, are used by some agencies as a means of ensuring that there are a sufficient number of small business contract awardees for a multiple award contract that had been set-aside. Agencies use ''on ramp'' provisions to award new contracts to small businesses under a multiple award contract where some of the current awardees are no longer small as a result of a size recertification. Agencies use ''off ramp'' provisions to remove or terminate a contractor that has recertified its status as other-than-small and therefore is no longer eligible to receive new task orders as a small business.

The SBA welcomes comments on these approaches. Further, the SBA requests comments on the use of 8(a) sole source awards on orders issued against an 8(a) set-aside, partially set-aside or reserved multiple award contracts. In addition, the SBA welcomes comments on the use of ''on ramp/off ramp'' procedures.

The SBA notes that consistent with the interim FAR rule, SBA strongly encourages contracting officers to modify, on a bilateral basis, existing multiple award contracts in accordance with FAR 1.108(d)(3) to address the new FAR provisions on multiple award contracts, if the remaining period of performance extends at least six months after the effective date of that rule, and the amount of work or number of orders expected under the remaining performance period is substantial. There are many valuable opportunities under existing multiple award contracts to help small businesses through order set-asides. These opportunities should not be lost. To this end, GSA's Federal Acquisition Service, which is responsible for managing the MAS Program, is in the process of modifying their existing contract vehicles to include all appropriate set-aside clauses.

The SBA has also proposed amendments to § 125.5 concerning its COC program to address multiple award contracts and permit COCs on such contracts, including ''reserves,'' and orders issued against multiple award contracts. SBA acknowledges that contracting officers should be making responsibility determinations at the contract level for multiple award contracts. However, if a contracting officer makes a responsibility determination at the order level that affects a small business apparent successful offeror, then the contracting officer must refer the matter to SBA for a COC.

In addition, the SBA has proposed amendments to the limitations on subcontracting set forth in § 125.6 to explain that the period of performance for each order issued against a multiple award contract will be used to determine compliance with the limitations on subcontracting requirements. The SBA has proposed amendments to the 8(a) BD (13 CFR 124.510), HUBZone (13 CFR 126.601, 126.700), and SDVO Program (13 CFR 125.15) regulations to state the same.

The SBA notes that it considered two options with respect to application of the limitations on subcontracting for multiple award contracts: (1) On an order by order basis; or (2) in the aggregate at any point in time over the course of the contract. The SBA believed that requiring the limitations on subcontracting to apply on an order by order basis for a multiple award contract (if the contract is a set-aside, partial set-aside or reserve, or if the order was set-aside) is the best approach to allow contracting officers to monitor such compliance.

We understand that allowing a small business to meet this requirement in the aggregate at certain points in time provides greater flexibility to both the small business and procuring activity, especially with respect to multiple award contracts where the small business prime contractor may utilize different subcontractors for different task orders. However, we believe that it is too difficult to monitor compliance and that in fact, agencies are not monitoring such compliance. In fact, we believe it would be extremely difficult to monitor compliance on a multi-agency multiple award contract where contracting officers from different agencies are awarding task orders against the same contract. We note that GSA has informed SBA that it monitors compliance through designated FAC–C contracting officer representatives. SBA specifically requests comments on this issue.

We note that for 8(a) contracts, the SBA has retained a provision that permits the SBA to waive this requirement and allow an 8(a) BD Participant to meet the subcontracting limitations for the combined total of all orders issued to date at the end of any six-month period where he or she makes a written determination that larger amounts of subcontracting are essential during certain stages of performance, provided that there are written assurances from both the 8(a) BD Participant and the procuring activity that the contract will ultimately comply with the requirements of this section. The SBA has retained this ''waiver'' in the proposed rule because it affords additional business development opportunities for 8(a) BD Participants, but welcomes comments on whether the ''waiver'' should remain solely for 8(a) contracts, or whether the requirements should be the same for all programs.

In addition, and with respect to the limitations on subcontracting, SBA has proposed that a contracting officer must document a small business concern's performance of work requirements as part of the small business's performance evaluation. This means that if the small business meets the applicable limitation on subcontracting, its efforts must be documented. This also means that if a small business fails to meet the applicable limitations on subcontracting for the program, the contracting officer must document this failure. Contracting officers must use this information, which will be available to all contracting officers on the Past Performance Information Retrieval System (PPIRS), when evaluating compliance on future contract awards. The FAR requires agencies to post contractor evaluations in the PPIRS database, which now serves as the single, authorized application to retrieve contractor performance information.

We note that if a small business fails to meet the subcontracting limitations requirement set forth in the contract, the contracting officer may terminate the contract for default pursuant to FAR § 49.401. Specifically, the FAR permits the contracting officer to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual obligations—in this case, the failure to meet the limitations on subcontracting. If the small business can establish or the contracting officer determines that the failure to perform is excusable (*e.g.,* arose out of causes beyond the control and without the fault or negligence of the contractor), then no termination for default would be required.

C. Amendments to Other Parts Addressing SBA's Procurement Programs—Parts 124, 125, 126 and 127

The SBA has also proposed amendments to the various parts of its regulations that cover specific procurement programs: Part 124 (8(a) BD Program); part 125 (SDVO SBC Program); part 126 (HUBZone Program); and part 127 (WOSB Program). The proposed amendments to these parts conform to the general proposed amendments in part 125 concerning multiple award contracts. For example, the SBA amended each of these parts to include multiple award contracts as types of contracts available for set-asides, partial set-asides and reserves under these programs. The SBA also amended each of these parts to address status protests and appeals relating to multiple award contracts or orders issued against multiple award contracts, and the limitations on subcontracting and nonmanufacturer rule requirements.

With respect to the WOSB Program, we note that a contracting officer may restrict competition to EDWOSBs if the contract is in an industry that SBA has designated as underrepresented and the contracting officer has a reasonable expectation based on market research that two or more EDWOSBs will submit offers, the anticipated award price (including options) does not exceed $6.5 million for a contract assigned a NAICS

code for manufacturing or $4 million for a contract assigned any other NAICS code, and the contract may be awarded at a fair and reasonable price. The contracting officer may restrict competition for WOSBs in an industry that SBA has designated as substantially underrepresented if the contracting officer has a reasonable expectation based on market research that two or more WOSBs will submit offers, the anticipated award price (including options) does not exceed $6.5 million for a contract assigned a NAICS code for manufacturing or $4 million for a contract assigned any other NAICS code, and the contract may be awarded at a fair and reasonable price.

Because the Jobs Act specifically permits set-asides, partial set-asides and reserves of multiple award contracts, as well as set-asides of orders against multiple award contracts that were themselves awarded through full and open competition, the SBA has proposed amending the WOSB Program regulations to address application of the contracting thresholds for that program with respect to multiple award contracts. The SBA's proposed regulations explain that the thresholds for the WOSB Program ($6.5 million for manufacturing and $4 million for everything else) will apply to each order issued against the multiple award contract, rather than the estimated contract value for the multiple award contract and rather than the total value of all orders issued against the multiple award contract. If SBA were to apply the thresholds to the value of the multiple award contract, then it would be difficult to set-aside, partially set-aside or reserve a multiple award contract under the WOSB Program because the estimated dollar value of the acquisition will almost always exceed the $4 and $6.5 million thresholds (since the estimated dollar value of such an acquisition would be the total value of several different contracts). The SBA welcomes comments on this proposal.

In addition, the SBA has proposed regulations to the SDVO SBC Program, HUBZone Program and WOSB Program to address the situation where an awardee under one of these programs is later decertified or deemed ineligible for the program. The SBA has proposed that a concern that represents itself as eligible for the program or is certified into the program and receives a contract award keeps its status throughout the life of the contract, unless the contract exceeds five years, there is a contract novation, or there has been a merger or acquisition. In those instances, the concern will have to recertify its status. Essentially, the SBA has proposed applying the current size re-certification rule to the status of a small business for each of its programs. The SBA welcomes comments on this proposal.

IV. Request for Comments

The Jobs Act has set forth the necessary tools to ensure that small businesses receive their fair share of Federal awards. It opens the door for small businesses by providing them access to multiple award contracts and orders issued against multiple award contracts. It also sets forth limitations on contract consolidation and provides for greater bundling enforcement.

As such, the SBA requests comments on each proposed amendment to the rule. We have noted above specific issues on which the agency would like to receive comments. However, SBA seeks comments on all aspects of this proposed rule.

Compliance With Executive Orders 12866, 12988, 13132, 13563, the Paperwork Reduction Act (44 U.S.C., Chapter 35) and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

OMB has determined that this rule is a ''significant'' regulatory action under Executive Order 12866. The Regulatory Impact Analysis is set forth below.

Regulatory Impact Analysis

1. Necessity of Regulation

This regulatory action implements the Small Business Jobs Act of 2010, Public Law 111–240. Specifically, it implements the following sections of the Jobs Act: section 1311 (definition of multiple award contract); section 1312 (publication on Web site a list and rationale for bundled contracts); section 1313 (consolidation of contracts definitions, policy, limitations on use, determination on necessary and justified); and section 1331 (reservation of multiple award contracts and orders against multiple award contracts for small businesses). Those sections of the Jobs Act address small business set-asides and reserves of multiple award contracts and orders issued pursuant to such contracts, as well as bundling and contract consolidation.

The SBA's current regulations address bundling with respect to multiple award contracts as well as set-asides of its various programs, in general. However, the regulations do not provide the specific guidance needed by the contracting community, which is set forth in this proposed rule. The SBA believes it is necessary and beneficial to address these recent amendments to the Small Business Act in its regulations to ensure consistency and clarity on these issues as they relate to small businesses. This is especially true since these provisions of the Jobs Act are creating new procurement mechanisms for contracting officers to use to award small businesses contracts and orders issued against contracts.

2. Alternative Approaches to Proposed Rule

The SBA considered numerous alternatives when drafting this regulation. The SBA considered an alternative approach with respect to the definition of multiple award contract. The Jobs Act sets forth a definition of that term. However, the DFARS also set forth a more specific definition of multiple award contracts. After reviewing legislative history and other reports relating to this issue, the SBA believes that the DFARS definition is a reasonable interpretation of the definition set forth in the Jobs Act as well as a more specific definition of the term because it specifically addresses multiple award contracts issued by the GSA as part of the MAS Program. Consequently, the SBA based its definition of multiple award contract on the DFARS definition, although it changed the wording slightly.

In addition, the SBA considered various approaches with respect to application of its programs to multiple award contracts. As noted in the discussion above, the proposed rule states that agencies may partially set-aside or reserve awards of multiple award contracts (and set-aside orders issued against multiple award contracts) for small businesses even if the agency did not meet its prior fiscal year's small business goals or is currently not meeting its goals. The SBA explored other options when drafting this rule (*e.g.,* should the contracting officer be required to partially set-aside a multiple award contract if the agency is failing to currently meet its goals).

The SBA also considered several alternatives as it relates to partial set-asides against multiple award contracts. The FAR currently addresses partial set-asides for small businesses, but the procedures seem out-of-date and complex. The SBA believes that the best alternative is to propose a change in the current method of conducting a partial set-aside.

Other examples of alternatives considered are discussed in the preamble above (*e.g.,* how to determine a small business is meeting the subcontracting limitations requirement).

3. What are the potential benefits and costs of this regulatory action?

The potential benefits of this rule are to increase small business participation in Federal prime contracts by limiting a procuring agency's use of bundled and consolidated contracts, ensuring small businesses have opportunities with respect to justified bundled and consolidated contracts, and ensuring that small businesses have greater access to multiple award contracts, including orders issued against such contracts. Currently, there is inadequate guidance for agencies regarding application of the SBA's programs to multiple award contracts and orders issued against such contracts. As a result, we believe that small businesses have been denied many opportunities to submit offers on and potentially receive awards on these contracts or the orders.

For example, Congress established an annual goal that 23 percent of the dollar value of prime contracts awarded by the Federal government must be awarded to small business. In fiscal year (FY) 2010, small businesses received 22.65 percent of federal dollars; in FY 2009, small businesses received 21.89 percent of federal dollars; and in FY 2008, small businesses received 21.50 percent of federal dollars. Although it is getting close, the Federal government is still not meeting this statutory goal. One benefit of this rule is to provide needed mechanisms and guidance to assist agencies and the Federal government in meeting this goal.

In addition, the Federal Procurement Data System shows that there were over 137,000 actions for small businesses on the Federal Supply Schedule in FY 2009, which amounted to over $5,000,000,000 in obligations to small businesses. Of that amount, over $700,000,000 was obligated as part of a BPA. There were 470 actions for small businesses on a GSA Governmentwide Acquisition Contract in FY 2009, which amounted to over $200,000,000 in obligations to small businesses. That means there were almost 138,000 actions against a GSA multiple award contract for small businesses amounting to over $5,200,000,000 in dollars obligated in FY 2009.

The data also shows that there were over 1500 actions where there was a set-aside for small business (or a specific category of small business), which amounted to over $180,000,000 in obligations to small businesses. The data also shows that there were over 1400 actions against a BPA where there was a set-aside for small business (or a specific category of small business), which amounted to over $43,000,000 in obligations to small businesses awarded that year.

In comparison, there were over 364,000 actions against a GSA Multiple Award Schedule contract awarded to other-than-small businesses amounting to over $7,000,000,000 in dollars obligated in FY 2009. Of that amount, over $2,000,000,000 was obligated as part of a BPA.

According to this data, small businesses do receive orders from agencies using the GSA Schedule. However, some of these awards may have been made to businesses that represented themselves as small for a specific NAICS code assigned to one of several SINs, which are assigned to a specific GSA Schedule Contract. An agency may have awarded an order with a different or no NAICS code and still have taken credit for an award to a small business. Further, agencies may have set-aside the orders against the GSA Schedule Contract and not required any limitations on subcontracting which could have permitted a large business to perform most or all of the work.

Regardless, we do not believe that this rule would impact the agencies, who would continue to use the GSA Schedule and make awards to small businesses using one standard set of criteria when making such awards. However, we have heard from many small businesses with a GSA Schedule Contract that they are not utilized by agencies. This proposed rule aims to help increase opportunities for small businesses. The rule's intent is that more small businesses can have the chance to compete and succeed on more multiple award contract orders. Therefore, this rule could impact small businesses that are underutilized on the Schedule by providing more of them with more opportunities.

In addition, we note that the Congressional Budget Office believed that agencies would continue to encourage the use of small businesses to procure goods and services and that doing so would not significantly increase procurement costs. *See* S. Rep. 111–343 at 12 (publicly available at *http://thomas.loc.gov/cgi-bin/cpquery/R?cp111:FLD010:@1(sr343)).*

However, we do note that once implemented as final, it is likely that changes would need to be made to the Interagency Acquisition Environment (IAE). For example, modifications may need to be made to the Government's contract award database, the Federal Procurement Data System-NG (FPDS–NG). We understand that this process will take some time and the Government will incur a cost for these changes to the system.

With respect to bundled contracts, data from FY 2009 shows that there were 36 bundled contracts with a value of over $3,448,000,000 and 63 consolidated contracts with a value of over $7,645,000,000. This regulation is intended to reduce the number of bundled and consolidated contracts, since they exclude small business participation at the prime contract level. SBA anticipates that this will have a beneficial impact for small businesses as well as the agencies. For example, although many agencies believe that combining numerous requirements into one contract would lessen the administrative burden for the agency, the fact is that it could increase the burden. For example, if an agency awards 10 contracts in response to a single solicitation, then it could receive 10 responses every time it solicits a quote for an order. In the end, it may have been less time-consuming overall to merely have broken up the requirement into smaller pieces and issued fixed price contracts for parts of the requirement to small businesses.

Executive Order 13563

This executive order directs agencies to, among other things: (a) Afford the public a meaningful opportunity to comment through the Internet on proposed regulations, with a comment period that should generally consist of not less than 60 days; (b) provide for an ''open exchange'' of information among government officials, experts, stakeholders, and the public; and (c) seek the views of those who are likely to be affected by the rulemaking, even before issuing a notice of proposed rulemaking. As far as practicable or relevant, SBA considered these requirements in developing this proposed rule, as discussed below.

1. Did the agency use the best available techniques to quantify anticipated present and future costs when responding to E.O. 12866 (e.g., identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes)?

Yes, the agency utilized the most recent data available on the Federal Procurement Data System (FYs 2010 and 2009 data).

2. Public participation: Did the agency: (a) Afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally consist of not less than 60 days; (b) provide for an ''open exchange'' of information among government officials, experts, stakeholders, and the public; (c) provide timely online access to the rulemaking docket on Regulations.gov; and (d) seek the views of those who are likely to be affected by rulemaking, even before issuing a notice of proposed rulemaking?

The Jobs Act imposes a specific statutory time by which the SBA must issue a final regulation. The SBA and OFPP worked with DoD, GSA and NASA to implement these provisions relating to multiple award contracts in an interim final rule in the FAR. The FAR interim final rule provides some, but all the guidance needed by procuring officials on this issue. Therefore, to provide this needed guidance quickly, the SBA intends to issue this rule with a 60-day comment period suggested by the executive order. As indicated above in the **ADDRESSES** section of this rule, the public is provided with the link to the online rulemaking Web site and is encouraged to use this medium to submit comments and view the comments of others.

In addition, we note that SBA has taken other steps to encourage public participation in its rulemakings. Specifically, SBA has conducted a ''listening tour'' to discuss the issues presented in the Jobs Act with interested members of the public. The SBA toured 13 cities, transcribed the input from the public and requested and received written comments (comments could be submitted to SBA employees or to www.regulations.gov). *See* 76 FR 12395 (March 7, 2011); 76 FR 16703 (March 25, 2011); 76 FR 26948 (May 10, 2011). Further, we note that as the sole agency that is charged with representing the interests of small businesses, SBA receives calls every day from small business owners and procurement officials discussing the very issues set forth in the Jobs Act. SBA gave appropriate consideration to the various suggestions, recommendations and relevant information received from these sources when drafting this rule.

The Jobs Act required SBA to consult with other agencies, such as GSA, when drafting the regulations, and SBA has done so. The SBA met with several procuring agencies to discuss the effects of the Jobs Act on each agency, in particular the GSA Schedule. Specifically, the SBA met with agency Offices of Small Business Programs, Chief Acquisition Officers, and Senior Procurement Executives. The SBA also gathered input and ideas from various agencies on their procurement practices, which were used when drafting these rules.

3. Flexibility: Did the agency identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public?

Yes, the agency considered several approaches, as discussed in the preamble. We believe the proposed rule provides flexibility to procuring agencies with respect to application of the SBA's programs to multiple award contracts.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminates ambiguity, and reduce burden. As discussed above in Section IV of the preamble, the action does not have retroactive or preemptive effect.

Executive Order 13132

This rule does not have federalism implications as defined in the Executive Order. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

Paperwork Reduction Act (PRA), 44 U.S.C., Ch. 35

For purposes of the Paperwork Reduction Act, 44 U.S.C. Chapter 35, SBA has determined that this proposed rule will not impose any new reporting or recordkeeping requirements. Small business must already represent their status at the time of submission of initial offer. This rule only seeks to clarify when such businesses represent their status for multiple award contracts and orders issued against multiple award contracts.

In addition, in accordance with FAR §§ 4.1202, 52.204–8, 52.219–1 and 13 CFR part 121, concerns must submit paper or electronic representations or certifications in connection with prime contracts and subcontracts. The Jobs Act requires that each offeror or applicant for a Federal contract, subcontract, or grant shall contain a certification concerning the small business size and status of a business concern seeking the Federal contract, subcontract or grant.

Regulatory Flexibility Act, 5 U.S.C., 601–612

SBA has determined that this proposed rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.* Accordingly, SBA has prepared an Initial Regulatory Flexibility Analysis (IRFA) addressing the impact of this Rule. The IRFA examines the objectives and legal basis for this proposed rule; the kind and number of small entities that may be affected; the projected recordkeeping, reporting, and other requirements; whether there are any Federal rules that may duplicate, overlap, or conflict with this proposed rule; and whether there are any significant alternatives to this proposed rule.

1. What are the reasons for, and objectives of, this proposed rule?

This regulatory action implements several sections of the Small Business Jobs Act of 2010, Public Law 111–240. These sections of the Jobs Act address small business set-asides and reserves of multiple award contracts and orders issued pursuant to such contracts, as well as bundling and contract consolidation.

The objective of the rule is to implement these statutory changes by further defining terms and expanding on the concepts set forth in the Jobs Act.

2. What is the legal basis for this proposed rule?

Small Business Jobs Act of 2010, Public Law 111–240.

3. What is SBA's description and estimate of the number of small entities to which the rule will apply?

This rule addresses the application of all of SBA's small business programs on multiple award contracts and addresses the limitations on bundled and consolidated contracts. As of February 2011, there were over 348,000 small business registered in the Central Contractor Registration (CCR) with a Dynamic Small Business Search Supplemental (DSBS) page. According to the FAR § 4.11, prospective vendors must be registered in CCR prior to the award of a contract; basic agreement, basic ordering agreement, or blanket purchase agreement. Therefore, CCR and DSBS are the primary databases used by Federal contracting officers when conducting market research and it shows the small businesses that will be affected by this rule, since those are the small businesses that conduct or would

like to conduct business with the Federal Government.

The SBA notes that not all of these small businesses have received multiple award contracts in the past and therefore, the number of affected small businesses could be less. However, the SBA believes that this rule will open the door to many more Federal procurement opportunities to small businesses, including opportunities for orders against the GSA Schedule. Therefore, the SBA believes that all small businesses could be impacted by this rule.

4. What are the projected reporting, recordkeeping, Paperwork Reduction Act and Other Compliance Requirements?

The SBA does not believe that there are any new recordkeeping requirements. The proposed rule does provide that businesses will need to report their size status at the time of contract award for a multiple award contract, similar to how it is done now. However, the business will need to represent its status for a single or multiple NAICS codes in order to be deemed a small business for the orders issued against the multiple award contract and each order will contain a NAICS code.

In addition, the SBA has proposed a new compliance requirement with respect to the limitations on subcontracting. Under the limitations on subcontracting, a small business must perform a certain percentage of the work itself and it limited as to how much work it can subcontract. This is generally easy to monitor for single award contracts, but not so easy with a multiple award contract where many task or delivery orders will be issued, sometimes by different agencies. As such, the SBA has proposed that small business comply with the limitations on subcontracting for each order, rather than the total multiple award contract.

5. What relevant federal rules may duplicate, overlap, or conflict with this rule?

This proposed rule may conflict with current FAR and General Services Administration regulations. As a result, those regulations will need to be amended once this rule is issued as final. The SBA consulted with both prior to issuing this proposed rule. However, as noted in the discussion in the preamble, SBA attempted to draft the regulations to avoid unnecessary conflicts. For example, the FAR and GSA define the term ''teaming'' to mean something in particular. Rather than define the term ''teaming'' to conflict with those rules, SBA defined the term ''Small Business Teaming Arrangement.''

6. What significant alternatives did SBA consider that accomplish the stated objectives and minimize any significant economic impact on small entities?

One of the major parts of this rule is size status for multiple award contracts and orders issued against multiple award contracts, including the GSA Schedule. The agency first considered that a business concern represent its size status at the time of submission of initial offer and on each and every order issued against a multiple award contract. The SBA proposed, however, that the small business represent its status at the time of submission of initial offer for the multiple award contract and that representation would generally be good for up to five years, including for all orders issued against that multiple award contract with the same or higher size standard. This is less of a burden on small businesses, yet ensures that an agency's goals truly reflect awards to small businesses.

The other alternatives are discussed in the preamble as well as the Regulatory Impact Analysis.

List of Subjects

13 CFR Part 121

Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

13 CFR Part 124

Administrative practice and procedure, Government procurement, Minority businesses, Reporting and recordkeeping requirements, Small business, Technical assistance.

13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

13 CFR Part 126

Administrative practice and procedure, Government procurement, Penalties, Reporting and recordkeeping requirements, Small business.

13 CFR Part 127

Government procurement, Reporting and recordkeeping requirements, Small businesses.

Accordingly, for the reasons stated in the preamble, SBA proposes to amend 13 CFR parts 121, 124, 125, 126, and 127 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for 13 CFR part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 637(a), 644, 662(5), and 694a; and Public Law 105–135, sec. 401 et seq., 111 Stat. 2592.

2. Amend § 121.103 by adding new paragraph (b)(8) to read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(a) * * *

(b) * * *

(8) In the case of a solicitation of offers for a bundled contract with a reserve (as defined in § 125.1), a small business concern prime contractor may enter into a Small Business Teaming Arrangement with one or more other small business concerns and submit an offer as a small business for a Federal procurement without regard to affiliation so long as each team member is small under the size standard corresponding to the NAICS code assigned to the contract and there is a written, signed teaming or joint venture agreement amongst the small business concerns. *See* § 125.1 for the definition of Small Business Teaming Arrangement. With respect to Small Business Teaming Arrangements that are joint ventures, *see* 121.103(h) for specific requirements and limitations.

* * * * *

3. Amend § 121.402 by:

a. Revising paragraphs (a) and (b);

b. Redesignating paragraphs (c), (d) and (e) as (d), (e), and (f), respectively; and

c. Adding a new paragraph (c) to read as follows:

§ 121.402 What size standards are applicable to Federal Government Contracting Programs?

(a) A concern must not exceed the size standard for the NAICS code specified in the solicitation. The contracting officer must specify the size standard in effect on the date the solicitation is issued. If SBA amends the size standard and it becomes effective before the date initial offers (including price) are due, the contracting officer may amend the solicitation and use the new size standard.

(b) The procuring agency contracting officer, or authorized representative, designates the proper NAICS code and corresponding size standard in a solicitation, selecting the NAICS code which best describes the principal purpose of the product or service being acquired. Every solicitation, including a request for quotes, must contain a NAICS code.

(i) Primary consideration is given to the industry descriptions in the NAICS United States Manual, the product or service description in the solicitation and any attachments to it, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being purchased.

(ii) A procurement is usually classified according to the component which accounts for the greatest percentage of contract value. Acquisitions for supplies must be classified under the appropriate manufacturing or supply NAICS code, not under a Wholesale Trade or Retail Trade NAICS code. A concern that submits an offer or quote for a contract, order or subcontract where the NAICS code assigned to the contract, order or subcontract is one for supplies, and furnishes a product it did not itself manufacture or produce, is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of § 121.406(b).

(c) Multiple Award Contracts (*see* definition at § 125.1).

(i) For Multiple Award Contracts, the contracting officer must:

(A) Assign the solicitation a single NAICS code and corresponding size standard which best describes the principal purpose of the acquisition as set forth in paragraph (b) above, only if the NAICS code will also best describe the principal purpose of each order to be placed under the Multiple Award Contract. If a service NAICS code has been assigned to the Multiple Award Contract, then a service NAICS code must be assigned to the solicitation for the order, including an order for services that also requires some supplies; or

(B) Divide the solicitation into discrete categories (Contract Line Item Numbers (CLINs), Special Item Numbers (SINs), Sectors, Functional Areas (FAs), or the equivalent), and assign each discrete category the single NAICS code and size standard that best describes the principal purpose of the good or services to be acquired under that category (CLIN, SIN, Sector, FA or equivalent)as set forth in paragraph (b) above. A concern must meet the applicable size standard for eachcategory (CLIN, SIN, Sector, FA or equivalent) for which it seeks an award as a small business concern.

(ii)(A) The contracting officer must assign a single NAICS code for each order issued against a Multiple Award Contract. When placing an order under a multiple award contract with multiple NAICS codes, the contracting officer must assign the NAICS code and corresponding size standard that best describes the principle purpose of each order. In cases like the GSA Schedule, where an agency can issue an order against multiple SINs with different NAICS codes, the contracting officer must select the single NAICS code that best represents the acquisition.

(B) With respect to an order issued against a multiple award contract, an agency will receive small business credit for goaling only if the business concern awarded the order has represented its status as small for the underlying multiple award contract for the same NAICS code as that for the order or if the contracting officer requires the business to represent its status in response to that particular order solicitation.

* * * * *

4. Amend § 121.404 by:

a. Revising the heading;

b. Revising paragraph (a);

c. Revising paragraph (b) by removing ''date of certification by SBA'' and adding in its place ''date the program office requests a formal size determination in connection with a concern that is otherwise eligible for program certification.''

d. Revising paragraph (f);

e. Revising the first sentence in paragraph (g), introductory text and adding a new second sentence;

f. Revising paragraph (g)(2) by redesignating it as paragraph (g)(2)(i) and adding the following new paragraph (g)(2)(ii);

g. Revising the first sentence in paragraph (g)(3);

h. Revising the second sentence in paragraph (g)(3)(iv);

i.Removing paragraph (g)(3)(vi);

j. Redesignating paragraph (g)(4) as (g)(5); and

k. Adding a new paragraph (g)(4), to read as follows:

§ 121.404 When is the size status of a business concern determined?

(a) SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation), which includes price.

(1) With respect to Multiple Award Contracts and orders issued against the Multiple Award Contract:

(i) SBA will determine size at the time of initial offer (or other formal response to a solicitation), which includes price, for the Multiple Award Contract based upon the size standard set forth in the solicitation for the Multiple Award Contract if a single NAICS codes is assigned as set forth in § 121.402(c)(i)(A). If a business is small at the time of offer for the Multiple Award Contract, it is small for each order issued against the contract, unless a contracting officer requests a new size certification in connection with a specific order.

(ii) SBA will determine size at the time of initial offer (or other formal response to a solicitation), which includes price, for the Multiple Award Contract based upon the size standard set forth for each discrete category (*e.g.,* CLIN, SIN, Sector, FA or equivalent) for which a business concern submits an offer and represents it is small for a Multiple Award Contract as set forth in § 121.402(c)(i)(B). If the business concern submits an offer for the entire Multiple Award Contract, SBA will determine whether it meets the size standard for each discrete category (CLIN, SIN, Sector, FA or equivalent). If a business is small at the time of offer for a discrete category on the Multiple Award Contract, it is small for each order issued against that category with the same NAICS code and size standard, unless a contracting officer requests a new size certification in connection with a specific order.

(iii) SBA will determine size at the time of initial offer (or other formal response to a solicitation), which includes price, for an order issued against a Multiple Award Contract if the contracting officer requires the business concern to recertify its status at the time of initial offer for an order.

(2) With respect to ''Agreements'' such as Blanket Purchase Agreements (BPAs) (except for BPA's issued against a GSA Schedule Contract), Basic Agreements, Basic Ordering Agreements, or any other Agreement that a contracting officer sets aside or reserves awards to any type of small business, a concern must qualify as small at the time of its initial offer (or other formal response to a solicitation), which includes price, for the Agreement. Because an Agreement is not a contract, the concern must also qualify as small for each order issued pursuant to the Agreement in order to be considered small for the order and for an agency to receive small business goaling credit for the order.

* * * * *

(f) For purposes of architect-engineering or two-step sealed bidding procurements, a concern must qualify as small as of the date that it certifies that it is small as part of its initial bid or proposal (which may not include price).

(g) A concern that represents itself as a small business and qualifies as a small

business at the time of initial offer (or other formal response to a solicitation), which includes price, is considered a small business throughout the life of that contract. This means that if a business concern is small at the time of initial offer for a Multiple Award Contract (*see* 121.1042(c) for designation of NAICS codes on a Multiple Award Contract), then it will be considered small for each order issued against the contract with the same NAICS code and size standard, unless a contracting officer requests a new size certification in connection with a specific order. * * *

* * * * *

(2)(i) * * *

(ii) Recertification is required:

(A) when a concern acquires or is acquired by another concern;

(B) from both the acquired concern and the acquiring concern if each has been awarded a contract as a small business; and

(C) from a joint venture when the acquired concern, acquiring concern, or merged concern is a participant in a joint venture that has been awarded a contract or order as a small business.

* * * * *

(3) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its small business size status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option thereafter. * * *

* * * * *

(iv) * * * The NAICS code and size standard assigned to an order must correspond to a NAICS code and size standard assigned to the underlying long-term contract and must be assigned in accordance with § 121.402(b) & (c).

(4) The requirements in paragraphs (1), (2), and (3) of this section apply to Multiple Award Contracts. However, if the Multiple Award Contract was set-aside for small businesses, was partially set-aside for small businesses, or reserved for small business, then in the case of a contract novation or merger or acquisition where no novation is required and the resulting contractor is now otherthansmall, the agency cannot exercise the next option and cannot count any new orders issued pursuant to the contract, including options on current orders, from that point forward, towards its small business goals. This includes set-asides, partial set-asides, and reserves for 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, and WOSB/EDWOSBs.

* * * * *

5. Amend § 121.406 by revising paragraph (a) to read as follows:

§ 121.406 How does a small business concern qualify to provide manufactured products or other supply items under a small business set-aside, service-disabled veteran-owned small business set-aside, WOSB or EDWOSB set-aside, or 8(a) contract?

(a) *General.* In order to qualify as a small business concern for a small business set-aside, service-disabled veteran-owned small business set-aside, WOSB or EDWOSB set-aside, or 8(a) contract, apartial set-aside, reserve, or set-aside of orders against a multiple award contract to provide manufactured products or other supply items, an offeror must either: * * *

* * * * *

§ 121.407 [Removed and Reserved]

6. Remove and reserve § 121.407.

7. Amend § 121.1001 by:

a. Revising paragraph (a)(1);

§ 121.1001 Who may initiate a size protest or request a formal size determination?

(a) *Size Status Protests.* (1) For SBA's Small Business Set-Aside Program, including the Property Sales Program, or any instance in which a procurement or order has been restricted to or reserved for small business or a particular group of small business (including a partial set-aside), the following entities may file a size protest in connection with a particular procurement, sale or order: * * *

* * * * *

8. Amend § 121.1004 by revising paragraphs (a)(1), (a)(2) and (a)(3) to read as follows:

§ 121.1004 What time limits apply to size protests?

(a) *Protests by entities other than contracting officers or SBA*—(1) *Sealed bids or sales (including protests on partial set-asides and reserves of Multiple Award Contracts and set-asides of orders against Multiple Award Contracts).* A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after bid or proposal opening.

(2) *Negotiated procurement (including protests on partial set-asides and reserves of Multiple Award Contracts and set-asides of orders against Multiple Award Contracts).* A protest must be received by the contracting officer prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after the contracting officer has notified the protestor of the identity of the prospective awardee.

(3) *Long-Term Contracts.* For contracts with durations greater than five years (including options), including all existing long-term contracts, Multi-agency contracts (MACs), Government Wide Acquisition Contracts and Multiple Award Contracts: * * *

* * * * *

9. Amend § 121.1103 by revising paragraph (a) to read as follows:

§ 121.1103 What are the procedures for appealing a NAICS code or size standard designation?

(a)(1) Any interested party adversely affected by a NAICS code designation may appeal the designation to OHA. An interested party would include a business concern seeking to change the NAICS code designation in order to be considered a small business for the challenged procurement, regardless of whether the procurement is reserved for small businesses or unrestricted. The only exception is that, for a sole source contract reserved under SBA's 8(a) Business Development program (*see* part 124 of this chapter), only SBA's Associate Administrator for Business Development may appeal the NAICS code designation.

(2) A NAICS code appeal may include an appeal involving the applicable size standard, such as where more than one size standard corresponds to the selected NAICS code, or a question relating to the size standard in effect at the time the solicitation was issued or amended.

* * * * *

PART 124—8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

10. The authority citation for 13 CFR part 124 is amended to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644 and Pub. L. 99–661, Pub. L. 100–656, sec. 1207, Pub. L. 101–37, Pub. L. 101–574, section 8021, Pub. L. 108–87, and 42 U.S.C. 9815.

11. Amend § 124.501 by adding a sentence after the first sentence in paragraph (a) to read as follows:

§ 124.501 What general provisions apply to the award of 8(a) contracts?

(a) * * * This includes set-asides, partial set-asides and reserves of Multiple Award Contracts and set-asides of orders issued against Multiple Award Contracts. * * *

* * * * *

12. Amend § 124.503 by:

a. Revising heading in paragraph (h);

b. Revising paragraphs (h)(1)(i), (h)(1)(ii), and (h)(1)(iv);

c. Revising the heading and first sentence in paragraph (h)(2); and

d. Adding new paragraph (h)(3) to read as follows:

§ 124.503 How does SBA accept a procurement for award through the 8(a) BD program?

* * * * *

(h) *Task or Delivery Order Contracts, including Multiple Award Contracts*—(1) *Contracts set-aside for exclusive competition among 8(a) Participants.* (i) A task or delivery order contract, Multiple Award Contract, or order issued against a Multiple Award Contract that is set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants must follow the established 8(a) competitive procedures, including an offering to and acceptance into the 8(a) program, SBA eligibility verification of the apparent successful offerors prior to contract award, application of the performance of work requirements set forth in § 124.510, and the nonmanufacturer rule, if applicable, (*see* § 121.406(b)).

(ii) An agency is not required to offer or receive acceptance of individual orders into the 8(a) BD program if the task or delivery order contract or Multiple Award Contract was set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants. * * *

(iv) An agency may issue a sole source award against a Multiple Award Contract that has been set-aside exclusively for 8(a) Program Participants, partially set-aside for 8(a) Program Participants or reserved solely for 8(a) Program Participants if the required dollar thresholds for sole source awards are met.

(2) *Allowing orders issued to 8(a) Participants under Multiple Award Contracts that were not set-aside for exclusive competition among eligible 8(a) Participants to be considered 8(a) awards.* In order for an order issued to an 8(a) Participant and placed against a Multiple Award Contract to be considered an 8(a) award, where the Multiple Award contract was not initially set-aside, partially set-aside or reserved for exclusive competition among 8(a) Participants, the following conditions must be met: * * *

* * * * *

(3) *Reserves.* A procuring activity must offer and SBA must accept a requirement that is reserved for 8(a) concerns (*e.g.,* an acquisition where the contracting officer states an intention to make one or more awards to only 8(a) concerns under full and open competition). However, a contracting officer does not have to offer the requirement to SBA where the acquisition has been reserved for small businesses, even if the contracting officer states an intention to make one or more awards to several types of small business including 8(a) Participants since that is not an 8(a) contract award.

* * * * *

13. Amend § 124.504 by:

a. Revising paragraph (a) to read as follows; and

b. Revising paragraph (c)(3) by removing ''reserved for'' and replacing it with ''in''.

§ 124.504 What circumstances limit SBA's ability to accept a procurement for award as an 8(a) contract?

* * * * *

(a) *Prior intent to award as a small business set-aside, or use the HUBZone, Service Disabled Veteran-Owned Small Business, or Women-Owned Small Business programs.* The procuring activity issued a solicitation for or otherwise expressed publicly a clear intent to award the contract as a small business set-aside, or to use the HUBZone, Service Disabled Veteran-Owned Small Business, or Women-Owned Small Business programs prior to offering the requirement to SBA for award as an 8(a) contract. The AA/BD may permit the acceptance of the requirement, however, under extraordinary circumstances.

* * * * *

14. Amend § 124.505 by revising the heading to read as follows: ''§ *124.505 When will SBA appeal the terms or conditions of a particular 8(a) contract or a procuring activity decision not to use the 8(a) BD program?''.*

15. Amend § 124.510 by revising paragraph (c) to read as follows:

§ 124.510 What percentage of work must a Participant perform on an 8(a) contract?

* * * * *

(c) *Indefinite delivery and indefinite quantity contracts.* (1) In order to ensure that the required percentage of costs on an indefinite delivery or indefinite quantity 8(a) award is performed by the Participant, the Participant must demonstrate that it has performed the required percentage for each order. This includes Multiple Award Contracts that were set-aside, partially set-aside or reserved solely for 8(a) BD Participants as well as orders issued against Multiple Award Contracts that were set-aside solely for 8(a) BD Participants. For a service or supply contract, this means that the Participant must perform 50 percent of the applicable costs for each task or delivery order with its own employees or the cost of manufacturing the supplies or products, whichever is applicable.

(2) The applicable SBA District Director may waive the provisions in paragraph (c)(1) of this section requiring a Participant to meet the applicable performance of work requirement for each task or delivery order. Instead, the District Director may permit the Participant to meet the applicable performance of work for the combined total of all orders issued to date at the end of any six-month period where he or she makes a written determination that larger amounts of subcontracting are essential during certain stages of performance. However, the 8(a) Participant and procuring activity's contracting officer must provide written assurances that the contract will ultimately comply with the requirements of this section. The procuring activity's contracting officer does not have authority to waive the provisions in paragraph (c)(1) of this section requiring a Participant to meet the applicable performance of work requirement for each task or delivery order, even if the agency has a Partnership Agreement with SBA.

Example. Two task orders are issued under an 8(a) indefinite quantity service contract during the first six months of the contract. The contract requires $100,000 in personnel costs to be incurred on the first task order, and 90% of those costs ($90,000) are incurred for performance by the Participant's own work force. The second task order issued during the first six months also requires $100,000 in personnel costs to be incurred. Where the relevant SBA District Director has waived the requirements of paragraph (c)(1), the 8(a) Participant would have to incur only 10 percent of the personnel costs on the second task order ($10,000) because it would still have performed 50% of the total personnel costs ($200,000) at the end of the six-month period ($100,000).

(3) Where the Participant does not ultimately comply with the performance of work requirements by the end of the contract, SBA will not grant future waivers for the Participant. Further, the contracting officer must document an 8(a) Participant's performance of work requirements as part of its performance evaluation in accordance with the procedures set forth in FAR 42.1502. The contracting officer must also evaluate compliance for future contract awards in accordance with the procedures set forth in FAR 9.104–6.

PART 125—GOVERNMENT CONTRACTING PROGRAMS

16. The authority citation for 13 CFR part 125 is amended to read as follows:

Authority: 15 U.S.C. 632(p), (q); 634(b)(6), 637, 644, 657f, and 657q.

17. Revise § 125.1 to read as follows:

§ 125.1 What definitions are important to SBA's Government Contracting Programs?

(a) *Chief Acquisition Officer* means the employee of a Federal agency designated as such pursuant to section 16(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(a)).

(b) *Commercial off-the-shelf item* has the same definition as set forth in 41 U.S.C. 101 (as renumbered) and Federal Acquisition Regulation (FAR) § 2.101.

(c) *Consolidation of contract requirements, consolidated contract or consolidated requirement* means a solicitation for a single contract or a Multiple Award Contract to satisfy two or more requirements of the Federal agency for goods or services that have been provided to or performed for the Federal agency under two or more separate contracts each of which was lower in cost than the total cost of the contract for which the offers are solicited, the total cost of which exceeds $2 million (including options).

(d) *Contract* unless otherwise noted, has the same definition as set forth in FAR § 2.101 and includes orders issued against Multiple Award Contracts and orders competed under agreements where the execution of the order is the contract (*e.g.,* a Blanket Purchase Agreement (BPA), a Basic Agreement (BA), or Basic Ordering Agreement (BOA)).

(e) *Contract bundling, bundled requirement, bundled contract, or bundling* means the consolidation of two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract or a Multiple Award Contract that is likely to be unsuitable for award to a small business concern (but may be suitable for award to a small business with a Small Business Teaming Arrangement) due to:

(1) The diversity, size, or specialized nature of the elements of the performance specified;

(2) The aggregate dollar value of the anticipated award;

(3) The geographical dispersion of the contract performance sites; or

(4) Any combination of the factors described in the above paragraphs (1), (2), and (3) of this section.

(f) *Cost of the contract* means all allowable direct and indirect costs allocable to the contract, excluding profit or fees.

(g) *Cost of contract performance incurred for personnel* means direct labor costs and any overhead which has only direct labor as its base, plus the concern's General and Administrative rate multiplied by the labor cost.

(h) *Cost of manufacturing* means costs incurred by the business concern in the production of the end item being acquired, including the costs associated with crop production. These are costs associated with producing the item being acquired, including the direct costs of fabrication, assembly, or other production activities, and indirect costs which are allocable and allowable. The cost of materials, as well as the profit or fee from the contract, are excluded.

(i) *Cost of materials* means costs of the items purchased, handling and associated shipping costs for the purchased items (which includes raw materials), commercial off-the-shelf items (and similar common supply items or commercial items that require additional manufacturing, modification or integration to become end items), special tooling, special testing equipment, and construction equipment purchased for and required to perform on the contract. In the case of a supply contract, include the acquisition of services or products from outside sources following normal commercial practices within the industry.

(j) *General Services Administration (GSA) Schedule Contract* means a Multiple Award Contract issued by GSA and includes the Federal Supply Schedules and other Multiple Award Schedules.

(k) *Multiple Award Contracts* means contracts that are:

(1) A multiple award schedule contract issued by GSA (*e.g.,* GSA Schedule Contract) or agencies granted Multiple Award Schedule contract authority by GSA (*e.g.,* Department of Veterans Affairs) as described in FAR part 38 and subpart 8.4;

(2) A multiple award task-order or delivery-order contract issued in accordance with FAR subpart 16.5, including Governmentwide acquisition contracts; and

(3) Any other indefinite-delivery, indefinite-quantity contract entered into with two or more sources pursuant to the same solicitation.

(l) *Office of Small and Disadvantaged Business Utilization (OSDBU) or the Office of Small Business Programs (OSBP)* means the office in each Federal agency having procurement powers that is responsible for ensuring that small businesses receive a fair proportion of Federal contracts in that agency. The office is managed by a Director, who is responsible and reports directly to the head of the agency or deputy to the agency (except that for DoD, they report to the Secretary or the Secretary's designee).

(m) *Personnel* means individuals who are ''employees'' under § 121.106 of this chapter except for purposes of the HUBZone program, where the definition of ''employee'' is found in § 126.103 of this chapter.

(n) *Partial set-aside (or partially set-aside)* means, for a Multiple Award Contract, a contracting vehicle that can be used: When market research indicates that a total set-aside is not appropriate; the procurement can be broken up into smaller discrete portions or discrete categories such as by Contract Line Items, Special Item Numbers, Sectors or Functional Areas or other equivalent; and two or more small business concerns, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs are expected to submit an offer on the set-aside part or parts of the requirement at a fair market price. A contracting officer has the discretion, but is not required, to set-aside the discrete portions or categories for different small businesses participating in SBA's small business programs (*e.g.,* CLIN 0001, 8(a) set-aside; CLIN 0002, HUBZone set-aside; CLIN 0003, SDVO SBC set-aside; CLIN 0004, WOSB set-aside; CLIN 0005 EDWOSB set-aside; CLIN 0006, small business set-aside).

(o) *Reserve* means, for a Multiple Award Contract:

(1) An acquisition conducted using full and open competition where the contracting officer's market research and recent past experience evidence that—

(i) At least two small businesses, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs could perform one part of the requirement, but the contracting officer was unable to divide the requirement into smaller discrete portions or discrete categories by utilizing individual Contract Line Items (CLINs), Special Item Numbers (SINs), Functional Areas (FAs), or other equivalent; or

(ii) At least one small business, 8(a) BD Participant, HUBZone SBC, SDVO SBC, WOSB or EDWOSB can perform the entire requirement, but there is not a reasonable expectation of receiving at least two offers from small business concerns, 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs at a fair market price for all the work contemplated throughout the term of the contract; and

(2) The contracting officer makes—

(i) Two or more contract awards to any one type of small business concern (*e.g.,* small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and competes any orders solely amongst the specified types of small business concerns if the rule of two or any alternative set-aside requirements provided in the small business program have been met;

(ii) Several awards to several different types of small businesses (*e.g.,* one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB) and competes any orders solely amongst all of the small business concerns if the rule of two has been met; or

(iii) One contract award to any one type of small business concern (*e.g.,* small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and subsequently issues orders directly to that concern.

(3) A bundled contract where the contracting officer's market research and recent past experience evidence that one or more Small Business Teaming Arrangement (but not any individual small business concerns) may submit an offer or receive a contract award and the contracting officer states an intention to make at least one award to a Small Business Teaming Arrangement.

(p) *Rule of Two* refers to the requirements set forth in §§ 124.506, 125.2(f), 125.19(c), 126.607(c) and 127.503 of this chapter that there is a reasonable expectation that the contracting officer will obtain offers from at least two small businesses and award will be made at fair market price.

(q) *Senior Procurement Executive* means the employee of a Federal agency designated as such pursuant to section 16(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(c)).

(r) *Separate contract* means a contract or order (including those placed against a GSA Schedule Contract or an indefinite delivery/indefinite quantity contract) that has previously been performed by any business, including an other-than-small business or small business concern.

(s) *Separate smaller contract* means a contract that has previously been performed by one or more small business concerns or was suitable for award to one or more small business concerns.

(t) *Single contract* means any contract or order (including those placed against a GSA Schedule Contract or an indefinite delivery/indefinite quantity contract) resulting in one or more awardee.

(u) *Small Business Teaming Arrangement* means an arrangement where:

(1) Two or more small business concerns have formed a joint venture to act as a potential prime contractor (for the definition of and exceptions to affiliation for joint ventures, *see* § 121.103); or

(2) A potential small business prime contractor agrees with one or more other small business concerns to have them act as its subcontractors under a specified Government contract. A Small Business Teaming Arrangement between a prime and its small business subcontractor(s) must exist through a written agreement between the parties that is specifically referred to as a ''Small Business Teaming Arrangement'' or ''Small Business Teaming Agreement;'' and sets forth the different responsibilities, roles and percentages of work as it relates to the acquisition.

(3) A small business teaming arrangement can include two business concerns in a mentor/protégé relationship so long as both the mentor and protégé are small or the protégé is small and the concerns have received an exception to affiliation pursuant to § 121.103(h)(3)(ii) or (iii) of this chapter.

(4) The agreement must be provided to the contracting officer as part of the proposal.

(v) *Subcontract or subcontracting* means that portion of the contract performed by a business concern, other than the business concern awarded the contract, under a second contract, purchase order, or agreement for any parts, supplies, components, or subassemblies which are not available commercial off-the-shelf items, and which are manufactured in accordance with drawings, specifications, or designs furnished by the contractor, or by the government as a portion of the solicitation. Raw castings, forgings, and moldings are considered as materials, not as subcontracting costs. Where the prime contractor has been directed by the Government as part of the contract to use any specific source for parts, supplies, or components subassemblies, the costs associated with those purchases will be considered as part of the cost of materials, not subcontracting costs.

(w) *Substantial bundling* means any bundling that meets the following dollar amounts (if the acquisition strategy contemplates Multiple Award Contracts or multiple award orders issued against a GSA Schedule Contract or a task or delivery order contract awarded by another agency, these thresholds apply to the cumulative estimated value of the Multiple Award Contracts or orders, including options):

(1) $8.0 million or more for the Department of Defense;

(2) $6.0 million or more for the National Aeronautics and Space Administration, the General Services Administration, and the Department of Energy; and

(3) $2.5 million or more for all other agencies.

18. Amend § 125.2 by:

a. Revising the section heading;

b. Revising paragraphs (a), (b), (c), (d) and (e) to read as follows:

§ 125.2 What are SBA's and the procuring agency's responsibilities when providing contracting assistance to small businesses?

(a) *General.* The objective of the SBA's contracting programs is to assist small business concerns, including 8(a) BD Participants, HUBZone small business concerns, Service Disabled Veteran-Owned Small Business Concerns, Women-Owned Small Businesses and Economically Disadvantaged Women-Owned Small Businesses, in obtaining a fair share of Federal Government prime contracts, subcontracts, orders, and property sales. Therefore, these regulations apply to all types of Federal Government contracts, including Multiple Award Contracts, and contracts for architectural and engineering services, research, development, test and evaluation. Small business concerns must receive any award (including orders, and orders placed against Multiple Award Contracts) or contract, part of any such award or contract, and any contract for the sale of Government property, regardless of the place of performance, which SBA and the procuring or disposal agency determine to be in the interest of:

(1) Maintaining or mobilizing the Nation's full productive capacity;

(2) War or national defense programs;

(3) Assuring that a fair proportion of the total purchases and contracts for property, services and construction for the Government in each industry category are placed with small business concerns; or

(4) Assuring that a fair proportion of the total sales of Government property is made to small business concerns.

(b) *SBA's responsibilities in the acquisition planning process*—(1) *SBA Procurement Center Representative (PCR) Responsibilities*—(i) *PCR Review.*

(A) SBA has PCRs who are generally located at Federal agencies and buying activities that have major contracting programs. At the SBA's discretion, PCRs will review all acquisitions that are

issued on a sole source basis or not set-aside or reserved for small businesses above or below the Simplified Acquisition Threshold, to determine whether a set-aside or sole source award to a small business under one of SBA's programs is appropriate and to identify alternative strategies to maximize the participation of small businesses in the procurement. This review includes acquisitions that are Multiple Award Contracts where the agency has failed to set-aside all or part of the acquisition or reserve the acquisition for small businesses. It also includes acquisitions where the agency has failed to set-aside orders placed against Multiple Award Contracts for small business concerns.

(B) PCRs will work with the cognizant Small Business Specialist (SBS) and agency OSDBU or OSBP as early in the acquisition process as practicable to identify proposed solicitations that involve bundling, and with the agency acquisition officials to revise the acquisition strategies for such proposed solicitations, where appropriate, to increase the probability of participation by small businesses, including small business contract teams and Small Business Teaming Arrangements, as prime contractors.

(C) In conjunction with their duties to promote the set-aside of procurements for small business, PCRs may identify small businesses that are capable of performing particular requirements.

(D) PCRs will also ensure that any Federal agency decision made concerning the consolidation of contract requirements considers the use of small businesses and ways to provide small businesses with maximum opportunities to participate as prime contractors and subcontractors in the acquisition or sale of real property.

(E) PCRs will review whether for bundled and consolidated contracts that are recompeted, the amount of savings and benefits was achieved under the prior bundling or consolidation of contract requirements, that such savings and benefits will continue to be realized if the contract remains bundled or consolidated, or such savings and benefits would be greater if the procurement requirements were divided into separate solicitations suitable for award to small business concerns.

(ii) *PCR Recommendations in General.* The PCR must recommend to the procurement activity alternative procurement methods that would increase small business prime contract participation if a PCR believes that a proposed procurement: includes in its statement of work goods or services currently being performed by a small business and is in a quantity or estimated dollar value the magnitude of which renders small business prime contract participation unlikely; will render small business prime contract participation unlikely (*e.g.,* ensure geographical preferences are justified); is for construction and seeks to package or consolidate discrete construction projects; or if a PCR does not believe a bundled or consolidated requirement is necessary and justified. Such alternatives may include:

(A) Breaking up the procurement into smaller discrete procurements, especially construction acquisitions that can be procured as separate projects;

(B) Breaking out one or more discrete components, for which a small business set-aside may be appropriate;

(C) Reserving one or more awards for small businesses when issuing Multiple Award Contracts;

(D) Using a partial set-aside;

(E) Stating in the solicitation for a Multiple Award Contract that the orders will be set-aside for small businesses; and

(F) Where the bundled or consolidated requirement is necessary and justified, the PCR will work with the procuring activity to tailor a strategy that preserves small business prime contract participation to the maximum extent practicable.

(iii) *PCR Recommendations for Small Business Teaming and Subcontracting.* The PCR will work to ensure that small business participation is maximized through Small Business Teaming Arrangements and subcontracting opportunities. This may include:

(A) Recommending that the solicitation and resultant contract specifically state the small business subcontracting goals, which are expected of the contractor awardee;

(B) Recommending that the small business subcontracting goals be based on total contract dollars instead of or in addition to subcontract dollars;

(C) Reviewing an agency's oversight of its subcontracting program, including its overall and individual assessment of a contractor's compliance with its small business subcontracting plans. The PCR will furnish a copy of the information to the SBA Commercial Market Representative (CMR) servicing the contractor;

(D) Recommending that a separate evaluation factor with significant weight is established for the extent to which offerors attained their subcontracting goals on previous contracts;

(E) Recommending that a separate evaluation factor with significant weight is established for evaluating the offerors' proposed approach to small business utilization, the extent to which offerors propose small business utilization, and the extent to which offerors attain their subcontracting goals on previous contracts;

(F) For bundled and consolidated requirements, requiring that a separate evaluation factor with significant weight is established for evaluating the offerors' proposed approach to small business utilization, the extent to which offerors propose small business utilization, and the extent to which offerors attain their subcontracting goals on previous contracts;

(G) For bundled or consolidated requirements, recommending the solicitation state that the agency must evaluate offers from teams of small businesses the same as other offers, with due consideration to the capabilities and past performance of all proposed subcontractors. It may also include recommending that the agency reserve at least one award to a small business prime contractor with a Small Business Teaming Arrangement;

(H) For Multiple Award Contracts and multiple award requirements above the substantial bundling threshold, recommending or requiring that the solicitation state that the agency will solicit offers from small business concerns and small business concerns with Small Business Teaming Arrangements; and

(I) For consolidated contracts, ensuring that agencies have provided small business concerns with appropriate opportunities to participate as prime contractors and subcontractors and making recommendations on such opportunities as appropriate.

(iv) *Appeals of PCR and BPCR Recommendations.* In cases where there is disagreement between a PCR and the contracting officer over the suitability of a particular acquisition for a small business set-aside, partial set-aside or reserve, whether or not the acquisition is a bundled, substantially bundled or consolidated requirement, the PCR may initiate an appeal to the head of the contracting activity. If the head of the contracting activity agrees with the contracting officer, SBA may appeal the matter to the Secretary of the Department or head of the agency. The time limits for such appeals are set forth in FAR § 19.505 (48 CFR 19.505).

(2) *SBA BPCR Responsibilities.* (i) Breakout PCRs (BPCRs) are assigned to major contracting centers. A major contracting center is a center that, as determined by SBA, purchases substantial dollar amounts of other than commercial items, and which has the potential to achieve significant savings as a result of the assignment of a BPCR. (ii) BPCRs advocate full and open

competition in the Federal contracting process and recommend the breakout for competition of items and requirements which previously have not been competed. They may appeal the failure by the buying activity to act favorably on a recommendation in accord with the appeal procedures in paragraph (b)(1)(v) of this section. BPCRs also review restrictions and obstacles to competition and make recommendations for improvement. Other authorized functions of a BPCR are set forth in 48 CFR 19.403(c) (FAR § 19.403(c)) and Section 15(l) of the Small Business Act (15 U.S.C. 644(l)).

(c) *Procuring Agency Responsibilities*—(1) *Requirement to Foster Small Business Participation.* The Small Business Act requires each Federal agency to foster the participation of small business concerns as prime contractors and subcontractors in the contracting opportunities of the Government regardless of the place of performance of the contract. In addition, Federal agencies must ensure that all bundled and consolidated contracts contain the required analysis and justification and provide small business concerns with appropriate opportunities to participate as prime contractors and subcontractors. To comply with these requirements, agency acquisition planners must:

(i) Structure procurement requirements to facilitate competition by and among small business concerns, including small business concerns owned and controlled by service-disabled veteran-owned small business concerns, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women;

(ii) Avoid unnecessary and unjustified bundling of contracts or consolidation of contract requirements that inhibits or precludes small business participation in procurements as prime contractors;

(iii) Follow the limitations on use of consolidated contracts;

(iv) With respect to any work to be performed the amount of which would exceed the maximum amount of any contract for which a surety may be guaranteed against loss under 15 U.S.C. 694b, the contracting procurement agency must, to the extent practicable, place contracts so as to allow more than one small business concern to perform such work;

(v) Ensure that prior to placing an order against another agency's Multiple Award Contract, a determination that use of another agency's contract vehicle is the best procurement approach and promotes small business participation; and

(vi) Provide SBA the necessary information relating to the acquisition under review. This includes providing PCRs (to the extent of their security clearance) copies of all documents relating to the acquisition under review, including, but not limited to, the performance work statement/statement of work, technical data, market research, hard copies or their electronic equivalents of Department of Defense (DoD) Form 2579 or equivalent, etc. The DoD Form 2579 or equivalent must be sent electronically to the PCR (or if a PCR is not assigned to the procuring activity, to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located).

(2) *Requirement for market research.* Each agency must conduct market research to determine the type and extent of small business participation in the acquisition. In addition, each agency must conduct market research and any required analysis and justifications before proceeding with an acquisition strategy that could lead to a bundled, substantially bundled, or consolidated contract. The purpose of the market research and analysis is to determine whether the bundling or consolidation of the requirements is necessary and justified and all statutory requirements for such a strategy have been met. Agencies should be as broad as possible in their search for qualified small businesses, using key words as well as NAICS codes in their examination of the Dynamic Small Business Search Engine that is available in CCR, and must not place unnecessary and unjustified restrictions when conducting market research (*e.g.,* requiring that small businesses prove they can provide the best scientific and technological sources) when determining whether to set-aside, partially set-aside, reserve or sole source a requirement to small businesses. During the market research phase, the acquisition team must consult with the applicable PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located) and the activity's Small Business Specialist.

(3) *Proposed Acquisition Strategy.* A procuring activity must provide to the applicable PCR (or to the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located if a PCR is not assigned to the procuring activity) at least 30 days prior to a solicitation's issuance:

(i) A copy of a proposed acquisition strategy (*e.g.,*DoD Form 2579, or equivalent) whenever a proposed acquisition strategy:

(A) Includes in its description goods or services currently being performed by a small business and the magnitude of the quantity or estimated dollar value of the proposed procurement would render small business prime contract participation unlikely;

(B) Seeks to package or consolidate discrete construction projects;

(C) Is a bundled or substantially bundled requirement; or

(D) Is a consolidation of contract requirements.

(ii) A written statement explaining why, if the proposed acquisition strategy involves a bundled or consolidated requirement, the procuring activity believes that the bundled or consolidated requirement is necessary and justified, the analysis required by paragraph (d)(2)(i) of this section, the acquisition plan, any bundling information required under paragraph (d)(3) of this section, and any other relevant information. The PCR and agency OSDBU or OSBP, as applicable, must then work together to develop alternative acquisition strategies identified in paragraph (b)(1) of this section to enhance small business participation.

(iii) All required clearances for the bundled, substantially bundled, or consolidated requirement.

(iv) A written statement explaining why, if the description of the requirement includes goods or services currently being performed by a small business and the magnitude of the quantity or estimated dollar value of the proposed procurement would render small business prime contract participation unlikely, or if a proposed procurement for construction seeks to package or consolidate discrete construction projects:

(A) The proposed acquisition cannot be divided into reasonably small lots to permit offers on quantities less than the total requirement;

(B) Delivery schedules cannot be established on a basis that will encourage small business participation;

(C) The proposed acquisition cannot be offered so as to make small business participation likely; or

(D) Construction cannot be procured as separate discrete projects.

(4) *Procuring Agency Small Business Specialist (SBS) Responsibilities.* (i) As early in the acquisition planning process as practicable, but no later than 30 days before the issuance of a

solicitation, or prior to placing an order without a solicitation, the procuring activity must coordinate with the procuring activity's SBS when the acquisition strategy contemplates an acquisition meeting the dollar amounts set forth for substantial bundling. If the acquisition strategy contemplates Multiple Award Contracts or orders under the GSA Multiple Award Schedule Program or a task or delivery order contract awarded by another agency, these thresholds apply to the cumulative estimated value of the Multiple Award Contracts or orders, including options. The procuring activity is not required to coordinate with its SBS if the contract or order is entirely set-aside for small business concerns, or small businesses under one of SBA's small business programs, as authorized under the Small Business Act.

(ii) The SBS must notify the agency OSDBU or OSBP if the agency's acquisition strategy or plan includes bundled or consolidated requirements that the agency has not identified as bundled, or includes unnecessary or unjustified bundling of requirements. If the strategy involves substantial bundling, the SBS must assist in identifying alternative strategies that would reduce or minimize the scope of the bundling.

(iii) The SBS must coordinate on all required determinations and findings for bundling and/or consolidation, and acquisition planning and strategy documentation.

(5) *OSDBU and OSBP Oversight Functions.* The Agency OSDBU or OSBP must:

(i) Conduct annual reviews to assess the:

(A) Extent to which small businesses are receiving their fair share of Federal procurements, including contract opportunities under programs administered under the Small Business Act;

(B) Adequacy of the bundling or consolidation documentation and justification; and

(C) Adequacy of actions taken to mitigate the effects of necessary and justified contract bundling or consolidation on small businesses (*e.g.,* review agency oversight of prime contractor subcontracting plan compliance under the subcontracting program).

(ii) Provide a copy of the assessment under paragraph (c)(5)(i) of this section to the agency head and SBA Administrator.

(iii) Identify proposed solicitations that involve significant bundling of contract requirements, and work with the agency acquisition officials and the SBA to revise the procurement strategies for such proposed solicitations to increase the probability of participation by small businesses as prime contractors;

(iv) Facilitate small business participation as subcontractors and suppliers, if a solicitation for a substantially bundled contract is to be issued;

(v) Assist small business concerns to obtain payments, required late payment interest penalties, or information regarding payments due to such concerns from an executive agency or a contractor, in conformity with chapter 39 of Title 31 or any other protection for contractors or subcontractors (including suppliers) that is included in the FAR or any individual agency supplement to such Governmentwide regulation;

(vi) Cooperate, and consult on a regular basis, with the SBA with respect to carrying out these functions and duties;

(vii) Make recommendations to contracting officers as to whether a particular contract requirement should be awarded to any type of small business. The failure of the contracting officer to accept any such recommendations must be documented and included within the appropriate contract file; and

(viii) Coordinate on any acquisition planning and strategy documentation, including bundling and consolidation determinations at the agency level.

(6) *Communication on Achieving Goals.* All Senior Procurement Executives, senior program managers, Directors of OSDBU or Directors of OSBP must communicate to their subordinates the importance of achieving small business goals and ensuring that a fair proportion of awards are made to small businesses.

(d) *Contract Consolidation and Bundling*—(1) *Limitation on the Use of Consolidated Contracts.* (i) An agency may not conduct an acquisition that is a consolidation of contract requirements unless the Senior Procurement Executive or Chief Acquisition Officer for the Federal agency, before carrying out the acquisition strategy:

(A) Conducts market research;

(B) Identifies any alternative contracting approaches that would involve a lesser degree of consolidation of contract requirements;

(C) Makes a written determination, which is coordinated with the agency's OSDBU/OSBP, that the consolidation of contract requirements is necessary and justified;

(D) Identifies any negative impact by the acquisition strategy on contracting with small business concerns; and

(E) Certifies to the head of the Federal agency that steps will be taken to include small business concerns in the acquisition strategy.

(ii) A Senior Procurement Executive or Chief Acquisition Officer may determine that an acquisition strategy involving a consolidation of contract requirements is necessary and justified.

(A) A consolidation of contract requirements may be necessary and justified if the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches identified under paragraph (d)(1)(i)(B).

(B) The benefits may include cost savings and/or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits that individually, in combination, or in the aggregate would lead to: benefits equivalent to 10 percent of the contract or order value (including options) where the contract or order value is $94 million or less; or benefits equivalent to 5 percent of the contract or order value (including options) or $9.4 million, whichever is greater, where the contract or order value exceeds $94 million.

(C) Savings in administrative or personnel costs alone do not constitute a sufficient justification for a consolidation of contract requirements in a procurement unless the expected total amount of the cost savings, as determined by the Senior Procurement Executive or Chief Acquisition Officer, is expected to be substantial in relation to the total cost of the procurement. To be substantial, such administrative or personnel cost savings must be at least 10 percent of the contract value (including options).

(iii) DoD and each military department must comply with this section until the SBA determines that DoD and each military department are in compliance with its Governmentwide and agency specific contracting goals. If SBA determines that DoD and the military departments are in compliance with such goals, then consolidated contracts must be conducted in accordance with 10 U.S.C. 2382.

(iv) Each agency must ensure that any decision made concerning the consolidation of contract requirements considers the use of small businesses and ways to provide small businesses with opportunities to participate as prime contractors and subcontractors in the acquisition.

(v) If the consolidated requirement is also considered a bundled requirement, then the contracting officer must instead follow the provisions regarding bundling set forth in paragraphs (d)(2)–(7) or (d)(3) of this section, whichever is applicable.

(2) *Limitation on the Use of Contract Bundling.* (i) When the procuring activity intends to proceed with an acquisition involving bundled or substantially bundled procurement requirements, it must document the acquisition strategy to include a determination that the bundling is necessary and justified, when compared to the benefits that could be derived from meeting the agency's requirements through separate smaller contracts.

(ii) A bundled requirement is necessary and justified if, as compared to the benefits that it would derive from contracting to meet those requirements if not bundled, it would derive measurably substantial benefits. The procuring activity must quantify the identified benefits and explain how their impact would be measurably substantial. The benefits may include cost savings and/or price reduction, quality improvements that will save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits that individually, in combination, or in the aggregate would lead to:

(A) Benefits equivalent to 10 percent of the contract or order value (including options) where the contract or order value is $94 million or less; or

(B) Benefits equivalent to 5 percent of the contract or order value (including options) or $9.4 million, whichever is greater, where the contract or order value exceeds $94 million.

(iii) Notwithstanding paragraph (d)(2)(ii) of this section, the Senior Procurement Executives or the Under Secretary of Defense for Acquisition and Technology (for other Defense Agencies) in the Department of Defense and the Deputy Secretary or equivalent in civilian agencies may, on a non-delegable basis, determine that a bundled requirement is necessary and justified when:

(A) There are benefits that do not meet the thresholds set forth in paragraph (d)(2)(ii) of this section but, in the aggregate, are critical to the agency's mission success; and

(B) Procurement strategy provides for maximum practicable participation by small business.

(iv) The reduction of administrative or personnel costs alone must not be a justification for bundling of contract requirements unless the administrative or personnel cost savings are expected to be substantial, in relation to the dollar value of the procurement to be bundled (including options). To be substantial, such administrative or personnel cost savings must be at least 10 percent of the contract value (including options).

(v) In assessing whether cost savings and/or a price reduction would be achieved through bundling, the procuring activity and SBA must compare the price that has been charged by small businesses for the work that they have performed and, where available, the price that could have been or could be charged by small businesses for the work not previously performed by small business.

(vi) The substantial benefit analysis set forth in paragraph (d)(2)(ii) of this section is still required where a requirement is subject to a Cost Comparison Analysis under OMB Circular A–76.

(3) *Limitations on the Use of Substantial Bundling.* Where a proposed procurement strategy involves a Substantial Bundling of contract requirements, the procuring agency must, in the documentation of that strategy, include a determination that the anticipated benefits of the proposed bundled contract justify its use, and must include, at a minimum:

(i) The analysis for bundled requirements set forth in paragraph (d)(2)(i) of this section;

(ii) An assessment of the specific impediments to participation by small business concerns as prime contractors that will result from the substantial bundling;

(iii) Actions designed to maximize small business participation as prime contractors, including provisions that encourage small business teaming for the substantially bundled requirement;

(iv) Actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract or contracts that may be awarded to meet the requirements; and

(v) The identification of the alternative strategies that would reduce or minimize the scope of the bundling, and the rationale for not choosing those alternatives (*i.e.,* consider the strategies under paragraphs (b)(1)(ii) of this section).

(4) *Significant Subcontracting Opportunities in Justified Consolidated, Bundled and Substantially Bundled Requirements.* (i) Where a justified consolidated, bundled or substantially bundled requirement offers a significant opportunity for subcontracting, the procuring agency must designate the following factors as significant factors in evaluating offers:

(A) A factor that is based on the rate of participation provided under the subcontracting plan for small business in the performance of the contract; and

(B) For the evaluation of past performance of an offeror, a factor that is based on the extent to which the offeror attained applicable goals for small business participation in the performance of contracts.

(ii) Where the offeror for such a contract qualifies as a small business concern, the procuring agency must give to the offeror the highest score possible for the evaluation factors identified above.

(5) *Notification to Current Small Business Contractors of Intent to Bundle.* The procuring activity must notify each small business which is performing a contract that it intends to bundle that requirement with one or more other requirements at least 30 days prior to the issuance of the solicitation for the bundled or substantially bundled requirement. The procuring activity, at that time, should also provide to the small business the name, phone number and address of the applicable SBA PCR (or if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the buying activity is located). This notification must be documented in the contract file.

(6) *Notification to Public of Rationale for Bundled Requirement.* The head of a Federal agency must publish on the agency's Web site a list and rationale for any bundled requirement for which the agency solicited offers or issued an award. The notification must be made within 30 days of the agency's data certification regarding the validity and verification of data entered in that Federal Procurement Data Base to the Office of Federal Procurement Policy. However, to foster transparency in Federal procurement, the agency is encouraged to provide such notification before issuance of the solicitation.

(7) *Notification to SBA of Recompeted Bundled or Consolidated Requirement.* For each bundled or consolidated contract that is to be recompeted (even if additional requirements have been added or deleted) the procuring agency must notify SBA's PCR as soon as possible but no later than 30 days prior to issuance of the solicitation of:

(i) The amount of savings and benefits achieved under the prior bundling or consolidation of contract requirements,

(ii) Whether such savings and benefits will continue to be realized if the contract remains bundled or consolidated, and

(iii) Whether such savings and benefits would be greater if the procurement requirements were divided into separate solicitations suitable for award to small business concerns.

(e) *Multiple Award Contracts*—(1) *General.* (i) The contracting officer must set-aside a Multiple Award Contract if the requirements for a set-aside are met. This includes set-asides for small businesses, 8(a) Participants, HUBZone SBCs, SDVO SBCs, WOSBs or EDWOSBs.

(ii) The contracting officer in his or her discretion may partially set-aside or reserve a Multiple Award Contract, or set-aside, or preserve the right to set aside, orders against a Multiple Award Contract that was not itself set aside for small business. The ultimate decision of whether to use any of the above-mentioned tools in any given procurement action is a decision of the contracting agency.

(iii) The procuring contracting officer must document the contract file and explain why the procuring agency did not partially set-aside or reserve a Multiple Award Contract, or set-aside orders issued against a Multiple Award Contract, when these authorities could have been used.

(2) *Set-aside of Multiple Award Contracts.* (i) The contracting officer must follow the procedures for a set-aside set forth in paragraph (f) of this section.

(ii) The contracting officer must assign a NAICS code to the solicitation for the Multiple Award Contract and each order pursuant to § 121.402(c) of this chapter. *See* § 121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(iii) When drafting the solicitation for the contract, agencies should consider an on-ramp provision that permits the agency to refresh the awards by adding more small business contractors. Agencies should also consider the need to transition off existing contractors that no longer qualify as small for the size standard corresponding to the NAICS code assigned to the contract (*e.g.,* termination for convenience). However, agencies must transition off existing contractors that were required to, but unable to, recertify their small business status pursuant to § 121.104(g) of this chapter.

(iv) A business must comply with the applicable limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule, if applicable, (*see* § 121.406(b)) in the performance of the contract and each order.

(3) *Partial Set-asides of Multiple Award Contracts.* (i) If the contracting officer decides to partially set-aside a Multiple Award Contract, the contracting officer must follow the procedures for a set-aside set forth in paragraph (f) of this section for the part or parts of the contract that have been set-aside.

(ii) The contracting officer must assign a NAICS code to the solicitation for the Multiple Award Contract and each order issued against the Multiple Award Contract pursuant to § 121.402(c) of this chapter. *See* § 121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(iii) A contracting officer must state in the solicitation that the small business will not compete against other-than-small businesses for any order issued against that part or parts of the Multiple Award Contract that are set-aside.

(iv) A contracting officer must state in the solicitation that the small business will be permitted to compete against other-than-small businesses for an order issued against the portion of the Multiple Award Contract that has not been partially set-aside if the small business submits an offer for the non-set-aside portion. The business concern will not have to comply with the limitations on subcontracting provision (*see* § 125.6) and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed and awarded under the portion of the contract that is not set-aside.

(v) When drafting the solicitation for the contract, agencies should consider an on-ramp provision that permits the agency to refresh these awards by adding more small business contractors to that portion of the contract that was set-aside. Agencies should also consider the need to transition off existing contractors that no longer qualify as small for the size standard corresponding to the NAICS code assigned to the contract (*e.g.,* termination for convenience). However, for that portion of the contract that was set-aside, agencies must transition off existing contractors that were required to but unable to recertify their small business status pursuant to § 121.104(g) of this chapter.

(vi) A small business (or 8(a) Participant, HUBZone SBC, SDVO SBC or WOSB/EDWOSB) is not required to submit an offer on the part of the solicitation that is not set-aside. However, a small business may, if it chooses, submit an offer on the part or parts of the solicitation that have been set-aside and/or on the parts that have not been set-aside.

(vii) A small business must comply with the applicable limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule, if applicable, (*see* § 121.406(b)) in the performance of the contract and each order that is set-aside against the contract.

(4) *Reserves of Multiple Award Contracts Awarded in Full and Open Competition.* (i) If the contracting officer decides to reserve a multiple award contract established through full and open competition, the contracting officer must assign a NAICS code to the solicitation for the Multiple Award Contract and each order issued against the Multiple Award Contract pursuant to § 121.402(c) of this chapter. *See* § 121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(ii) A contracting officer must state in the solicitation that if there are two or more contract awards to any one type of small business concern (*e.g.,* small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB), the agency will compete any orders solely amongst the specified types of small business concerns if the rule of two or an alternative set-aside requirement provided in the small business program have been met.

(iii) A contracting officer must state in the solicitation that if there are several awards to several different types of small businesses (*e.g.,* one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB), the agency will compete any orders solely amongst all of the small business concerns if the rule of two has been met.

(iv) A contracting officer must state in the solicitation that if there is only one contract award to any one type of small business concern (*e.g.,* small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB), the agency may issue orders directly to that concern for work that it can perform.

(v) Small businesses are permitted to compete against other-than-small businesses for an order issued against the Multiple Award Contract if the small business has been awarded a contract for those supplies or services.

(v) A business must comply with the applicable limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule, if applicable, for any order issued against the Multiple Award Contract if the order is competed and awarded under the set-aside portion of the contract (*see* § 121.406(b)). However, a business need not comply with the limitations on subcontracting provisions (*see* § 125.6) and the

nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed amongst small and other-than-small business concerns.

(5) *Reserve of Multiple Award Contracts that are Bundled.* (i) If the contracting officer decides to reserve a multiple award contract established through full and open competition that is a bundled contract, the contracting officer must assign a NAICS code to the solicitation for the Multiple Award Contract and each order issued against the Multiple Award Contract pursuant to § 121.402(c) of this chapter. *See* § 121.404 for further determination on size status for the Multiple Award Contract and each order issued against that contract.

(ii) The Small Business Teaming Arrangement must comply with the applicable limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule, if applicable, (*see* § 121.406(b)) on all orders issued against the Multiple Award Contract, although the cooperative efforts of the team members will be considered in determining whether the subcontracting limitations requirement is met (*see* § 125.6(j)).

(iii) Team members of the Small Business Teaming Arrangement will not be affiliated (*see* § 121.103(b)(8)).

(6) *Set-aside of orders against Multiple Award Contracts that have not been Set-Aside, Partially Set-Aside or Reserved for Small Businesses.* (i) Notwithstanding the fair opportunity requirements set forth in 10 U.S.C. 2304c and 41 U.S.C. 253j, the contracting officer has the authority to set-aside orders against Multiple Award Contracts that were competed on a full and open basis.

(ii) The contracting officer may state in the solicitation and resulting contract for the Multiple Award Contract that:

(A) Based on the results of market research, orders issued against the Multiple Award Contract will be set-aside for small businesses or any subcategory of small businesses whenever the rule of two or any alternative set-aside requirements provided in the small business program have been met; or

(B) The agency is preserving the right to consider set-asides using the rule of two or any alternative set-aside requirements provided in the small business program, on an order-by-order basis.

(iii) After conducting market research, the contracting officer shall first consider whether there is a reasonable expectation that offers will be obtained from at least two 8(a) BD, HUBZone, SDVO or WOSB small business concerns under the respective programs, before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs.

(iv) The contracting officer must assign a NAICS code to the solicitation for each order issued against the Multiple Award Contract pursuant to § 121.402(c) of this chapter. *See* § 121.404 for further determination on size status for each order issued against that contract.

(v) A business must comply with applicable limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule, if applicable, (*see* § 121.406(b)) in the performance of each order that is set-aside against the contract.

(7) *Tiered evaluation of offers, or cascading.* An agency cannot create a tiered evaluation of offers or ''cascade'' unless it has specific statutory authority to do so. This is a procedure used in negotiated acquisitions when the contracting officer establishes a tiered or cascading order of precedence for evaluating offers that is specified in the solicitation, which states that if no award can be made at the first tier, it will evaluate offers at the next lower tier, until award can be made. For example, an agency is not permitted to state an intention to award one contract to an 8(a) BD Participant and one to a HUBZone SBC, but only if no awards are made to 8(a) BD Participants, unless the agency has specific statutory authority to do so.

19. Amend § 125.3 by:

a. Revising the section heading; and

b. Adding a new paragraph (h) to read as follows:

§ 125.3 What types of subcontracting assistance are available to small businesses?

* * * * *

(h) *Subcontracting consideration in bundled and consolidated contracts.* (1) For bundled requirements, the agency must evaluate offers from teams of small businesses the same as other offers, with due consideration to the capabilities of all proposed subcontractors.

(2) For substantial bundling, the agency must design actions to maximize small business participation as subcontractors (including suppliers) at any tier under the contract or contracts that may be awarded to meet the requirements.

(3) For significant subcontracting opportunities in consolidated contracts, bundled and substantially bundled requirements *see* § 125.2(d)(4).

20. Amend § 125.4 by revising the heading to read as follows:

§ 125.4 What is the Government property sales assistance program?

* * * * *

21. Amend § 125.5 by:

a. Revising the heading;

b. Revising paragraphs (a)(1) and (a)(2);

c. Revising paragraph (b)(1)(i), (b)(1)(ii), and (b)(1)(iii);

d. Revising paragraph (b)(1)(v)(A) by removing ''SIC'' and replacing it with ''NAICS'';

e. Revising paragraph (b)(1)(v)(C) by adding ''or reserve'' after ''In the case of a set-aside'';

f. Revising the first sentence in paragraph (c)(1);

g. Revising paragraph (h);

h. Revising the first sentence in paragraph (i)(2);

i. Revising paragraph (l)(1)(iii); and

j. Revising paragraph (m) by inserting the following at the end of the paragraph.

§ 125.5 What is the Certificate of Competency Program?

(a) *General.* (1) The Certificate of Competency (COC) Program is authorized under section 8(b)(7) of the Small Business Act. A COC is a written instrument issued by SBA to a Government contracting officer, certifying that one or more named small business concerns possess the responsibility to perform a specific Government procurement (or sale) contract, which includes Multiple Award Contracts and orders placed against Multiple Award Contracts, where responsibility type issues are used to determine award or establish the competitive range. The COC Program is applicable to all Government procurement actions, including Multiple Award Contracts and orders placed against Multiple Award Contracts where the contracting officer has used any issues of capacity or credit (responsibility) to determine suitability for an award. With respect to Multiple Award Contracts, contracting officers should determine responsibility at the time of award of the contract. However, if a contracting officer makes any of the responsibility determinations set forth in paragraph (2) below for an order issued against a Multiple Award Contract, the contracting officer must refer the matter to SBA for a COC. The COC procedures apply to all Federal procurements, regardless of the location of performance or the location of the procuring activity.

(2) A contracting officer must refer a small business concern to SBA for a

possible COC, even if the next apparent successful offeror is also a small business, when the contracting officer:

(i) Denies an apparent successful small business offeror award of a contract or order on responsibility grounds;

(ii) Refuses to consider a business concern for award of a contract or order after evaluating the concern's offer on a pass/fail (or go/no go) basis under a responsibility-related evaluation factor (such as experience or past performance); or

(iii) Refuses to consider a business concern for award of a contract or order because it failed to meet a definitive responsibility criterion contained in the solicitation.

(3) * * *

* * * * *

(b) *COC Eligibility.* (1) The offeror seeking a COC has the burden of proof to demonstrate its eligibility for COC review.

(i) To be eligible for a COC, an offeror must qualify as a small business under the applicable size standard in accordance with part 121 of this chapter.

(ii) To be eligible for a COC, an offeror must have agreed to comply with applicable limitations on subcontracting (see § 125.6). Whether an offeror has agreed to comply with the limitations on subcontracting is a matter of technical acceptability or responsiveness. Whether an offeror will be able to comply with the limitations on subcontracting is a matter of responsibility.

(iii) A non-manufacturer making an offer on a contract for supplies that is set-aside or reserved for small business (where the small business will be competing against other small businesses for orders) must furnish end items that have been manufactured in the United States by a small business. A waiver of this requirement may be requested under §§ 121.1301 through 121.1305 of this chapter for either the type of product being procured or the specific contract at issue.* * *

* * * * *

(c) *Referral of nonresponsibility determination to SBA.* (1) The contracting officer must refer the matter in writing to the SBA Government Contracting Area Office (Area Office) serving the area in which the headquarters of the offeror is located. * * *

* * * * *

(h) *Notification of intent to issue on a contract or order with a value between $100,000 and $25 million.* Where the Director determines that a COC is warranted, he or she will notify the contracting officer (or the procurement official with the authority to accept SBA's decision) of the intent to issue a COC, and of the reasons for that decision, prior to issuing the COC. At the time of notification, the contracting officer or the procurement official with the authority to accept SBA's decision has the following options: * * *

(i) * * *

(2) SBA Headquarters will furnish written notice to the Director, OSDBU or OSBP of the procuring agency, with a copy to the contracting officer, that the case file has been received and that an appeal decision may be requested by an authorized official. * * *

* * * * *

(l) * * *

(1) * * *

* * * * *

(iii) The COC has been issued for more than 60 days (in which case SBA may investigate the business concern's current circumstances and the reason why the contract has not been issued).

* * * * *

(m) * * * Where SBA issues a COC with respect to a business concern that was not going to be considered for award for the reasons contained in (a)(2)(ii) or (a)(2)(iii) of this section, award need not be made to that offeror where the contracting officer considers the offeror for award, but does not issue the award to that offeror for reasons unrelated to the SBA's responsibility determination.

22. Amend § 125.6 by:

a. Revising the heading;

b. Revising paragraph (a);

c. Removing current paragraph (e);

d. Redesignating paragraphs (f), (g), (h), and (i) as (e), (f), (g), and (h) respectively;

e. Revising newly designated paragraph (f);

f. Adding a new paragraph (i); and

g. Adding a new paragraph (j) to read as follows:

§ 125.6 What are the prime contractor performance requirements (limitations on subcontracting)?

(a) *In order to be awarded a full or partial small business set-aside contract, an 8(a) contract, a WOSB or EDWOSB contract pursuant to part 127 of this chapter, or a small business reserve, a small business concern must agree that:*

* * * * *

(f) The period of time used to determine compliance will be the period of performance which the evaluating agency uses to evaluate the offer. If the evaluating agency fails to state in its solicitation the period of performance it will use to evaluate the offer, it will use the base contract period (excluding options) to determine compliance. In indefinite delivery or indefinite quantity contracts, the agency will use the maximum authorized in the base contract period (excluding options) to determine compliance. In Multiple Award Contracts, the agency will use the period of performance for each order issued against the Multiple Award Contract to determine compliance unless the order is competed amongst small and other-than-small businesses (in which case the subcontracting limitations will not apply).

* * * * *

(i) Where an offeror is exempt from affiliation under § 121.103(b)(8) of this chapter and qualifies as a small business concern for a reserve of a bundled contract, the performance of work requirements set forth in this section apply to the cooperative effort of the small business team members of the Small Business Teaming Arrangement, not its individual members.

(j) The contracting officer must document a small business concern's performance of work requirements as part of the small business' performance evaluation in accordance with the procedures set forth in FAR 42.1502. The contracting officer must also evaluate compliance for future contract awards in accordance with the procedures set forth in FAR 9.104–6.

23. Amend § 125.8 by revising paragraph (b) to read as follows:

§ 125.8 What definitions are important in the Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) Program?

(a) * * *

(b) *Interested Party* means the contracting activity's contracting officer, the SBA, any concern that submits an offer for a specific SDVO contract (including Multiple Award Contracts), or any concern that submitted an offer in a full and open competition and its opportunity for award will be affected by a reserve of an award given to a SDVO SBC.

* * * * *

24. Revise § 125.14 it to read as follows:

§ 125.14 What are SDVO contracts?

SDVO contracts, including Multiple Award Contracts (*see* § 125.1), are those awarded to an SDVO SBC through any of the following procurement methods:

(a) Sole source awards to an SDVO SBC;

(b) Set-aside awards, including partial set-asides, based on competition restricted to SDVO SBCs;

(c) Awards based on a reserve for SDVO SBCs in a solicitation for a Multiple Award Contract (*see* § 125.1); or

(d) Orders set-aside for SDVO SBCs against a Multiple Award Contract, which had been awarded in full and open competition.

25. Amend § 125.15 by adding new paragraphs (d) and (e) to read as follows:

§ 125.15 What requirements must an SDVO SBC meet to submit an offer on a contract?

* * * * *

(d) *Multiple Award Contracts.* (1) *Partial set-asides.*The SDVO SBC must comply with the applicable limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule, if applicable (*see* § 121.406(b)), in the performance of a contract partially set-aside for SDVO SBCs.

(2) *Set-aside of orders.* The SDVO SBC must comply with the applicable limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule, if applicable, (*see* § 121.406(b)) in the performance of each individual order that has been set-aside for SDVO SBCs.

(3) *Reserves.*The SDVO SBC must comply with the applicable limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule, if applicable, (*see* § 121.406(b)) in the performance of the contract that is reserved for one or more SDVO SBCs. However, the SDVO SBC will not have to comply with the limitations on subcontracting provisions (*see* § 125.6) and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed amongst SDVO SBCs and other-than-small business concerns.

(e) *Recertification.* (1) A concern that represents itself and qualifies as an SDVO SBC at the time of initial offer (or other formal response to a solicitation), which includes price, including a Multiple Award Contract, is considered an SDVO SBC throughout the life of that contract. This means that if an SDVO SBC is qualified at the time of initial offer for a Multiple Award Contract, then it will be considered an SDVO SBC for each order issued against the contract, unless a contracting officer requests a new SDVO SBC certification in connection with a specific order. Where a concern later fails to qualify as an SDVO SBC, the procuring agency may exercise options and still count the award as an award to an SDVO SBC. The following exceptions apply:

(i) Where an SDVO contract is novated to another business concern, the concern that will continue performance on the contract must certify its status as an SDVO SBC to the procuring agency, or inform the procuring agency that it does not qualify as an SDVO SBC, within 30 days of the novation approval. If the concern is not an SDVO SBC, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDVO goals.

(ii) Where a concern that is performing an SDVO SBC contract acquires, is acquired by, or merges with another concernand contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its SDVO SBC status to the procuring agency, or inform the procuring agency that it no longer qualifies as an SDVO SBC. If the contractor is not an SDVO SBC, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDVO goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new status.

(iii) There has been an SDVO SBC status protest on the solicitation or contract. *See* 125.27(e) for the effect of the status determination on the contract award.

(2) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its SDVO SBC status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option.

(3) A business concern that did not certify itself as an SDVO SBC, either initially or prior to an option being exercised, may recertify itself as an SDVO SBC for a subsequent option period if it meets the eligibility requirements.

(4) Re-certification does not change the terms and conditions of the contract. The limitations on subcontracting, nonmanufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(5) Where the contracting officer explicitly requires concerns to recertify their status in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its self-representation as part of its response to the solicitation for the order.

(6) A concern's status may be determined at the time of a response to a solicitation for an Agreement and each order issued pursuant to the Agreement.

26. Amend § 125.22 by revising the heading to read as follows: ''*§ 125.22 May SBA appeal a contracting officer's decision not to make a procurement available for award as an SDVO contract?''.*

27. Amend § 125.24 by revising paragraph (b) to read as follows:

§ 125.24 Who may protest the status of an SDVO SBC?

* * * * *

(b) For all other procurements, including Multiple Award Contracts (*see* § 125.1), any interested party may protest the apparent successful offeror's SDVO SBC status.

PART 126—HUBZONE PROGRAM

28. The authority citation for part 126 is amended to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a.

29. Amend § 126.103 by revising the definition of the term ''Interested party'' to read as follows:

§ 126.103 What definitions are important in the HUBZone program?

* * * * *

Interested party means any concern that submits an offer for a specific HUBZone sole source or set-aside contract (including Multiple Award Contracts), any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a price evaluation preference given a qualified HUBZone SBC, any concern that submitted an offer in a full and open competition and its opportunity for award will be affected by a reserve of an award given to a qualified HUBZone SBC, the contracting activity's contracting officer, or SBA.

* * * * *

30. Revise § 126.600 to read as follows:

§ 126.600 What are HUBZone contracts?

HUBZone contracts, including Multiple Award Contracts (*see* 125.1), are those awarded to a qualified HUBZone SBC through any of the following procurement methods:

(a) Sole source awards to qualified HUBZone SBCs;

(b) Set-aside awards, including partial set-asides, based on competition restricted to qualified HUBZone SBCs;

(c) Awards to qualified HUBZone SBCs through full and open competition after a price evaluation preference in favor of qualified HUBZone SBCs;

(d) Awards based on a reserve for HUBZone SBCs in a solicitation for a Multiple Award Contract (*see* § 125.1); or

(e) Orders set-aside for HUBZone SBCs against a Multiple Award Contract, which had been awarded in full and open competition.

31. Amend § 126.601 by adding new paragraphs (g) and (h) to read as follows:

§ 126.601 What additional requirements must a qualified HUBZone SBC meet to bid on a contract?

* * * * *

(g) *Multiple Award Contracts*—(1) *Partial set-asides.*The qualified HUBZone SBC must comply with the applicable limitations on subcontracting provisions (*see* § 126.700) and the nonmanufacturer rule, if applicable, in the performance of a contract partially set-aside for HUBZone SBCs.

(2) *Set-aside of orders.* The qualified HUBZone SBC must comply with the applicable limitations on subcontracting provisions (*see* § 126.700) and the nonmanufacturer rule, if applicable, in the performance of each individual order that has been set-aside for HUBZone SBCs.

(3) *Reserves.* The qualified HUBZone SBC must comply with the applicable limitations on subcontracting provisions (*see* § 126.700) and the nonmanufacturer rule, if applicable, in the performance of the contract that is reserved for one or more HUBZone SBCs. However, the qualified HUBZone SBC will not have to comply with the limitations on subcontracting provisions (*see* § 126.700) and the nonmanufacturer rule for any order issued against the Multiple Award Contract if the order is competed amongst qualified HUBZone SBCs and other-than-small business concerns.

(h) *Recertification of Status for an Award.* (1) A concern that is a qualified HUBZone SBC at the time of initial offer and contract award,including a Multiple Award Contract, is considered a HUBZone SBC throughout the life of that contract. This means that if a HUBZone SBC is certified at the time of initial offer and contract award for a Multiple Award Contract, then it will be considered a HUBZone SBC for each order issued against the contract, unless a contracting officer requests a new HUBZone SBC certification in connection with a specific order. Where a concern later is decertified, the procuring agency may exercise options and still count the award as an award to a HUBZone SBC. The following exceptions apply:

(i) Where a HUBZone contract (or a contract awarded through full and open competition based on the HUBZone price evaluation preference) is novated to another business concern, the concern that will continue performance on the contract must certify its status as a HUBZone SBC to the procuring agency, or inform the procuring agency that it does not qualify as a HUBZone SBC,within 30 days of the novation approval. If the concern cannot certify that it qualifies as a HUBZone SBC, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its HUBZone goals.

(ii) Where a concern that is performing a HUBZone contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its HUBZone SBC status to the procuring agency, or inform the procuring agency that it has been decertified or no longer qualifies as a HUBZone SBC. If the contractoris unable to recertify its status as a HUBZone SBC, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its HUBZone goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new status.

(iii) There has been a HUBZone status protest on the solicitation or contract. *See* 126.803(d) for the effect of the status determination on the contract award.

(2) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options) a contracting officer must request that a business concern recertify its HUBZone SBC status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option.

(3) A business concern that did not certify itself as a HUBZone SBC, either initially or prior to an option being exercised, may recertify itself as a HUBZone SBC for a subsequent option period if it meets the eligibility requirements.

(4) Re-certification does not change the terms and conditions of the contract. The limitations on subcontracting, non-manufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(5) Where the contracting officer explicitly requires concerns to recertify their status in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its self-representation as part of its response to the solicitation for the order and at the time of award.

(6) A concern's status may be determined at the time of submission of its initial response to a solicitation for and award of an Agreementand each order issued pursuant to the Agreement.

32. Revise § 126.602 to read as follows:

§ 126.602 Must a qualified HUBZone SBC maintain the employee residency percentage during contract performance?

(a) Qualified HUBZone SBCs eligible for the program pursuant to § 126.200(b) must meet the HUBZone residency requirement at all times while certified in the program. However, the qualified HUBZone SBC may ''attempt to maintain'' (*See* § 126.103) the required percentage of employees who reside in a HUBZone during the performance of any HUBZone contract awarded to the concern on the basis of its HUBZone status, except as set forth in paragraph (d).

(b) For indefinite delivery/indefinite quantity contracts, including Multiple Award Contracts, the qualified HUBZone SBC must attempt to maintain the residency requirement during the performance of each order issued against that contract.

(c) A qualified HUBZone SBC eligible for the program pursuant to § 126.200(a) must have at least 35% of its employees engaged in performing a HUBZone contract residing within any Indian reservation governed by one or more of the concern's Indian Tribal Government owners, or residing within any HUBZone adjoining any such Indian reservation. To monitor compliance, SBA will conduct program examinations, pursuant to §§ 126.400 through 126.403, where appropriate.

(d) Every time a qualified HUBZone SBC submits and offer and is awarded a HUBZone contract, it must meet all of the HUBZone Program's eligibility requirements, including the employee residency requirement at the time it submits its initial offer and up until and at the time of award. This means that if a HUBZone SBC is performing on a HUBZone contract and submits an offer for another HUBZone contract, it can no longer attempt to maintain the HUBZone residency requirement; rather, it must meet the requirement at the time it submits its initial offer and up until and at the time of award.

33. Amend § 126.610 by revising the heading to read as follows:

§ 126.610 May SBA appeal a contracting officer's decision not to make a procurement available for award as a HUBZone contract?''

34. Amend § 126.613 by:

a. Adding a new sentence at the end of paragraph (a)(1); and

b. Adding an Example 4 in paragraph (b).

§ 126.613 How does a price evaluation preference affect the bid of a qualified HUBZone SBC in full and open competition?

(a) * * *

(1) * * * This does not apply if the HUBZone SBC will receive the contract as part of a reserve for HUBZone SBCs.

* * * * *

(b) * * *

Example 4: In a full and open competition, a qualified HUBZone SBC submits an offer of $98 and a large business submits an offer of $93. The contracting officer has stated in the solicitation that one contract will be reserved for a HUBZone SBC. The contracting officer would not apply the price evaluation preference when determining which HUBZone SBC would receive the contract reserved for HUBZone SBCs, but would apply the price evaluation preference when determining the awardees for the non-reserved portion.

* * * * *

§ 126.614 [Removed and Reserved]

35. Remove and reserve § 126.614.

36. Amend § 126.800 by revising paragraph (b) as follows:

§ 126.800 Who may protest the status of a qualified HUBZone SBC?

* * * * *

(b) For all other procurements, including Multiple Award Contracts (*see* 125.1), SBA, the CO, or any other interested party may protest the apparent successful offeror's qualified HUBZone SBC status.

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT ASSISTANCE PROGRAM

37. The authority for 13 CFR part 127 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), and 644.

38. Revise § 127.101 to read as follows:

§ 127.101 What type of assistance is available under this part?

This part authorizes contracting officers to restrict competition to eligible Economically Disadvantaged Women-Owned Small Businesses (EDWOSBs) for certain Federal contracts or orders in industries in which the Small Business Administration (SBA) determines that WOSBs are underrepresented in Federal procurement. It also authorizes contracting officers to restrict competition to eligible WOSBs for certain Federal contracts or orders in industries in which SBA determines that WOSBs are substantially underrepresented in Federal procurement and has waived the economically disadvantaged requirement.

39. Amend § 127.102 by revising the following definitions to read as follows:

§ 127.102 What are the definitions of the terms used in this part?

* * * * *

EDWOSB requirement means a Federal requirement for services or supplies for which a contracting officer has restricted competition to eligible EDWOSBs, including Multiple Award Contracts, partial set-asides, reserves, and orders set-aside for EDWOSBs issued against a Multiple Award Contract. * * *

Interested party means any concern that submits an offer for a specific EDWOSB or WOSB requirement (including Multiple Award Contracts), any concern that submitted an offer in a full and open competition and its opportunity for award will be affected by a reserve of an award given a WOSB or EDWOSB, the contracting activity's contracting officer, or SBA. * * *

WOSB requirement means a Federal requirement for services or supplies for which a contracting officer has restricted competition to eligible WOSBs, including Multiple Award Contracts, partial set-asides, reserves, and orders set-aside for WOSBs issued against a Multiple Award Contract.

40. Amend § 127.300 by revising paragraph (a) to read as follows:

§ 127.300 How is a concern certified as an EDWOSB or WOSB?

(a) *General.* At the time a concern submits an offer on a specific contract (including a Multiple Award Contract) or order reserved for competition among EDWOSBs or WOSBs under this Part, it must be registered in the Central Contractor Registration (CCR), have a current representation posted on the Online Representations and Certifications Application (ORCA) that it qualifies as an EDWOSB or WOSB and have provided the required documents to the WOSB Program Repository, or if the repository is unavailable, be prepared to submit the documents to the contracting officer if selected as the apparent successful offeror.

* * * * *

41. Amend § 127.400 by revising the first sentence of paragraph (a) to read as follows:

§ 127.400 What is an eligibility examination?

(a) *Purpose of examination.* Eligibility examinations are investigations that verify the accuracy of any certification made or information provided as part of the certification process (including third-party certifications) or in connection with an EDWOSB or WOSB requirement. * * *

* * * * *

42. Amend § 127.401 by revising paragraph (a) to read as follows:

§ 127.401 What is the difference between an eligibility examination and an EDWOSB or WOSB status protest pursuant to subpart F of this part?

(a) *Eligibility examination.* An eligibility examination is the formal process through which SBA verifies and monitors the accuracy of any certification made or information provided as part of the certification process or in connection with an EDWOSB or WOSB requirement. * * *

* * * * *

43. Amend § 127.503 by:

a. Revising paragraphs (a)(2), (a)(3), (b)(2), and (b)(3); and

b. Adding a new paragraph (f) to read as follows:

§ 127.503 When is a contracting officer authorized to restrict competition under this part?

(a) * * *

(1) * * *

(2)(i) The anticipated award price (including options) of the contract does not exceed $6,500,000 in the case of a contract assigned a NAICS code for manufacturing, or $4,000,000 in the case of all other contracts; or

(ii) For Multiple Award Contracts, the anticipated award price (including options) of each order issued against the Multiple Award Contract does not exceed $6,500,000 in the case of an order assigned a NAICS code for manufacturing, or $4,000,000 in the case of all other orders; and

(3) Award may be made at a fair and reasonable price.

(b) *WOSB requirements.* * * *

(1) * * *

(2) The anticipated award price (including options) of the contract will not exceed $6,500,000 in the case of a contract or order assigned an NAICS code for manufacturing, or $4,000,000 in the case of all other contracts; or

(ii) For Multiple Award Contracts, the anticipated award price (including options) of each order issued against a Multiple Award Contract does not exceed $6,500,000 in the case of an order assigned a NAICS code for manufacturing, or $4,000,000 in the case of all other orders; and

(3) Award may be made at a fair and reasonable price.

* * * * *

(f) *Recertification.* (1) A concern that represents itself and qualifies as a WOSB or EDWOSB at the time of initial offer (or other formal response to a solicitation), which includes price, including a Multiple Award Contract, is considered a WOSB or EDWOSB throughout the life of that contract. This means that if a WOSB/EDWOSB is qualified at the time of initial offer for a Multiple Award Contract, then it will be considered an WOSB/EDWOSB for each order issued against the contract, unless a contracting officer requests a new WOSB or EDWOSB certification in connection with a specific order. Where a concern later fails to qualify as a WOSB/EDWOSB, the procuring agency may exercise options and still count the award as an award to a WOSB/EDWOSB. The following exceptions apply:

(i) Where a WOSB/EDWOSB contract is novated to another business concern, the concern that will continue performance on the contract must certify its status as a WOSB/EDWOSB to the procuring agency, or inform the procuring agency that it does not qualify as a WOSB/EDWOSB,within 30 days of the novation approval. If the concern cannot certify its status as a WOSB/EDWOSB, the agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals.

(ii) Where a concern that is performing a WOSB/EDWOSB contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its WOSB/EDWOSB status to the procuring agency, or inform the procuring agency that it no longer qualifies as a WOSB/EDWOSB.If the contractor is not a WOSB/EDWOSB, the agency may no longer be able to count the options or orders issued pursuant to the contract, from that point forward, towards its women-owned small business goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new status if necessary.

(iii) There has been a WOSB or EDWOSB status protest on the solicitation or contract. *See*127.604(f) for the effect of the status determination on the contract award.

(2) For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its WOSB/EDWOSB status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option.

(3) A business concern that did not certify itself as a WOSB/EDWOSB, either initially or prior to an option being exercised, may recertify itself as a WOSB/EDWOSB for a subsequent option period if it meets the eligibility requirements.

(4) Re-certification does not change the terms and conditions of the contract. The limitations on subcontracting, nonmanufacturer and subcontracting plan requirements in effect at the time of contract award remain in effect throughout the life of the contract.

(5) Where the contracting officer explicitly requires concerns to recertify their status in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its self-representation as part of its response to the solicitation for the order.

(6) A concern's status may be determined at the time of a response to a solicitation for an Agreement and each order issued pursuant to the Agreement.

44. Amend § 127.506 by:

a. Adding the word, ''order'' at the end of paragraph (a); and

b. Removing the word ''contract'' and adding the words ''contract or order'' in paragraphs (c)(2), (c)(4), (c)(5) and (d).

§ 127.506 May a joint venture submit an offer on an EDWOSB or WOSB requirement?

A joint venture may submit an offer on an EDWOSB or WOSB requirement if the joint venture meets all of the following requirements:

(a) Except as provided in § 121.103(h)(3) of this chapter, the combined annual receipts or employees of the concerns entering into the joint venture must meet the applicable size standard corresponding to the NAICS code assigned to the contract or order;

* * * * *

45. Amend § 127.508 by revising the heading to read as follows:

§ 127.508 May SBA appeal a contracting officer's decision not to make a requirement available for award as a WOSB Program contract?

46. Amend § 127.600 by revising the first sentence of paragraph (a) to read as follows:

§ 127.600 Who may protest the status of a concern as an EDWOSB or WOSB?

An interested party may protest the EDWOSB or WOSB status of an apparent successful offeror on an EDWOSB or WOSB requirement or contract. * * *

Dated: May 4, 2012.

Karen Gordon Mills,

Administrator.

[FR Doc. 2012–11317 Filed 5–15–12; 8:45 am]

BILLING CODE 8025–01–P

FEDERAL REGISTER

Vol. 77 Wednesday,

No. 95 May 16, 2012

Part VII

Environmental Protection Agency

40 CFR Parts 9 and 449

Effluent Limitations Guidelines and New Source Performance Standards for the Airport Deicing Category; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 449

[EPA–HQ–OW–2004–0038. FRL–9667–6]

RIN 2040–AE69

Effluent Limitations Guidelines and New Source Performance Standards for the Airport Deicing Category

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is promulgating technology-based effluent limitations guidelines (ELGs) and new source performance standards (NSPS) under the Clean Water Act (CWA) for discharges from airport deicing operations. The requirements generally apply to wastewater associated with the deicing of airfield pavement at primary airports. The rule requires all such airports to comply with requirements based on substitution of less toxic pavement deicers that do not contain urea. The rule also establishes NSPS for wastewater discharges associated with aircraft deicing for a subset of new airports. These airports must also meet requirements based on collection of deicing fluid and treatment of the collected fluid. The ELGs and NSPS will be incorporated into National Pollutant Discharge Elimination System (NPDES) permits issued by the permitting authority. EPA expects compliance with this regulation to reduce the discharge of deicing-related pollutants by 16 million pounds per year. EPA estimates the annual cost of the rule at $3.5 million.

DATES: This final rule is effective on June 15, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OW–2004–0038. All documents in the docket are listed on the Web site at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through the docket Web site or in hard copy at the Office of Water Docket, EPA West Building Room 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is 202–566–1744, and the telephone number for the Office of Water Docket is 202–566–1752.

FOR FURTHER INFORMATION CONTACT: For further information, contact Eric Strassler, Engineering and Analysis Division, telephone: 202–566–1026; email: *strassler.eric@epa.gov.*

SUPPLEMENTARY INFORMATION:

Regulated Entities

Entities regulated by this action may include:

Category	Example of regulated entity	North American Industry Classification System code
Industry	Primary airports	481, 4881
	Airlines	4811

This section is not intended to be exhaustive, but rather provides a guide for readers regarding entities that are likely to be regulated by this action. Other types of entities that do not meet the above criteria could also be regulated. To determine whether your facility is regulated by this action, you should carefully examine the applicability criteria listed in § 449.1 and the definitions in § 449.2 of the rule and detailed further in Section V of this preamble. If you still have questions regarding the applicability of this action to a particular entity, consult one of the persons listed for technical information in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Supporting Documentation

Today's final rule is supported by a number of documents, including:

- Technical Development Document for Final Effluent Limitation Guidelines and Standards for the Airport Deicing Category (TDD), Document No. EPA–821–R–12–005.
- Economic Analysis for Final Effluent Limitation Guidelines and Standards for the Airport Deicing Category (EA), Document No. EPA–821–R–12–004.
- Environmental Impact and Benefit Assessment for Final Effluent Limitation Guidelines and Standards for the Airport Deicing Category (EIB), Document No. EPA–821–R–12–003.

These documents are available in the public record for this rule and on EPA's Web site at *http://epa.gov/guide/airport.*

Overview

The preamble describes the terms, acronyms, and abbreviations used in this notice; the background documents that support the regulations; the legal authority of these rules; a summary of the final rule; background information; and the technical and economic methodologies used by the Agency to develop these regulations.

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I. Legal Authority

EPA is promulgating this regulation under the authorities of sections 101, 301, 304, 306, 308, 402, and 501 of the CWA, 33 United States Code (U.S.C.) 1251, 1311, 1314, 1316, 1318, 1342, and 1361 and pursuant to the Pollution Prevention Act of 1990, 42 U.S.C. 13101 et seq.

II. Purpose and Summary of the Final Rule

Commercial airports and air carriers conduct deicing operations as required by the Federal Aviation Administration (FAA). Airport discharges from deicing operations may affect water quality in surrounding communities, including reductions in dissolved oxygen, fish kills, reduced organism abundance and species diversity, contamination of drinking water sources (both surface and groundwater), creation of noxious odors and discolored water in residential areas and parkland, and other effects.

Today, EPA is promulgating effluent limitations guidelines (ELGs) and new source performance standards (NSPS) for the Airport Deicing Point Source Category. The regulations address control of the wastewater discharges from deicing operations based on product substitution, wastewater collection practices used by airports, and treatment practices for the collected wastewater. New source airports within the scope of this rule are required to collect spent aircraft deicing fluid (ADF) and meet numerical discharge limits. Those airports and certain existing airports performing airfield pavement deicing are to use non-urea-containing deicers, or alternatively, meet a numeric effluent limitation for ammonia. The requirements are implemented in CWA discharge permits.

The rule requirements and the technologies that serve as the basis for the ELGs and standards are explained in Sections IV, V, and VI of this preamble.

III. Background

A. Clean Water Act

Congress passed the Federal Water Pollution Control Act Amendments of 1972, also known as the CWA, to ''restore and maintain the chemical, physical, and biological integrity of the nation's waters.'' (33 U.S.C. 1251(a)). The CWA establishes a comprehensive program for protecting our nation's waters. Among its core provisions, the CWA prohibits the discharge of pollutants from a point source to waters of the United States, except as authorized under the CWA. Under section 402 of the CWA, EPA and delegated state permitting authorities authorize discharges by a NPDES permit. The CWA also authorizes EPA to establish national technology-based effluent limitation guidelines and standards (effluent guidelines or ELGs) for discharges from different categories of point sources, such as industrial, commercial, and public sources.

In addition, the CWA authorizes EPA to promulgate nationally applicable pretreatment standards that restrict pollutant discharges from facilities that discharge wastewater indirectly through sewers flowing to publicly owned treatment works (POTWs), as outlined in section 307(b) and (c), 33 U.S.C. 1317(b) and (c). EPA establishes national pretreatment standards for those pollutants in wastewater from indirect dischargers that may pass through, interfere with, or are otherwise incompatible with POTW operations. Generally, pretreatment standards are designed to ensure that wastewaters from direct and indirect industrial dischargers are subject to similar levels of treatment. In addition, POTWs are required to implement local treatment limits applicable to their industrial

indirect dischargers to satisfy any local requirements. See 40 CFR 403.5.

Direct dischargers must comply with effluent limitations in NPDES permits. Indirect dischargers, who discharge through POTWs, must comply with pretreatment standards. Technology-based effluent limitations in NPDES permits are derived from effluent limitations guidelines (CWA sections 301 and 304, 33 U.S.C. 1311 and 1314) and new source performance standards (section 306) promulgated by EPA, or based on best professional judgment where EPA has not promulgated an applicable effluent guideline or new source performance standard (CWA section 402(a)(1)(B), 33 U.S.C. 1342(a)(1)(B)). Additional limitations based on water quality standards (CWA section 301(b)(1)(C), 33 U.S.C. 1311(b)(1)(C)) are also required to be included in the permit in certain circumstances. The ELGs are established by regulation for categories of industrial dischargers and are based on the degree of control that can be achieved using various levels of pollution control technology.

EPA promulgates national ELGs and standards of performance for major industrial categories for three classes of pollutants: (1) Conventional pollutants (*i.e.,* total suspended solids, oil and grease, BOD_5, fecal coliform, and pH), as outlined in section 304(a)(4) and 40 CFR 401.16; (2) toxic pollutants (*e.g.,* toxic metals such as chromium, lead, nickel, and zinc; toxic organic pollutants such as benzene, benzo-a-pyrene, phenol, and naphthalene), as outlined in section 307(a) of the Act, 40 CFR 401.15 and 40 CFR part 423 appendix A; and (3) non-conventional pollutants, pollutants that are neither conventional nor toxic (*e.g.,* ammonia-N, formaldehyde, and phosphorus).

B. NPDES Permits

Section 402 of the CWA requires permits for point source discharges of pollutants to waters of the United States. In most states, the permits are issued by a state agency that has been authorized by EPA. Currently, 46 states and one U.S. territory are authorized to issue NPDES permits. In the other states and territories, EPA issues the permits.

Section 402(p) of the Act, added by the Water Quality Act of 1987 (Pub. L. 100–4, February 4, 1987), requires stormwater dischargers ''associated with industrial activity'' to be covered under an NPDES permit. In its initial stormwater permit regulations, called the ''Phase I'' stormwater regulations (55 FR 47990, November 16, 1990), EPA designated air transportation facilities, including both airlines and airports, that have vehicle maintenance shops (including vehicle rehabilitation, mechanical repairs, painting, fueling, and lubrication), equipment cleaning operations, or airport deicing operations as subject to NPDES stormwater permitting requirements. See 40 CFR 122.26(b)(14)(viii).

Airport stormwater discharges may be controlled under a general NPDES permit, which covers multiple facilities with similar types of operations and/or wastestreams, or by an individual permit. An airport may have additional NPDES permits for non-stormwater discharges, such as from equipment repair and maintenance facilities. The following discussion pertains only to airport stormwater permits.

1. General Permits

Currently, most airport deicing discharges are covered by a general permit issued by either EPA or an NPDES-authorized state agency. In most areas where EPA is the permit authority, the Multi-Sector General Permit (MSGP) covers airport deicing discharges (73 FR 56572, September 29, 2008). Many NPDES-authorized state agencies have issued general permits in their respective jurisdictions with requirements similar to the MSGP. An airport seeking coverage under a general permit submits a Notice of Intent (NOI) to the permit authority rather than a detailed permit application. By submitting an NOI, the permittee is agreeing to comply with the conditions in the final general permit.

For airports, the major requirements of the current MSGP, include the following:

- Develop a stormwater pollution prevention plan, including a drainage area site map, documentation of measures used for management of deicing contaminated stormwater, an evaluation of runway and aircraft deicing operations, and implementation of a program to control or manage deicing contaminated stormwater, including consideration of various listed control practices.
- Implement deicing source reduction measures, including minimizing or eliminating the use of urea and glycol-containing deicing chemicals; minimizing contamination of deicing contaminated stormwater from runway and aircraft deicing operations; evaluating whether over-application of deicing chemicals occurs; and consider use of various listed source control measures.
- For airports using more than 100,000 gallons of glycol-based deicing chemicals and/or 100 tons or more of urea containing deicers annually, monitor discharges quarterly for the first four quarters of the permit cycle, for the following pollutants: biochemical oxygen demand (BOD_5), chemical oxygen demand (COD), ammonia, and pH.
- If the average of the four monitoring values for any parameter exceeds its benchmark, implement additional control measures where feasible, and continue monitoring.
- Conduct an annual site inspection during the deicing season, and during periods of actual deicing operations if possible, as well as routine facility inspections at least monthly during the deicing season.

EPA expects to modify the MSGP when the next permit is issued, to conform it to today's final Airport Deicing rule.

2. Individual Permits

Some EPA and state NPDES-permitting authorities have required certain airports to obtain individual permits. In these situations, an airport must submit a detailed application and the permit authority develops specific requirements for the facility.

Some individual permits contain specialized requirements for monitoring and/or best management practices (BMPs). Some of these permits also contain numeric water quality-based effluent limitations. Information on water quality-based permitting is available on EPA's Web site at *http://cfpub.epa.gov/npdes/generalissues/watertechnology.cfm.*

C. Effluent Guidelines and Standards Program

Effluent guidelines and NSPS are technology-based regulations that are developed by EPA for a category of dischargers. These regulations are based on the performance of control and treatment technologies. The legislative history of CWA section 304(b), which is the heart of the effluent guidelines program, describes the need to press toward higher levels of control through research and development of new processes, modifications, replacement of obsolete plans and processes, and other improvements in technology, taking into account the cost of controls. Congress has also stated that EPA need not consider water quality impacts on individual water bodies as the guidelines are developed; see Statement of Senator Muskie (October 4, 1972), reprinted in Legislative History of the Water Pollution Control Act Amendments of 1972, at 170. (U.S. Senate, Committee on Public Works, Serial No. 93–1, January 1973.)

There are four types of standards applicable to direct dischargers (dischargers to surface waters), and two standards applicable to indirect dischargers (discharges to POTWs).

1. Best Practicable Control Technology Currently Available (BPT)

Traditionally, EPA establishes BPT effluent limitations based on the average of the best performances of facilities within the industry, grouped to reflect various ages, sizes, processes, or other common characteristics. EPA may promulgate BPT effluent limits for conventional, toxic, and non-conventional pollutants. In specifying BPT, EPA looks at a number of factors. EPA first considers the cost of achieving effluent reductions in relation to the effluent reduction benefits. The Agency also considers the age of the equipment and facilities, the processes employed, engineering aspects of the control technologies, any required process changes, non-water quality environmental impacts (including energy requirements), and such other factors as the Administrator deems appropriate. See CWA section 304(b)(1)(B). If, however, existing performance is uniformly inadequate, EPA may establish limitations based on higher levels of control than what is currently in place in an industrial category, when based on an Agency determination that the technology is available in another category or subcategory, and can be practically applied.

2. Best Conventional Pollutant Control Technology (BCT)

The 1977 amendments to the CWA required EPA to identify additional levels of effluent reduction for conventional pollutants associated with BCT technology for discharges from existing industrial point sources. In addition to other factors specified in section 304(b)(4)(B), the CWA requires that EPA establish BCT limitations after consideration of a two part ''cost-reasonableness'' test. EPA explained its methodology for the development of BCT limitations in July 1986 (51 FR 24974). Section 304(a)(4) designates the following as conventional pollutants: BOD_5 measured over five days, total suspended solids, fecal coliform, pH, and any additional pollutants defined by the Administrator as conventional. The Administrator designated oil and grease as an additional conventional pollutant on July 30, 1979 (44 FR 44501; 40 CFR 401.16).

3. Best Available Technology Economically Achievable (BAT)

BAT represents the second level of stringency for controlling direct discharge of toxic and nonconventional pollutants. In general, BAT ELGs represent the best economically achievable performance of facilities in the industrial subcategory or category. The factors considered in assessing BAT include the cost of achieving BAT effluent reductions, the age of equipment and facilities involved, the process employed, potential process changes, and non-water quality environmental impacts, including energy requirements and such other factors as the Administrator deems appropriate. The Agency retains considerable discretion in assigning the weight to be accorded these factors. Economic achievability is an additional statutory factor considered in setting BAT. Generally, EPA determines economic achievability on the basis of total costs to the industry and the effect of compliance with BAT limitations on overall industry and subcategory financial conditions. As with BPT, where existing performance is uniformly inadequate, BAT may reflect a higher level of performance than is currently being achieved based on technology transferred from a different subcategory or category. BAT may be based upon process changes or internal controls, even when these technologies are not common industry practice.

4. New Source Performance Standards (NSPS)

NSPS reflect effluent reductions that are achievable based on the best available demonstrated control technology (BADCT). Owners of new facilities have the opportunity to install the best and most efficient production processes and wastewater treatment technologies. As a result, NSPS should represent the most stringent controls attainable through the application of the BADCT for all pollutants (that is, conventional, nonconventional, and priority pollutants). In establishing NSPS, EPA is directed to take into consideration the cost of achieving the effluent reduction and any non-water quality environmental impacts and energy requirements.

5. Pretreatment Standards for Existing Sources (PSES)

Section 307(b) calls for EPA to issue pretreatment standards for discharges of pollutants to POTWs. PSES are designed to prevent the discharge of pollutants that pass through, interfere with, or are otherwise incompatible with the operation of POTWs. Categorical pretreatment standards are technology-based and are analogous to BPT and BAT effluent limitation guidelines. See CWA sections 301((b)(1)(B) and 301(b)(2)(A)), 33 U.S.C. 1311(b)(1)(B) and 1311(b)(2)(A). The General Pretreatment Regulations, which set forth the framework for the implementation of categorical pretreatment standards, are found at 40 CFR part 403. These regulations establish pretreatment standards that apply to all non-domestic dischargers. See 52 FR 1586 (January14, 1987).

6. Pretreatment Standards for New Sources (PSNS)

Section 307(c) of the Act calls for EPA to promulgate PSNS. Such pretreatment standards must prevent the discharge of any pollutant into a POTW that may interfere with, pass through, or may otherwise be incompatible with the POTW. EPA promulgates PSNS based on best available demonstrated technology for new sources. New indirect dischargers have the opportunity to incorporate into their facilities the best available demonstrated technologies. The Agency typically considers the same factors in promulgating PSNS as it considers in promulgating NSPS.

D. Proposed Rule

EPA published a proposed rule for the Airport Deicing Category on August 28, 2009 (74 FR 44676). The proposed rule covered primary commercial airports that conduct deicing operations and have 1,000 or more annual jet departures. An existing airport in the scope of the proposal would have been required to certify that it uses airfield pavement deicers that do not contain urea, or alternatively, meet an effluent limitation for ammonia. Additionally, in-scope airports with 10,000 or more annual departures would have been required to:

- Collect at least a specified proportion (either 20 or 60 percent, based on size) of available ADF after it is sprayed on aircraft; and
- Meet a specified numeric effluent limit for ADF wastewater collected and discharged directly.

As proposed, all in-scope new source dischargers had the same airfield pavement deicing requirements as existing sources and were required to collect 60 percent of available ADF and meet the specified numeric limit for direct discharges of the collected fluid. EPA estimated that the proposed rule would apply to 218 existing airports; 110 airports for both the pavement deicer and ADF collection and

discharge requirements, and another 108 airports for the pavement deicer requirement only. Of those 218 airports, the Agency estimated that 148 airports were already in compliance with the proposed requirements.

1. ADF Collection

The proposed rule would have required all existing primary airports that have 10,000 or more annual departures to collect at least 20 percent of available ADF. The 20 percent collection requirement was based on the estimated performance of glycol collection vehicles (GCVs). Those primary airports that use 460,000 or more gallons of normalized ADF annually, which make up a small subset of this group, would have been required to collect at least 60 percent of all available ADF. (As defined in proposed § 449.2, normalized ADF is ADF less any water added by the manufacturer or customer before ADF application.) This collection requirement was based on the estimated performance of centralized deicing pads (CDPs). In-scope primary airports with less than 10,000 annual departures would not have been required to meet the national ELG requirements to collect their available deicing fluid or meet associated discharge limitations and would have continued to be subject to case-by-case Best Professional Judgment (BPJ) permitting requirements for ADF collection and treatment.

2. Numeric Limit for Collected ADF

For airports discharging collected ADF directly to surface waters, the proposal would have required these airports to meet numeric effluent limitations for COD. The limits were based on anaerobic fluidized bed (AFB) treatment technology.

3. Airfield Pavement Deicers

EPA proposed BAT for direct dischargers associated with airfield pavement deicing based on product substitution. Specifically, EPA based BAT on the substitution of pavement deicers containing urea with alternative, less toxic products that are also effective and not harmful to aircraft.

4. Other Technology Basis Considered

In the proposed rule, in addition to CDPs and GCVs, EPA described plug-and-pump technology with GCVs as a possible BAT basis for an ADF collection requirement, and calculated the cost of this technology. This technology, when used in combination with GCVs, is estimated to collect at least 40 percent of available ADF.

IV. Scope and Applicability of Final Rule

This final rule applies to primary airports. Existing airports with greater than or equal to 1,000 annual departures by non propeller driven aircraft must meet BAT requirements at § 449.10, as applicable.

A new airport with deicing discharges and located in specified geographic locations (see section V.C.2), that is operating less than 1,000 non-propeller aircraft departures annually is not required to meet the NSPS provisions in § 449.11. However, if the number of departures later increases above that threshold, then the substantive requirements in § 449.11 apply. This means that a new airport that expects to eventually exceed the 1,000 departure threshold must plan to install and operate facilities that will comply with the requirements of that section once it reaches the threshold of 1,000 non-propeller departures annually.

A. Subcategorization

EPA may divide a point source category into groupings called ''subcategories'' to provide a method for addressing variations among products, processes, and other factors, which result in distinctly different effluent characteristics. See *Texas Oil & Gas Ass'n.* v. *US EPA,* 161 F.3d 923, 939–40 (5th Cir. 1998). Regulation of a category by subcategories provides that each subcategory has a uniform set of effluent limitations that takes into account technological achievability and economic impacts unique to that subcategory. In some cases, effluent limitations within a subcategory may be different based on consideration of these same factors, which are identified in CWA section 304(b)(2)(B). The CWA requires that EPA, in developing effluent guidelines, consider a number of different factors, which are also relevant for subcategorization. The CWA also authorizes EPA to take into account other factors that the Agency deems appropriate.

In developing today's rule, EPA considered whether subcategorizing the aviation industry was warranted. In addition to those factors specified in the CWA, EPA evaluated a number of factors and potential subcategorization approaches, including the presence of an onsite glycol reclamation facility, amount of ADF applied, number of departures, availability of land to install collection systems, and FAA airport classifications. EPA concluded that establishing formal subcategories is not necessary for the Airport Deicing category. EPA structured the applicability and requirements of the final rule to account for the relevant factors (*e.g.,* amount of ADF applied) and has established a set of requirements appropriate for the range of situations that an airport may encounter during deicing operations.

B. Industry Description

The Airport and Airway Improvement Act (AAIA), 49 U.S.C. Chapter 471, defines airports by categories of airport activities, including Commercial Service (Primary and Non-Primary), Cargo Service, and Reliever. These categories are not mutually exclusive; an airport may be classified in more than one of these categories. Another group of generally smaller airports, not specifically defined by AAIA, is commonly known as ''general aviation'' airports. EPA estimates that there are approximately 500 commercial service airports.

Commercial service airports are publicly owned airports that have at least 2,500 passenger boardings each calendar year and receive scheduled passenger service. Passenger boardings refer to revenue passenger boardings on an aircraft in service in air commerce, whether or not in scheduled service. The definition also includes passengers who continue on an aircraft in international flight that stops at an airport in any of the 50 states for a non-traffic purpose, such as refueling or aircraft maintenance rather than passenger activity. Passenger boardings at airports that receive scheduled passenger service are also referred to as ''enplanements.''

Primary commercial service airports (primary airports) have more than 10,000 passenger boardings each year. Primary airports are further subdivided into Large Hub, Medium Hub, Small Hub and Non-Hub classifications, based on the percentage of total passenger boardings within the United States in the most recent calendar year ending before the start of the current fiscal year.

Early in the regulatory development process, EPA focused on deicing activities at primary airports, particularly those with extensive non-propeller traffic. Operators of general aviation aircraft, as well as smaller commercial non-jet aircraft, typically suspend flights during icing conditions, whereas commercial airlines operating at primary airports are much more likely to deice their jets in order to meet customer demands.

Based on the results of industry surveys that EPA conducted prior to the proposed rule, the Agency estimated that 320 primary airports conduct deicing operations. EPA reviewed the

relative sizes of various airports (based on annual departures), the levels of deicing activity, traffic characteristics (*i.e.,* passenger versus cargo operations), the extent of pollution controls and treatment in place, and the costs of various technologies for these airports. EPA further classified airports based on the number of annual non-propeller departures. EPA found that there were some primary airports, typically smaller airports, with high percentages of propeller aircraft, and therefore excluded airports with fewer than 1,000 annual non-propeller departures from the scope of the proposed rule. These airports have a higher proportion of propeller-aircraft flights, which are typically delayed or cancelled during icing conditions (*i.e.,* far less deicing takes place at these airports and far less deicing fluid is used, than at airports serving more jets).

C. Wastewater Sources and Wastewater Characteristics

1. Aircraft Deicing

Airlines apply most ADF to aircraft through pressurized spraying systems, mounted either on trucks that move around an aircraft, or on large fixed boom devices located at a pad dedicated to deicing.

Most of the ADF sprayed is Type I fluid, which is designed for minimal adhesion to aircraft surfaces. Consequently, the majority of Type I ADF is available for discharge due to dripping, over-spraying, tires rolling through or sprayed with fluid, and shearing during takeoff. Once the ADF has reached the ground, it will then mix with precipitation, as well as other chemicals found on airport surfaces; these chemicals typically include aircraft fuel, lubricants and solvents, and metals from aircraft, ground support and utility vehicles. Water containing these substances enters an airport's storm drain system. At many airports, the storm drains discharge directly to U.S. waters with no treatment.

Type IV fluid, an anti-icing chemical, is designed to adhere to the aircraft. Because of this adherence characteristic, EPA estimated that the majority of Type IV fluid is not available for collection.

For the purposes of this rule, the pollutant loadings are discussed in terms of applied ADF and how much of that ADF is expected to be discharged. A more detailed discussion of loadings estimates is presented in Section VI.B. Given the highly variable nature of storm events, it is difficult to estimate flows or concentrations of ADF-contaminated stormwater generated at an airport. Those factors are greatly dependent on site-specific factors, such as the size of the storm event associated with the discharge, drainage characteristics, ADF collection systems (if present), and airport operations. Additionally, due to the design of drainage systems at some airports, discharges may occur well after a storm event has completed.

2. Airfield Pavement Deicing

Most solid airfield deicing chemical products are composed of an active deicing ingredient (*e.g.,* potassium acetate, sodium acetate) and a small amount of additives (*e.g.,* corrosion inhibitors). Liquid airfield deicing chemical products are composed of an active ingredient (*e.g.,* potassium acetate, propylene glycol), water, and minimal additives. The airfield deicing products that include salts (*i.e.,* potassium acetate, sodium acetate, and sodium formate) will all ionize in water, creating positive salt ions (K^+, Na^+), BOD_5, and COD load as the acetate or formate ion degrades into carbon dioxide (CO_2) and water. Pavement deicers containing urea will degrade to ammonia, as well as generate BOD_5 and COD load.

Most of EPA's deicing characterization data does not reflect airfield pavement deicers. However, EPA collected samples from a few locations at Detroit Metro Airport that contain airfield deicing stormwater. Detroit Metro and Pittsburgh, both large hub airports, provided sampling data associated with stormwater contaminated by airfield pavement deicers. More information on these sampling activities is provided in the TDD. As with the aircraft deicers, the variability of storm events and drainage systems makes it difficult to estimate flows or concentrations of pavement deicing waste streams generated at an airport.

D. Control and Treatment Technologies for the Aviation Industry

The ADF application process has presented a challenge for those airports attempting to manage their contaminated stormwater streams. The process of applying ADF to aircraft through high pressure spraying, combined with the typical practices of spraying the aircraft outdoors in multiple, large unconfined (but usually designated) spaces, results in pollutants being dispersed over a wide area and entering storm drains at multiple locations. This process contrasts sharply with many other industries where pollutants are generated in confined areas, managed through a piping system, and not commingled with precipitation.

EPA has identified several technologies that are available to collect and manage portions of the ADF wastestream. Some of these collection technologies are more effective than others. EPA has also identified several pollution prevention (P2) approaches that may be used to minimize the amount of ADF applied. However, no single technology or P2 approach is capable of collecting or eliminating all applied ADF, as a portion of the fluid is designed to adhere to the aircraft until after takeoff, in order to ensure safe operations. Furthermore, with few exceptions, tracking by aircraft tires, wind dispersion, and dripping during taxiing and takeoff ensures that some amount of sprayed ADF, even if performed in a contained area, will end up in the drainage system of the airport. For these reasons, EPA concludes that all airports that perform aircraft deicing operations are direct dischargers. There are limited instances where an airport in a warm climate that performs only defrosting and gets little to no precipitation may, in fact, not discharge any deicing materials.

Once the available ADF wastestream is collected, it can be treated, and this process is similar to many other industries that generate wastewater. In a similar manner, airfield deicing has presented a challenge for airports attempting to manage their contaminated stormwater streams. Airfield deicing is typically conducted over a large area, including areas with frequent aircraft traffic, such as runways, where active collection technologies (*i.e.,* GCVs) are impractical to implement. At this time, EPA has not identified any available economically achievable technologies for the collection of pavement deicing stormwater. As a result, EPA also examined P2 technologies, which can reduce or eliminate the use of ADF chemicals and urea containing deicers for pavement deicing in today's final rule.

The following section discusses the technologies EPA considered for ADF collection and treatment and for addressing airfield deicing.

1. ADF Collection Technologies

a. GCV

A GCV is a truck that utilizes a vacuum mechanism to gather stormwater contaminated with ADF, resulting from deicing operations. GCVs are typically stationed near the ADF spraying trucks and are deployed either during aircraft deicing activities or after the aircraft deicing activity has been completed. The GCV then transports the

ADF-contaminated stormwater to an onsite storage and/or equalization facility, after which the material is either treated at the airport or sent offsite for treatment. EPA estimates that GCVs typically collect at least 20 percent of the available ADF when properly operated and maintained.

b. Plug and Pump

The plug and pump collection system utilizes an airport's existing stormwater collection system infrastructure to contain and collect ADF contaminated stormwater. Plug and pump systems also commonly utilize GCVs for ancillary ADF collection. Typical GCV deployment may include collecting ADF that has been sprayed beyond the plug and pump containment area or as an additional collection measure at the gate, ramp, and/or apron area after deicing operations and active plug and pump collection have ceased. The plug and pump system operates by placing either temporary inflatable balloons or storm sewer shutoff valves in the existing storm sewer system. During deicing events, the balloons are inflated and storm sewer shutoff valves are closed, trapping the ADF-contaminated stormwater in the collection system. Vacuum trucks pump the trapped contaminated stormwater from the storm sewer system and transport the liquid to onsite storage and/or equalization. In addition, catch basin inserts can be placed into manholes to collect ADF-contaminated stormwater.

c. CDPs

A CDP is a paved area on an airfield built specifically for aircraft deicing operations. It is typically located adjacent to a gate area, taxiway, or runway, and constructed with a drainage system separate from the airport's main storm drain system. A CDP is usually constructed of concrete with sealed joints to prevent the loss of sprayed ADF through the joints. The pad's collection system is typically connected to a wastewater storage facility, which then may send the wastewater to an onsite or offsite treatment facility.

Some airports use GCVs in combination with CDPs to collect ADF that lands outside the pad collection area in order to maximize collection and containment of ADF-contaminated stormwater. Airports typically locate the pads near the gate areas or at the threshold of a runway to minimize delays in aircraft takeoff and to enhance the effectiveness of the ADF applied by limiting time between application and takeoff.

CDPs reduce the volume of deicing wastewater by restricting deicing to small areas, and managing the collected wastewater through a dedicated drain system. EPA estimates that CDPs allow airports to collect at least 60 percent of the available ADF.

d. Summary of ADF Collection Technology Usage

EPA estimates the number of airports that use each of the above collection technologies in Table IV–1. Some airports use more than one technology, and some of the airports in the estimate use the technology for only a portion of their ADF-contaminated stormwater.

TABLE IV–1—ESTIMATED TOTALS OF ADF COLLECTION TECHNOLOGIES USED BY AIRPORTS

Collection technology	Number of airports
Glycol Collection Vehicle	53
Plug and Pump	29
Centralized Deicing Pad	66

See Section 8.2 of the TDD for further explanation of EPA's estimates of the ADF collection rates for the fluid collection technologies.

2. ADF-Contaminated Wastewater Treatment Technologies

In the proposed rule, EPA identified four technologies for treating ADF-contaminated wastewater: AFB, Ultrafiltration/Reverse Osmosis, Mechanical Vapor Recompression and Distillation, and Aerated Pond. The Agency selected AFB for further consideration and rejected the other technologies. See 74 FR 44687 and the TDD.

An AFB treatment system uses a vertical, cylindrical tank in which the ADF-contaminated stormwater is pumped upwards through a bed of granular activated carbon at a velocity sufficient to fluidize, or suspend, the media. A thin film of microorganisms grows on and coats each granular activated carbon particle, providing a vast surface area for biological growth. These microorganisms provide treatment of the ADF-contaminated stormwater. Byproducts from the AFB treatment system include methane, CO_2, and new biomass (animal material, bacteria). The AFB treatment system includes storage as an initial step to equalize flows and pollutant concentrations that feed into the biological treatment unit.

Treating wastes using an anaerobic biological system as compared to an aerobic system offers several advantages. The anaerobic system requires much less energy since aeration is not required and the anaerobic system produces less than 10 percent of the sludge of an aerobic process. In addition, because the biological process is contained in a sealed reactor, odors are eliminated. Based on EPA sampling results, the AFB treatment system successfully removes over 98 percent of BOD_5, over 97 percent of COD, and over 99 percent of propylene glycol from deicing wastestreams. This treatment reduces the BOD_5 and COD loads discharged to receiving waters by over 98 and 97 percent, respectively. Two airports in the United States use the AFB technology: Albany International Airport in Albany, New York, and Akron-Canton Regional Airport, in Akron, Ohio. Additionally, Portland International Airport in Oregon recently installed an AFB system and T.F. Green Airport in Providence, Rhode Island is planning the installation of this technology.

3. Pollution Prevention Technologies

EPA has identified several technologies currently in use at airports across the United States that may reduce ADF usage. The following section describes the major P2 approaches EPA identified during this rulemaking. EPA notes that it did not identify these ADF P2 approaches as a technology basis for BAT or NSPS in today's final rule due to a lack of available quantitative data on the actual pollutant reductions that these technologies may achieve and, moreover, because of a lack of data correlating minimized ADF application with safe deicing practices. However, EPA is aware that many airports use these technologies successfully and EPA encourages additional use. Furthermore, EPA notes that the collection technologies evaluated for today's rule are only capable of collecting a portion of the applied ADF. Therefore, to the extent that P2 technologies are proven to be effective, they have the ability to considerably reduce or eliminate ADF discharges. The ability to reduce the amount of applied deicing chemicals will not only have a positive environmental effect, but may also be cost-effective, as the decreases in costs of purchased deicing chemicals may offset the cost of the technology itself.

EPA applauds all efforts to develop deicing chemicals and approaches that reduce or eliminate pollutant discharges. In order to ensure that this rule doesn't prevent such approaches as they become proven, feasible, and available, today's final rule includes a provision to apply a P2 credit against the standard ADF collection

requirement. See Section X.C., ''Compliance with the NSPS Requirement,'' in this preamble.

In addition EPA notes that in discussions with the major airline and airport industry associations, ATA and ACI–NA, they stressed their commitment to pollution prevention approaches to reduce aircraft deicing discharges, while ensuring safety at all times, and the great strides they had made on pollution prevention approaches in addition to employing ADF collection technologies (see DCN AD01333). As a follow-up to these conversations, industry associations submitted a description of a voluntary pollution reduction program designed to further spur the industry towards safely reducing ADF discharges to the environment. Under the program, these associations intend to work together to:

- Conduct outreach and facilitate information exchange on the program and available pollution reduction technologies;
- Encourage the development, testing, and commercially appropriate deployment of pollution reduction technologies;
- Provide information characterizing the qualitative and quantitative performance and environmental benefits of appropriate pollution reduction technologies;
- Develop a quantitative goal for environmental benefits to be achieved through this program;
- Inventory pollution reduction technologies adopted during this program;
- Develop a comparison of the environmental benefits of pollution reduction technologies adopted during the program with the quantitative goal; and
- Report the results of the above components to EPA.

EPA supports this pollution prevention program and believes it has the potential to significantly reduce aircraft deicing discharges in a safe manner. See DCN AD01334 for more details on industry's pollution prevention program.

a. Infrared (IR) Deicing Systems

A few U.S. airports have used IR heating systems for several years and these systems have been demonstrated to deice aircraft effectively. One type of IR system consists of an open-ended hangar-type structure with IR generators mounted inside, suspended from the ceiling. The IR equipment is designed to use specific wavelengths that heat ice and snow, and minimize heating of aircraft components. The IR energy level and wavelength may be adjusted to suit the type of aircraft. Although the system can deice an aircraft, it cannot provide aircraft with anti-icing protection. Consequently, when the ambient temperature is below freezing, anti-icing fluid is typically applied to the aircraft after it leaves the hangar. In addition, a small amount of deicing fluid may be required for deicing areas of the aircraft not reached by the IR radiation, such as the flap tracks and elevators. The system, therefore, does not completely replace glycol-based fluids, but may greatly reduce the volume required.

Vendors claim use of an IR system reduces the amount of Type I ADF required by up to 90 percent. John F. Kennedy International Airport, in New York, uses an IR system for a small percentage of its flights.

b. Forced Air/Hot Air Deicing Systems

Forced air/hot air deicing systems are currently in operation at a few U.S. airports. These systems use forced air to blow snow and ice from aircraft surfaces. Some systems allow deicing fluids to be added to the forced air stream at different flow settings (*e.g.,* 9 and 20 gallons/minute), while other systems require separate application of deicing fluid. Several vendors are currently developing self-contained, truck-mounted versions of these forced-air systems, and most systems can be retrofitted onto existing deicing trucks.

The double gantry forced-air spray system is a similar method to truck-mounted forced-air systems. The gantries support a set of high- and low-pressure nozzles, which blast the aircraft surfaces with heated air at a pressure of 40 to 500 pounds per square inch. When weather conditions are severe, a small volume of water and glycol may be added to the air stream to remove dense coverings of snow and ice. Airfield use of the gantry system has been limited, perhaps because it is a permanently mounted system that has been known to cause delays in aircraft departures.

c. Product Substitution

Another solution to environmental problems associated with deicing chemicals is to replace chemical deicers with more environment-friendly products. In the ADF products category, initially the predominant deicers were based on ethylene glycol, whereas in recent years, propylene glycol-based deicers, which are less toxic to mammals, have become more widely used. Chemical manufacturers, the aviation industry, and the U.S. Air Force are continuing to explore development of deicers that could generate lower levels of pollutants compared to the glycol-based products.

4. Airfield Pavement Deicing Control Technologies

EPA identified product substitution as an available control technology for airfield pavement deicing chemicals. The Agency did not identify an available economically achievable technology to collect and treat wastewater containing pavement deicing pollutants.

Several types of products, such as potassium acetate, sodium formate, and sodium acetate, are available as alternatives to pavement deicers containing urea. The results from EPA's airport questionnaire reported that 83 percent of primary airports use airfield pavement deicers that do not contain urea. The most widely used substitute product, potassium acetate, accounts for 63 percent (by weight) of the annual airfield pavement deicer usage in the United States.

E. Regulated Pollutants

EPA identified 31 pollutants of concern that stem directly from airport deicing operations. For today's final rule, EPA identified COD as a pollutant of concern to be controlled for discharges of collected ADF contaminated stormwater and urea and ammonia as pollutants of concern to be controlled in discharges of airfield deicing contaminated stormwater. See Section 6 of the TDD for a full discussion of pollutants of concern and for EPA's rationale for selecting regulated pollutants.

V. Final Regulation

A. BPT and BCT

EPA considered whether, in this rule, it was necessary to establish BPT limits, given that pavement deicers will be controlled at the BAT level, which is no less stringent than the BPT limit. Because the same wastestream that would be controlled by BPT is also controlled by BAT, it is not necessary for EPA to promulgate BPT effluent limitations guidelines for the Airport Deicing Category, given that the BAT collection and treatment requirements on that wastestream would be at least as stringent as BPT requirements. Similarly, EPA is not establishing BCT limitations for this industry because the same wastestream that would be controlled by BCT is being controlled by BAT.

B. BAT

1. Airfield Deicing

a. Applicability/Scope of Airfield Deicing Discharge Requirements

EPA did not receive significant comments regarding the scope of the requirements for controlling airfield deicing discharges. EPA has retained the scope as described in the proposal: primary airports with departures of 1,000 or more non-propeller aircraft departures.

b. Candidate BAT Airfield Deicing Technologies: Product Substitution of Pavement Deicers Containing Urea

In general, airports discharge airfield pavement deicing chemicals without treatment, due to the difficulty and expense of collecting and treating the large volumes of contaminated stormwater generated on paved airfield surfaces. EPA is not aware of an available means to control these pollutants through collection and use of a conventional, end-of-pipe treatment system. It is possible, however, to reduce or eliminate certain pollutants by modifying deicing practices, such as using alternative chemical deicing products. In particular, EPA has identified ammonia and COD from airfield deicing as pollutants of concern, and both of these pollutants are a byproduct of pavement deicers containing urea. Accordingly, to address discharges of ammonia from airfield pavement, EPA identified one candidate for best available technology, namely, product substitution, or discontinuing the use of pavement deicers containing urea and using alternative pavement deicers instead. EPA found that the use of deicers without urea is the best available technology for reducing discharges of ammonia from pavement deicing, because it is safe, technologically feasible, and available across the industry. The technology does not produce discharges of ammonia as produced by deicers containing urea. Currently, only about 10 percent of chemical pavement deicers applied nationwide contain urea. The most widely used pavement deicer is potassium acetate, which represents 63 percent of all chemical pavement deicers applied nationwide.

2. Aircraft Deicing

For today's final rule, based on comments to the proposed rule, EPA revised the requirements related to the collection and discharge of ADF.

a. Applicability/Scope of Aircraft Deicing Discharge Requirements

Commenters raised multiple concerns with EPA's proposed approach of using departures as a proxy for ADF use. First, commenters explained that an airport in the very southern portion of the United States could have significant departures but use little ADF. Second, commenters requested that EPA consider a de minimis cut-off to account for defrosting (*i.e.* ADF application in the absence of active precipitation). Under the proposal, defrosting would be counted towards the volume of ADF required to be collected, yet commenters claim that it evaporates and is unable to be collected. Finally, airports with low overall ADF usage also requested EPA consider a de minimis cut-off. They cited concerns that the costs of the collection and treatment for ADF at these airports are disproportionally high in relation to the amount of pollutants generated. For example, one commenter, a non-hub primary airport, explained that it typically receives little snow and conducts occasional defrosting of aircraft, and generates no ADF-contaminated water, yet it would effectively be required to purchase a GCV if subject to the 20 percent collection requirement.

EPA reviewed its data with respect to each of these comments. On further review of the data and comments, EPA agrees that ADF usage in general is not closely related solely to the number of departures at airports. As such, in considering options for today's final rule, EPA did not base ADF collection and associated discharge options on the number of departures. Instead, EPA considered options based directly on estimates of the overall volume of ADF use, which EPA indicated in the proposal was another possible threshold criterion for the rule (74 FR 44714).

EPA reevaluated ADF usage data for all existing airports. This evaluation showed that airports with less than 30,000 gallons of available ADF may conduct a significant amount of defrosting, rather than deicing. See DCN AD01335. Defrosting results in limited amounts of ADF available for collection—effectively rendering collection technologies infeasible. Additionally, EPA found that the costs and economic impacts of ADF collection and treatment technologies for airports using less than 60,000 gallons of normalized ADF annually were disproportionally higher than those with greater ADF use.[1] See DCN AD01338 for additional details. As a result, in today's final rule, EPA evaluated options based on a cut-off of greater than or equal to 60,000 gallons of normalized ADF per deicing season. Under this option, airports at or above this threshold would be subject to these requirements, but airports below this threshold would have the technology-based limitations for aircraft deicing discharges in their NPDES permits determined by the permitting authority on a case-by-case, best professional judgment basis.

b. Exempted Wastewater (Those Associated With Deicing for Safe Taxiing)

EPA also altered its consideration of exempting wastewaters associated with deicing for safe taxiing. The proposed rule included a provision that would have exempted ADF-contaminated wastewater associated with deicing for safe taxiing from the proposed collection and treatment requirement. EPA proposed to limit deicing for safe taxiing to 25 gallons of ADF, based on an allowance at Denver International Airport (DIA), as the maximum amount that could be applied to an aircraft for the purposes of safe taxiing. This definition was intended to apply to airports with CDPs, and to prohibit conducting complete deicing of an aircraft at a terminal area without a collection system, instead of using the deicing pad. However, commenters expressed concern that climatic conditions at airports in the Midwest, Alaska, and on the East Coast differ greatly from those at DIA: commenters claimed that any ''deicing for safe taxiing'' allowances established at DIA cannot form a reasonable basis for application to airports in other regions of the country. In addition, cargo aircraft sometimes experience layovers in excess of 24 hours, potentially increasing the amount of snow or ice that must be removed to achieve compliance with FAA regulations. EPA agrees with the commenters and therefore the final rule does not limit the amount of ADF sprayed for the purposes of safe taxiing, nor does EPA require an airport to collect and treat ADF applied for safe taxiing purposes.

c. Candidate BAT Technology Bases for Collection and Discharge Requirements

EPA is not aware of an available and economically achievable technology that is capable of capturing 100 percent of the sprayed ADF. Section IV.D.1 details the available technologies for

[1] EPA notes, however, that many existing airports with annualized normalized ADF usage below 60,000 currently employ deicing collection technologies including centralized deicing pads.

collecting ADF, which include GCVs, plug and pump equipment, and CDPs. EPA estimates that these technologies collect 20 percent, 40 percent, and 60 percent of available ADF, respectively.

Commenters raised multiple concerns about CDPs, the technology that EPA proposed to identify as the basis for the 60 percent collection requirement. First, commenters raised concerns that CDPs are not feasible at all locations because of lack of space. Some of these commenters provided detailed engineering plans and analyses demonstrating their specific space constraints. Second, commenters raised concerns that using CDPs for all deicing operations would cause traffic and/or safety problems. Third, commenters asserted that the use of CDPs would lead to flight delays and that EPA had not included costs associated with such delays in its analyses. In addition, FAA indicated that it had similar concerns to those raised by industry commenters, regarding the identification of centralized deicing facilities as BAT. FAA indicated that the 60 percent collection requirement based on the exclusive use of CDPs might adversely affect the operational efficiency of some of the nation's largest and busiest airports. Further, FAA was concerned that for those land-constrained airports, construction and operation of CDPs for all deicing operations would not be able to meet FAA design standards. In explaining its concerns, FAA noted that delays associated with the use of CDPs would be extremely costly to the nation's productivity, economy, businesses, and the traveling public.

After considering these comments and reviewing the information in its record, EPA is not establishing a 60 percent ADF collection requirement based on CDPs for BAT. First, in response to FAA's concerns about the exclusive use of deicing pads for aircraft deicing, EPA contacted a number of large hub airports that currently use CDPs. EPA found the current percentage of flights for which these airports use the CDPs ranges from 50 to 95 percent. The airports explained that various operational or weather-related issues may make deicing pad use for all flights cumbersome if not impossible, (*i.e.,* severe system-wide delays), and require them to deice at the gate in some circumstances. EPA shares the commenters' and FAA's concerns that moving to exclusive use of CDPs for all deicing might lead to operational issues and delays. EPA, in discussions with FAA, attempted to craft regulatory provisions to allow an airport limited ability to bypass the use of a centralized pad in order to avoid these circumstances. However, limited data on the site-specific nature of this industry left EPA unable to develop regulatory provisions that would give airports the flexibility they need to avoid significant operational issues and delays. Second, based on public comments and information from FAA, EPA is concerned that some large airports critical to efficient air traffic operations in this country are space (land) constrained, and that building well-located CDPs for all deicing operations at these airports is likely not feasible for that reason. At the time of the proposal, EPA estimated that 14 airports would be subject to the 60 percent collection requirement. Because the data in EPA's record indicate that many of these airports currently meet this requirement, EPA estimated approximately seven airports would likely need to install pads as a result of the proposed requirement. Of these seven airports, four are large hubs, which, over years of expansions and other improvements, have already built out the majority of the land available to them. EPA has concluded that the lack of remaining available land, coupled with their existing layouts, has left these airports in a position where a CDP conforming to FAA's Advisory Circulars on deicing pad design, (*e.g.,* in a location that aircraft can travel to safely and efficiently to conduct deicing operations) cannot be constructed.

Therefore, for today's final rule, EPA has not established a 60 percent ADF collection requirement, which would have been based on identification of centralized deicing facilities as BAT for 100 percent of aircraft departures. This technology is not available at a number of existing airports due to land constraints, and therefore is not technologically feasible on a nationwide basis. For this and the other reasons discussed above, EPA finds that centralized deicing facilities should not be identified as BAT for this nationwide rulemaking. See CWA 304(b)(2)(B)—factors relating to the assessment of BAT include ''the process employed, the engineering aspects of the application of various types of control techniques, * * * and such other factors as the Administrator deems appropriate.'' EPA then considered the other two technologies described in the proposal as a possible basis of BAT for aircraft deicing discharges for today's final rule: 40 percent ADF collection requirement based on plug and pump with GCVs and 20 percent ADF collection requirement based on GCVs. With either of these collection technologies, as was the case in the proposed rule, EPA also included numeric COD limitations for direct discharges of collected ADF based on anaerobic treatment. For a discussion of other technologies examined but not selected as candidates for the basis of the COD limitations, see Section VI*.E.*2 in the proposed rule preamble (74 FR 44692) and Section 7 of the TDD.

3. Options Considered for Today's Final Rule

Using the technology bases identified above for airfield and aircraft deicing discharges, EPA developed three primary options for today's final rule. All three of these options have the same airfield pavement deicing discharge requirements based on product substitution of deicers that do not contain urea, but would vary the approach to control aircraft deicing discharges:

- Option 1: 40 percent ADF collection requirement for large and medium ADF users (based on plug and pump with GCVs); numeric COD limitations for direct discharges of collected ADF (based on anaerobic treatment).
- Option 2: 40 percent ADF collection requirement for the large ADF users (based on plug and pump with GCVs) and 20 percent ADF collection requirement for medium ADF users (based on GCVs); numeric COD limitations for direct discharges of collected ADF (based on anaerobic treatment).
- Option 3: Site-Specific Aircraft Deicing Discharge Controls: Do not establish effluent limitation guidelines in the final rule for aircraft deicing discharges, but instead, leave the determination of BAT requirements for each airport to the discretion of the permit writer on a case-by-case, ''best professional judgment'' basis based on site-specific conditions.

Under the first option, in addition to the airfield pavement requirements, all airports that use greater than or equal to 60,000 gallons of normalized ADF annually would be required to collect 40 percent of available ADF based on plug and pump with GCV technologies. In the proposed rule, EPA considered but did not identify this as its lead option because it found its costs to be comparable to those of CDPs, while CDPs achieved greater ADF collection. In the proposal, EPA therefore identified CDPs as BAT. EPA subsequently determined that CDPs are not achievable nationwide for existing airports and dropped it as an option for consideration in the final rule. This left the plug and pump with GCV option as the technology, among those that remained under consideration for today's rule, that would achieve the greatest collection of ADF.

Under the second option, in addition to the airfield pavement requirements, all airports that use greater than or equal to 60,000 gallons of normalized ADF annually but less than 460,000 gallons of normalized ADF (''medium ADF users,'' estimated to be 42 airports) would be required to collect 20 percent of available ADF based on GCVs, and airports that use more than 460,000 gallons of normalized ADF (''large ADF users,'' estimated to be 14 airports) would be required to collect 40 percent of available ADF based on the use of plug and pump with GCV technology.

Under both Options 1 and 2, the requirement to meet numeric effluent limits for COD for the collected ADF would need to be met prior to commingling with other wastestreams prior to discharge. For a discussion of other technologies examined but not selected as candidates for the basis of the nationwide COD limitations, see Section VII.E.2 in the proposed rule preamble (74 FR 44692) and Section 7 of the TDD.

Under the third option, EPA would establish national deicing discharge controls for airfield pavement deicing only. BAT limitations for aircraft deicing discharge would continue to be established by the permitting authority on a case-by-case basis.

Table V–1 provides the estimated national cost of each option along with the estimated national removals.

TABLE V–1—COST OF FINAL RULE OPTIONS

Option	Total pollutant removals (million lb)	Total annualized costs (2006 $million)
1	33.0	$78.4
2	30.2	49.4
3	16.4	3.5

4. BAT Options Selection

EPA is selecting Option 3 as best available technology for controlling airport deicing discharges. EPA has determined the best available technology for controlling airfield pavement discharges is product substitution. The record shows that products without urea are widely available in the industry, and in fact are already in use at a majority of airports across the country.

With respect to aircraft deicing discharge controls, EPA's record demonstrates that ADF collection and associated treatment technologies are technically feasible for many airports. Data supplied from the industry through EPA's nationally representative survey of airports indicates that dozens of airports currently use GCVs and plug and pump collection systems, in addition to a myriad of P2 technologies and practices, ranging from alternative means of applying ADF such as forced air nozzles, to alternate deicing technologies such as IR deicing. In addition, many airports also employ a variety of treatment technologies to treat collected ADF prior to discharge. Thus, EPA concludes this industry has several technology options potentially available for mitigating the pollutants associated with aircraft deicing activities. See the TDD for more information about collection and P2 technologies.

However, EPA has determined that none of the ADF collection technologies considered for today's final rule represents the best available technology for the entire category. Rather, EPA concludes that best available technology determinations should continue to be made on a site-specific basis because such determinations appropriately consider localized operational constraints (*e.g.,* traffic patterns), land availability, safety considerations, and potential impacts to flight schedules. Based on the information in its record, EPA cannot identify with precision the extent to which such limitations may preclude, at any particular airport, the use of the technologies that it considered for BAT control of aircraft deicing discharges for today's final rule. However, the record demonstrates that such limitations exist and are not isolated or insignificant. In light of this finding, EPA decided that it should not establish national ADF collection (and associated discharge requirements) based on any one or more of the ADF collection technologies as the presumptive BAT-level control technology. Rather, site-specific proceedings are the appropriate forum for weighing all relevant considerations in establishing aircraft deicing discharge controls.

More specifically, commenters provided by airport and airline industry on the proposed regulation raised concerns about the impacts that ADF collection technologies may have on safety and operations at airports across the country. They also commented on the lack of available space at many land constrained airports for ADF collection and treatment technologies. EPA reviewed the information submitted in comments, subsequent information provided by industry, and information obtained from site visits to thoroughly evaluate these concerns. After reviewing this information, EPA agrees with commenters that while many airports likely have the ability to implement some form of collection or P2 technologies in order to mitigate pollutant discharges associated with aircraft deicing, space, safety and operational considerations may limit the selection of the specific technologies and the extent to which they can be implemented at any particular airport. This finding became particularly apparent after reviewing questionnaire responses for some of the airports at which EPA also conducted site visits. EPA found that its ''model facility'' approach was not a suitable substitute for a detailed analysis of the site constraints at each airport. For example, a permit authority may need to evaluate existing traffic patterns at an airport, not only of the aircraft, but also of the service vehicles to determine if additional collection vehicles would lead to unacceptable safety concerns. With respect to land constraints, in the absence of detailed airport schematics, or without conducting a detailed site visit at each airport, EPA cannot determine if adequate space exists to incorporate the specific treatment and collection technologies evaluated as the basis for today's final rule.

Additionally, industry and FAA, in particular, have expressed overarching concerns about possible delays and economic impact that could result from the use of plug and pump and GCVs, both at specific airports and nationwide. EPA agrees that delays must be a factor in considering today's possible requirements and recognizes that such delays fundamentally affect U.S and

international business and recreational interests.

Airplane deicing activities, by their very nature, occur during freezing precipitation events. For some airports, even small amounts of precipitation can lead to delayed aircraft departures—even without deicing activity and/or ADF collection and treatment. As such, when delays occur at an airport during inclement weather, it is difficult to determine whether the delays are associated with the weather, the ADF collection and treatment technologies, or both. Further, even small delays at certain hub airports have a ripple effect that can affect the entire national air traffic schedule.

Some airports have identified procedures to mitigate or prevent delays associated with aircraft deicing discharge controls. These airports can handle large amounts of precipitation and/or operate ADF collection and treatment technologies with little or no delay, but these approaches may not be applicable nationwide. Further, the extent of delays deemed acceptable is likely to vary by airport. As was the case with land constraints, the confounding factors that need to be considered to evaluate possible delays that may be associated with the technology bases do not lend themselves to a national determination using a model facility approach. Further, EPA does not have detailed site-specific information to evaluate delays on an airport-by-airport basis.

While the facts stated above do not necessarily preclude the ability of an airport to collect and treat spent ADF, they do illustrate why EPA did not select any of the technologies considered as BAT for today's final rule, and why a site-specific BAT determination for ADF collection and treatment requirements is the proper approach for today's final rule.

Therefore, for the reasons identified above, EPA determined Option 3 is the only technologically feasible and available option considered for today's final BAT requirements. Option 3 would remove 4.4 million pounds of ammonia and 12 million pounds of COD, with a projected annual cost of $3.5 million. The costs of Option 3 are reasonable in terms of the pollutant reductions achieved ($0.21/lb). Further, as discussed in more detail in Section VII, EPA finds Option 3 is economically achievable. In addition, EPA examined the non-water quality impacts anticipated from compliance with Option 3 requirements and found none or only very minor impacts in comparison to typical industry energy use, emissions generation and sludge generation. See Section IX, ''Non-Water Quality Environmental Impacts.'' Therefore, based on all the factors above, EPA is identifying Option 3 as BAT and has based today's final rule on the Option 3 BAT requirements.

C. NSPS

1. New Source Definition

In the proposed rule, ''new source'' would have included both new airports and new runways constructed at existing airports. Commenters objected to the inclusion of new runways at existing airports in the new source definition. They noted that a new runway is not a source of pollutant discharges from aircraft deicing activity and that a new runway is not ''substantially independent'' of an existing source as required under the regulatory definition of ''new source.'' See 40 CFR 122.2 and 40 CFR 122.29(b)(1). Commenters acknowledge that a new runway may lead to additional discharges associated with airfield deicing, but noted that the requirements for airfield deicing discharges are the same for new and existing discharges. With respect to the requirements associated with discharges from aircraft deicing, they explained that a new runway is not a source of new discharges because aircraft deicing is performed at locations away from airport runways. Moreover, they explained that unlike a plant or factory from which a new source of discharge associated with a new process, production line, or piece of equipment can be clearly distinguished as a new source of discharge associated with an existing source, a new runway is not operated independently from other runways at an airport. Rather, a new runway and associated deicing operations are part of a wholly integrated airport system. After carefully considering these comments, EPA agrees that new runways should not be treated as new sources because new runways are generally too integral to the operations of an existing airport to be considered ''substantially independent'' of the existing airport.

2. NSPS Applicability

For today's final rule, the applicability of the NSPS provisions is effectively the same as that in the proposed rule. New primary airports with greater than or equal to 1,000 annual departures by non-propeller-driven aircraft are subject to the provisions of § 449.11(a) and (b).

In the proposed rule, § 449.1 defined the applicability of the overall category as covering primary airports with at least 1,000 annual scheduled commercial air carrier jet departures. In the final rule, the language in § 449.1 has been simplified to just ''primary airports,'' and the 1,000-departure threshold criteria are included in the provisions at §§ 449.10 and 449.11. This arrangement results in the same requirements for new source airports that EPA had intended in the proposed rule, with a clarification: A new primary airport with initially less than 1,000 departures is a new source, but not subject to the requirements of § 449.11. If the airport eventually exceeds 1,000 departures, then the provisions of § 449.11 apply.

The proposed rule defined the threshold for the new source ADF collection and associated discharge requirements as any new source with 10,000 or more annual departures. As was the case with existing sources, commenters explained that the number of departures is not a good analog for the amount of ADF usage, citing, for example, airports in the South that may have significant numbers of departures but typically need to deice their aircraft only once a year. After reviewing these comments and the information in its record, EPA agrees that departures alone are not the most appropriate indicator of ADF usage.

Therefore, for today's final rule, in addition to the proposed departure threshold, EPA is adding a geographical component to define which new sources are subject to the ADF collection and discharge requirements. As explained in Section V.B, EPA determined that, on a national basis, ADF collection may be infeasible at airports with annual ADF usage below 30,000 gallons. ADF usage below 30,000 gallons may reflect significant volumes of defrosting activity, which does not leave ADF available for collection.

Unlike existing sources, however, new sources do not have past ADF usage data available for establishing a threshold for being subject to ADF collection requirements. Therefore, in combination with the proposed departure threshold, in today's final rule, the Agency is incorporating a geographically based component that is closely aligned with a 30,000 gallon annual ADF usage threshold. In addition to applying the proposed departure threshold, EPA is making NSPS collection requirements for ADF applicable based on whether the airport is located within specific colder climatic zones (called a ''heating degree day [HDD] category'') as documented by the National Oceanic and Atmospheric Administration (NOAA). For airports within the scope of today's rule,

location in a warmer climate zone is generally associated with the use of smaller volumes of ADF.

HDD means the number of degrees per day the daily average temperature is below 65 degrees Fahrenheit. The daily average temperature is the mean of the maximum and minimum temperature for a 24-hour period. The annual HDD value is derived by summing the daily HDDs over a calendar year period. HDDs are computed using data from the U.S. National 1961–1990 Climate Normals, published by the National Climatic Data Center of NOAA. The original data are in whole degrees Fahrenheit. HDD values range from 0 to more than 9,000. NOAA presents this information in 1,000-HDD increment groups. EPA used the NOAA information to create HDD groups. These groups range from A to I, with group A being the lowest HDD values (less than 1,000 HDD) and group I being the highest (greater than 9,000 HDD).

EPA identified the corresponding HDD groups for existing airports and then compared the HDD group to ADF usage at each airport. In general, airports with greater than 10,000 departures in HDD groups A through C (3,000 HDD or less) used less than 30,000 gallons of ADF while those in HDD groups D through I used more than 30,000 gallons of ADF. As a result, these HDD groups in combination with the departure cut-off provide a dividing line nationwide that corresponds well with the ADF usage dividing line that EPA determined makes ADF collection feasible. EPA concludes that this approach best captures those new airports that will conduct more frequent deicing operations, as opposed to defrosting operations, and excludes those new airports that will likely conduct infrequent deicing. See DCN AD01267 for EPA's analysis of HDD categories.

In addition, EPA received comments questioning the feasibility of ADF collection technologies for airports located in Alaska. These commenters stated that deicing wastewater generation at Alaskan airports is substantially different from airports in the lower 48 states. First, often airports in Alaska will suspend air traffic as opposed to conducting deicing operations. Second, commenters stated that long periods of below freezing temperatures result in runoff characteristics that are substantially different from those is the lower 48 states and, as such, deicing materials are not available for collection (due to lack of runoff) making collection technologies infeasible. The data provided in the survey responses from Alaskan airports show that airports in this climactic zone use widely varying amounts of ADF per departure. Based on this data, EPA is unable to conclude that Alaskan airports conduct significant deicing, rather than defrosting, and as such, today's final new source ADF collection and discharge requirements do not apply to new airports in Alaska.

For the airports that are excluded from the NSPS requirements in today's final rule, permit authorities would determine an applicable new source performance standard on a case-by-case, best professional judgment basis.

3. NSPS Option Selection

For today's final rule, EPA evaluated ''best available demonstrated control technologies'' for purposes of setting NSPS under CWA section 306. Section 306 directs EPA to promulgate NSPS ''for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the BADCT, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.'' Congress envisioned that new treatment systems could meet tighter controls than existing sources because of the opportunity to incorporate the most efficient processes and treatment systems into the facility design. As a result, NSPS should represent the most stringent controls attainable through the application of the BADCT for all pollutants (that is, conventional, nonconventional, and priority pollutants).

After careful consideration of the information in its record, EPA is today promulgating the same NSPS requirements for both airfield pavement deicing discharges and airplane deicing discharges as it proposed; however, the applicability of the NSPS requirements has changed. Clearly, product substitution, the technology basis for the airfield deicing discharge requirements promulgated today for existing airports, is fully applicable to new airports. EPA determined that, just as with existing sources, all new sources would be capable of using airfield deicing products without urea. Furthermore, product substitution represents the greatest level of reduction in ammonia among the available technologies considered. Accordingly, EPA identifies product substitution of non-urea-containing airfield deicers as the best demonstrated available control technology for all new sources. As with BAT, there would be two alternatives for meeting this effluent limitation: either a certification requirement or a numeric limit on ammonia for all direct discharges of the stormwater from the airfields.

With respect to aircraft deicing discharge controls, EPA, in consultation with FAA, finds that its determination about safety, space, and operational constraints that may be present at existing airports for all the collection and treatment technologies discussed in today's final rule (CDPs, plug and pump with GCVs, GCVs alone and AFB treatment) would not similarly apply to new airports. This finding is supported because new airports can be designed to minimize space and logistical constraints that have been identified for retrofits at existing airports (see DCN AD01285). Further, among the ADF collection technologies that EPA considered, CDPs collect the greatest level of available ADF and are available to new sources in this category. With respect to new airports, the use of CDPs does not present the space/land, safety, or operational issues that would be raised in connection with the use of deicing pads at existing sources. In addition, CDPs in combination with AFBs for treatment of collected ADF are not so costly in comparison to the cost of a new airport [2] that they would be considered a ''barrier to entry.'' Moreover, according to FAA, when designed properly, CDPs often improve traffic flow and reduce delays associated with aircraft deicing. When designing a new airport, the local operating agency plans the site for all needed facilities, such as runways, taxiways, terminal(s) and other components needed to comply with safety and environmental requirements, which includes deicing facilities. See DCN AD01285. The new airport must be designed and built on enough land, in total, to accommodate a deicing pad and AFB treatment system (or other technology that meets the 60 percent collection requirement and the discharge requirements), to be installed either during initial construction or at a later time when it exceeds the 10,000 departure threshold. The airport sponsor would design its layout of runway(s), taxiways, location of terminal(s) and other buildings with sufficient space so that deicing facilities can be installed later without the need to acquire additional land. Therefore, EPA is promulgating the same NSPS requirements for airfield pavement deicing discharges as for existing sources, but in contrast to existing sources, EPA is promulgating NSPS requirements for ADF collection and discharge requirements at new airports

[2] Includes total costs for controls both for airfield pavement and aircraft deicing discharges.

based on the use of CDPs and anaerobic biological treatment. Meeting this combination of new source requirements for both airfield pavement deicing discharges and aircraft deicing discharges would not be an economic barrier to entry for new airports, as the cost of new airport construction, even at small airports, is significantly greater than the costs associated with product substitution and collection and/or treatment of spent deicing fluids. See Section VII.E.

As a point of clarification, EPA is promulgating the same numeric COD limitations for collected ADF that is discharged directly for new sources as was proposed. The technology basis, AFB system, is available to new airports. In addition, AFB achieves the greatest level of pollutant removals of those technologies considered during the development of this regulation, and the installation and use of this technology is not economically a barrier to entry for new airports.

Additionally, although EPA did not identify pollution prevention approaches and technologies as a basis for NSPS, these technologies may be effective at reducing available ADF. Moreover, future pollution prevention technologies may become available to aid in meeting the NSPS requirements. As such, the final rule includes a provision that allows dischargers to request a credit to be applied to the NSPS ADF requirement. See Section X.C.3 for additional information and examples.

D. PSES and PSNS

EPA is not promulgating PSES and PSNS for the Airport Deicing Category. Although some airports in the United States discharge ADF-contaminated stormwater to POTWs, EPA received no comments or other information indicating that POTWs currently have problems of pollutant pass-through, interference, or sludge contamination stemming from these discharges that would necessitate the promulgation of national categorical pretreatment standards.

Like the biological treatment system that forms the basis for today's COD new source performance standard, POTWs typically employ biological treatment systems and are similarly designed to remove organic pollutants that contribute to COD and/or BOD_5. In general, POTWs have the capability to achieve comparable removals to the NSPS technology basis. However, some airports and POTWs may need to make operational adjustments in order to process the wastewater effectively while avoiding POTW upset. EPA received a comment about the Downriver Treatment Facility in Detroit, Michigan, which accepts ADF wastewater from the Detroit Metropolitan Wayne County Airport. The treatment plant experienced viscous bulking due to a nutrient imbalance that occurred during the months that ADF was accepted. The issue was resolved by removing phosphorus at a later stage in the treatment plant system, rather than from the raw wastewater. The airport also made significant changes in order to segregate the deicing wastewater, collect and recycle the most concentrated ADF wastewater, and control the amount and concentration of wastewater discharged to the POTW.

EPA is aware that high concentration or ''slug'' discharges of deicing wastewater can create POTW upset. The national pretreatment program regulations specifically prohibit industrial users from discharging high concentrations of oxygen-demanding pollutants to POTWs if they cause interference to the POTW. See 40 CFR 403.5(b)(4). Under 40 CFR 403.5(c), control authorities may set and enforce ''local limits'' for airport discharges to POTWs to implement the prohibitions listed in § 403.5(b)(4). This provision ensures that any potential limits would protect against POTW interference by the oxygen-demanding pollutants in airport deicing discharges. See ''Local Limits Development Guidance,'' document no. EPA 833–R–04–002A, July 2004, available on EPA's Web site at *http://cfpub.epa.gov/npdes/pretreatment/pstandards.cfm.* As a result, many airports that discharge to POTWs have airport-specific requirements on allowable BOD_5 or COD discharge loading per day. These limits on daily pollutant loadings are specific to the receiving POTW. Airports usually meet this requirement by storing deicing stormwater in ponds or tanks and metering the discharge to meet the POTW permit loading requirements.

VI. Technology Costs and Pollutant Reductions

A. Compliance Costs

1. Overview

EPA estimated industry-wide compliance costs for the three options considered for today's rule. This section summarizes EPA's approach for estimating compliance costs, while the TDD provides detailed information on these estimates. All final cost estimates are expressed in terms of 2006 dollars and represent the cost of purchasing and installing equipment and control technologies, annual operating and maintenance costs, and associated monitoring and reporting requirements. In general, this approach is the same as the approach used in the proposal. However, some modifications were made for costing specific technology pieces in the costing models, including the numbers of GCVs per airport and the manner in which airports would store collected ADF containing wastewater.

EPA estimated compliance costs associated with the three options considered for today's rule using data collected through survey responses, site visits, sampling episodes, specific airport requests, and information supplied by vendors. Under the options considered, certain airports would have limitations based on the substitution of non-urea-containing pavement deicers and also would be required to collect a percentage of their available ADF that was applied to aircraft and treat the collected wastewater to comply with numeric limitations if discharged directly. EPA estimated costs for an airport to install technology to comply with the options, as well as to annually operate and maintain equipment and perform required monitoring or other activities to demonstrate ongoing compliance. EPA's cost estimates represent the incremental costs for a facility when its existing practices would not lead to compliance with the option being evaluated.

EPA calculated costs based on a computerized design and cost model developed for each of the technology options considered. EPA developed facility-specific costs for each of the airport industry questionnaire respondents (149 facilities), where each facility was treated as a ''model'' airport. Because the questionnaire respondents represent a subset of the industry, EPA subsequently modeled the national population by adjusting the costs upward to estimate the entire affected airport population.

The questionnaire responses provided EPA with information on three consecutive deicing seasons (2002 to 2005) for each of the model facilities. Some portions of EPA's costing effort reflect the airports' operations as reported for the three seasons. For example, estimates of applied deicing chemicals were taken as an average of the years for which the information was reported. In instances where aspects of an airport's operation changed over the three-year period, EPA used the most recent information.

EPA first established existing conditions (*i.e.,* baseline) for each model airport based on information and site plans submitted as part of the airport questionnaire. EPA then determined what upgrades or changes, if any, would

be required to comply with the option being considered for today's final rule. For example, in general, when an airport lacked a comparable collection system to the one used as the basis for an option, EPA included costs for installation/operation and maintenance of the option technology basis (*e.g.,* plug and pump systems in conjunction with GCVs).

2. Approach for Estimating Airfield Pavement Deicing Costs

Today's rule sets requirements for an airport to certify it uses non-urea-containing airfield deicers (unless it chooses to meet a numeric limit for ammonia). Through the airport questionnaire responses, EPA estimates that 198 airports will be subject to today's requirements. Of these 198 airports, 37 airports use deicers containing urea for airfield pavement deicing. As detailed in Section IV.D.4, EPA based its airfield pavement deicing requirement on product substitution. EPA calculated the cost for facilities to substitute the deicers containing urea with another widely available pavement deicer that does not produce ammonia in the wastewater. EPA chose to model the substitution costs on what it would cost to switch to potassium acetate, specifically because that product accounts for 63 percent of the applied chemical airfield deicer usage (by weight) in the United States. These incremental costs include capital costs associated with application equipment and storage, as appropriate, as well as the differential chemical costs. EPA assumed that those airports that currently do not use urea-containing deicers as a means of pavement deicing would experience no cost associated with this portion of today's regulation.

Using the facility area usage data as provided in the airport questionnaire, and available literature on typical urea-containing pavement deicer application rates, EPA estimated the airfield area that was annually deiced at each model facility. Using the estimated model facility deicing area in conjunction with the estimated $2.92/1,000 square feet cost of potassium acetate, EPA was able to calculate the cost per model facility to perform airfield deicing with potassium acetate. This cost was compared to the questionnaire-reported urea-containing deicer costs to determine the incremental costs of switching chemical airfield deicers. See the TDD for additional details on costing for airfield deicing product substitution.

3. Approach for Developing Aircraft Deicing Costs

Under two of the options considered for this rule, certain existing airports would be required to collect a percentage of their available ADF, and treat the collected wastewater to comply with numeric effluent limitations if it discharges directly. EPA estimated the costs for an airport to comply with collection and treatment requirements, as applicable, as well as perform required monitoring to demonstrate compliance. Of the 198 airports within the scope of the aircraft deicing controls considered for BAT, EPA expects that 55 airports would exceed the threshold for ADF use that would trigger the collection/discharge requirement. Costing for ADF collection is not relative to baseline practices in all instances, as an airport's existing collection technology may not be incrementally upgradeable to achieve the required collection efficiency. As such, EPA assessed all costs to comply with the options based on ADF collection and treatment with the assumption that any airport required to make upgrades to its collection and/or treatment system to meet the option would be starting from a baseline of zero collection and treatment. Note that this assumption does not carry through to pollutant removals, as baseline removals are accounted for when assessing pollutant removals associated with today's options. See section VI.B for more detail on the pollutant removal calculations.

EPA first established existing conditions for each model airport based on information and site plans submitted as part of the airport questionnaire. EPA then determined what upgrades, if any, would be required to comply with an option. As explained above, in general, when an airport lacked a comparable collection system to the one used as the basis for the option, EPA included costs for installation/implementation of the option technology basis such as plug and pump systems in conjunction with GCVs and an AFB treatment system for Option 1.

For those airports that would be required to collect additional ADF and meet associated discharge requirements to comply with the option, EPA estimated costs for storage/equalization (and associated piping to transfer collected ADF to storage) as part of the costs of the treatment technology. The option would not require, nor is it based on, collecting the full volume of wastewater generated in a deicing season. Rather, storage is included as part of the technology basis for flow and/or pollutant equalization to support the AFB treatment system. Where EPA estimates an airport would incur capital costs associated with ADF collection and discharge requirements, the Agency included costs for above-ground storage tanks, since above-ground storage tanks will have less of an impact on subsurface utilities, for which EPA does not have site-specific information. If airports needed to install below-ground storage tanks for operational reasons, this would likely be more expensive.

For the 15 airports that EPA anticipates would need to collect additional quantities of ADF-contaminated stormwater to comply with Option 1 or 2, EPA assumed these additional quantities would be discharged directly, thus requiring treatment to comply with the COD limitations. For example, for Option 1, this includes all airports that EPA estimates collect less than 40 percent of available ADF. Specifically, this includes those facilities that currently collect some portion of ADF-contaminated stormwater and subsequently discharge indirectly to a POTW or a centralized waste treatment (CWT) facility. EPA recognizes that an airport may decide to discharge to a POTW or CWT facility rather than directly discharge its wastewater. While this is likely a lower cost alternative in some cases, EPA did not assume that airports could discharge to a POTW or CWT, because the Agency does not have enough information about the capacity or willingness of a specific POTWs to receive these volumes of wastewater. To the extent that an airport selects this alternative, EPA may have over-costed the option.

Additionally, airports may have costs associated with permit application requirements or demonstrating compliance with Option 1 or 2, including assessing yearly ADF usage, determining ADF stormwater collection, system inspections, and COD monitoring. Monitoring requirements will continue to be determined by the permitting authority. However, for purposes of estimating monitoring costs associated with today's options, EPA assumed that airports that directly discharge collected ADF would take a 24-hour composite sample and analyze that for COD, and perform that analysis seven times per week for the duration the treated discharge occurs. EPA made a similar assumption for purposes of computing the weekly average effluent limitation (see the TDD for additional details). As a conservative estimate, EPA assumed a six-month discharge duration season for all modeled facilities.

4. Calculation of National Costs

EPA categorized all of the costs as either capital costs (one-time costs associated with planning or installation of technologies), or as operations and maintenance (O&M) costs (costs that occur on a regular ongoing basis such as monitoring or annual purchases of deicing materials). EPA amortized these capital costs over the lifespan of the capital improvement. For additional information on amortization, see the EA. Finally, EPA combined the amortized capital costs with the annual O&M costs to calculate the total annual cost of the option for that model facility.

EPA then utilized statistical weights assigned to each of the 149 model facilities to calculate a national estimated cost of complying with the option. Further discussion of all of the calculations discussed can be found in the TDD and in the EA.

B. Approach to Estimating Pollutant Reductions

1. Overview

The pollutants of concern associated with airfield and aircraft deicing and anti-icing chemicals are discussed in Section 6 of the TDD. These chemicals commingle with stormwater and may be discharged to the environment. These discharges are of environmental concern because the biodegradation of deicing chemicals results in oxygen depletion in the receiving water body. Moreover, some of these pollutants, such as ammonia, have toxic properties.

Pollutant loadings from airport deicing operations are challenging to estimate because they are highly variable and airport-specific. Because the use of deicing and anti-icing chemicals is weather dependent, the pollutant loadings at each airport vary based on weather conditions. The pollutant loadings also vary from airport to airport based on each airport's climate. In addition, the amount of applied chemical that is discharged to surface water is airport-specific, based on the existing stormwater separation, collection, and/or containment equipment present at each airport.

Due to the variable nature of these pollutant loads, EPA developed a baseline (or current) pollutant loading methodology based on the usage of ADF and airfield chemicals at the airports responding to the survey questionnaires. The methodology takes into account EPA's existing data sources and provides a better estimate of the loadings than those based on sporadic monitoring data alone. Similar to the costing methodology, EPA developed facility-specific baseline loads for a subset of the industry (*i.e.,* model facilities). For those model airports where existing practices would not lead to compliance with today's options, EPA then calculated the incremental pollutant removals associated with compliance. EPA subsequently adjusted the incremental pollutant removals upward to estimate the entire affected airport population. This approach is the same as the approach taken in the proposal.

2. Sources and Use of Available Data

While developing the pollutant loading models, EPA considered the following data sources:

- Pavement deicing chemical usage/purchase information for the 2002/2003, 2003/2004, and 2004/2005 deicing seasons, as reported by airport authorities in the Airport Deicing Questionnaire.
- ADF purchase information for the 2002/2003, 2003/2004, and 2004/2005 deicing seasons, as reported by air carriers in the Airline Deicing Questionnaire.
- Standard airport information available from the FAA and the Bureau of Transportation Statistics, including the number of operations and departures by airport,
- Weather information for each airport from NOAA, including temperature, freezing precipitation, and snowfall data.
- Existing airport stormwater collection and containment systems, as reported by airport authorities in the Airport Deicing Questionnaire.
- Standard chemical information about ADF and pavement deicing chemicals, including molecular formulas and densities.
- Analytical data from EPA sampling episodes of airport deicing operations.

a. Baseline Loading Calculations

The Agency estimated the total amount of pavement deicing chemicals and ADF used based on data collected in the Airport and Airline Questionnaires. The Airport Questionnaire respondents reported the purchase/usage amount, concentration, and brand name of pavement deicing materials. Using the Airline Questionnaire, EPA collected ADF purchase data from airlines with 1,000 or more departures operating at selected airports. During questionnaire development, airports indicated they did not have information on ADF usage and that EPA should direct this question to airlines. Purchase data were collected because the airlines stated that purchase data were most readily available, while usage data was not. For the purposes of these loading calculations, EPA estimated that the annual amount purchased was equal to the amount used for a deicing season. For instances in which EPA did not have ADF purchase data for every airline operating at a particular model airport, EPA extrapolated the amount of ADF used by the reporting airlines to estimate the total amount of ADF used by the entire airport. This was done based on the number of airport operations (departures) at the reporting airlines versus the total number of airport operations. In addition to the 56 airports for which EPA collected ADF purchase/usage data from the airline tenants, 10 airports reported the total volume of their ADF usage to EPA in their comment section of the Airport Deicing Questionnaire, resulting in estimates of total ADF usage for 66 model airports.

Using the airline and airport ADF purchase and usage data obtained from the questionnaire, airport departure data, and climate data, EPA developed a relationship between the amount of ADF used, and the climate and size of each model airport. EPA then used this equation to estimate the total gallons of ADF used at model airports that did not have ADF usage data in the Airport or Airline Questionnaires. EPA is aware that part of the methodology for developing today's regulation involved estimating airport-specific ADF usage. However, in order to prevent mandatory survey responses marked as CBI from being released, EPA is not revealing the exact methodology for modeling this ADF usage due to the potential for the deduction of CBI data through back calculation.

Once the amount of ADF used at each model airport had been determined, EPA needed to determine the amount of ADF available for direct discharge to the waters. EPA assumed that 75 percent of applied Type I ADF falls onto the pavement at the deicing area and is available for discharge. EPA assumed that 10 percent of Type IV ADF falls to the pavement in the deicing area and is available for discharge; the remaining 90 percent adheres to the plane. See the TDD for more information on these estimates. EPA then multiplied the total amount of applied ADF for each model airport by the appropriate percent available for discharge to determine the amount of ADF available for discharge. Note that collection requirements in the options are specified as percentages of ADF available for discharge, not percentages of total ADF applied. Evaluating the amount of ADF available for discharge, coupled with the estimated baseline collection rate, results in the total amount of discharged

available ADF. EPA then calculated the amount of COD loading associated with these discharges, described as follows.

Airfield pavement deicing chemicals are applied at various airside locations such as runways, taxiways and ramps. Theoretically, the amount of pavement deicers being discharged could range from approximately 0 percent, for chemicals that infiltrate highly permeable soils in unpaved areas during a thaw, to virtually 100 percent for paved areas near storm drains. In general, soil in unpaved areas is frozen during deicing season and is impermeable, promoting the overland flow of stormwater and pollutants to surface waters. Estimating the amount or proportion of pavement deicers discharged at a particular airport is difficult without performing a detailed study at the airport. EPA has not received any such detailed studies, nor other information from airports indicating that pavement deicers are absorbed into soil during the deicing season. Therefore, the Agency assumed for this rulemaking that 100 percent of the pavement deicers used could be discharged to surface waters.[3] This means the estimates of baseline pollutant loadings and removals associated with pavement de-icing are upper bound estimates. EPA then calculated the amount of COD loading associated with airfield chemical use and discharge as described below.

To calculate the COD loading associated with either ADF or airfield chemical discharge, EPA determined the theoretical oxygen demand (ThOD) associated with the degradation of each of the deicing chemicals. EPA based the ThOD estimate on the molecular formula of the chemical and the stoichiometric equation of the breakdown of the chemical to the end products of CO_2 and water. EPA assumed that the chemical would completely degrade in the environment over time and, therefore, the calculated ThOD load would be equivalent to the COD load. EPA estimated the COD load associated with each reported chemical based on the calculated mass of the chemical discharged, the molecular weight of the chemical, the ThOD, and the molecular weight of oxygen. EPA estimated the ammonia load associated with deicers containing urea based on the chemical equation for the breakdown of urea to ammonia, the mass of urea use, and the molecular weights of urea and ammonia. See Section 9 of the TDD for more information and example calculations of baseline loadings associated with ADF and airfield deicers.

b. Calculation of Pollutant Removals

After determining baseline loadings, EPA calculated total reductions of COD and ammonia associated with a national implementation of today's options.

i. Aircraft Deicing Related Pollutant Removals

EPA estimated the amounts of COD that would be reduced by Option 1 and 2, by estimating the existing baseline loadings associated with aircraft deicing at model airports and comparing that to the COD load that would be discharged after complying with the option (*e.g.,* for Option 1, COD load discharged if 40 percent of available ADF were collected and treated to meet the required discharge limitation). If a particular airport would be subject to a collection requirement of 40 percent under this option and is currently estimated to collect a greater proportion of available ADF, then no load removals were estimated for that airport.

ii. Airfield Deicing Related Pollutant Removals

EPA calculated ammonia and COD baseline loads for those model facilities using deicers containing urea. The Agency then calculated ammonia and COD loads for those same model facilities if they replaced their deicers containing urea with the substitute product, potassium acetate (which does not form ammonia and exerts a lower COD than urea). EPA computed the total load reduction by subtracting the ammonia and COD loadings between the baseline and the regulatory compliance conditions.

iii. National Extrapolation

These calculated loading reductions, summed for both airfield and aircraft deicing chemicals, as applicable, were then extrapolated by multiplying the pollutant removals for each model facility by the airport survey weighting factors to determine national loads for the entire industry for each regulatory option considered for today's rule.

C. Approach to Determining Long-Term Averages, Variability Factors, and Effluent Limitation Guidelines and Standards

This section describes the statistical methodology used to develop the daily maximum and the maximum for weekly average NSPS representing the BADCT levels of control for COD. EPA also used the same statistical methodology to develop the daily maximum limitation/standard for ammonia that is a compliance alternative when deicers containing urea are applied to runways. The following discussion uses the term ''limitation'' to collectively refer to effluent limitations guidelines and NSPS.

The following sections describe the data selection criteria, the statistical percentile basis of the effluent limitations, rationales for certain limitations, the calculations, the recommended long-term average value for treatment operations, and the engineering evaluation of the model technology's ability to achieve the levels required by the limitations.

1. Criteria Used To Select Data as the Basis of the Limitations

Typically, in developing effluent limitations for any industry, EPA qualitatively reviews all the data before selecting the appropriate data to use for calculating the limitations. EPA typically uses four criteria to assess the data. One criterion generally requires that the influent and effluent represent only wastewater from the regulated operations (*e.g.,* deicing), and do not include wastewater from other sources (*e.g.,* sanitary wastes). A second criterion typically ensures that the pollutants were present in the influent at sufficient concentrations to evaluate treatment effectiveness. A third criterion generally requires that the facility must have the technology and demonstrate proper operation of the technology. A fourth criterion typically requires that the data cannot represent periods of treatment upsets or shutdown and start-up periods. Shutdown periods can result from upset conditions, maintenance, and other atypical operations.

EPA has adapted the application of the fourth general criterion for data corresponding to start-up periods to reflect some unique characteristics of treating discharges from aircraft deicing operations. Most industries incur start-up conditions only during the adjustment period associated with installing new treatment systems. During this acclimation and optimization process, the concentration values tend to be highly variable with occasional extreme values (high and low). After this initial adjustment period, the systems should operate at steady state for years with relatively low variability around a long-term average. Because start-up conditions reflect one-time operating conditions, EPA

[3] As a point of clarification, in contrast to the NSPS requirements for aircraft deicing where an airport is only required to meet the standards for a portion of the applied deicing chemical, this means that an airport that elects to comply with today's BAT or NSPS requirements by meeting the ammonia limitation must meet this limitation for all airfield deicer that is discharged.

generally excludes such data in developing the limitations. In contrast, EPA expects airports to encounter start-up operations at the beginning of every deicing season because they probably will cease treatment operations during warmer months. Because this adjustment period will occur every year for the Airport Deicing Category, EPA has included start-up data in the data set used as the basis of the limitations. However, through its application of the other three criteria, EPA excluded extreme conditions that do not demonstrate the level of control possible with proper operation and control even during start-up periods. For detailed information on these exclusions, see Section 14 of the TDD.

In part, by retaining start-up data for the limitation's development, the limitations will be achievable because EPA based these limits on typical treatment during the entire season. As a point of clarification, once acclimated, EPA expects a typically well-designed and operated system for the collected deicing fluid to run continuously until the end of the deicing season, as facilities utilize storage/equalization prior to the AFB to manage a steady flow rate.

2. Data Used as Basis of the Effluent Limitations

As explained in Section 8 of the TDD, the technology basis for the COD numerical limitations associated with discharges of collected ADF wastewater is AFB biological treatment. Of the effluent data available to EPA, 2,562 concentration values for COD met the requirements in the criteria described above and are the basis of the COD final NSPS. The concentration values are measurements of filtered effluent collected from Albany Airport's two-unit anaerobic treatment system. The 2,562 COD values were collected by the airport during its daily monitoring of COD over ten deicing seasons (December 1, 1999 through April 10, 2009).

Product substitution is the basis for today's effluent limitation regarding airfield deicing chemicals. EPA also established ammonia discharge limitations as a compliance alternative. Ammonia naturally occurs in airport discharges as a result of excretions from wildlife that enter the stormwater; therefore, EPA determined it would not be appropriate to set this limitation at the non-detect level. Moreover, depending on a specific airports' drainage system, a portion of airfield deicing stormwater may be routed to the treatment system utilized in treating the collected ADF. Further, the AFB that has been identified as the basis for the NSPS requirement for treating collected ADF will itself produce ammonia discharges as a byproduct of treatment. Therefore, where airfield deicing stormwater that is free of urea contamination is routed through the AFB treatment system, the discharge after treatment may have ammonia concentrations higher than the non-detect level (see DCN AD00842). Consequently, EPA used ammonia effluent discharge data from the same AFB system it used to establish NSPS discharge requirements for ADF, located at Albany, to establish today's ammonia compliance alternative. Five ammonia concentration values available from Albany met the limitations criteria described above. The five ammonia values were collected by EPA during its sampling episode (February 5 through February 9, 2006).

3. Statistical Percentile Basis for Limitations

EPA uses a statistical framework to establish limitations that well-operated facilities are capable of complying with at all times. According to EPA, well-operated facilities are those that represent the BAT/BADCT level of control. Statistical methods are appropriate for dealing with effluent data because the quality of effluent, even in well-operated systems, is subject to a certain amount of variability or uncertainty. Statistics is the science of dealing with uncertainty in a logical and consistent manner. Statistical methods, together with engineering analysis of operating conditions, therefore, provide a logical and consistent framework for analyzing a set of effluent data and determining values from the data that form a reasonable basis for effluent limitations. Using statistical methods, EPA has derived numerical values for its daily maximum limitations and weekly average limitations.

The statistical percentiles upon which the limitations are based are intended to be high enough to accommodate reasonably anticipated variability within control of the facility. The limitations also reflect a level of performance consistent with the CWA requirement that these limitations be based on the best available technologies (or BADCT for new sources), including proper operation and maintenance of these technologies.

In establishing daily maximum limitations, EPA's objective is to restrict the discharges on a daily basis at a level that is achievable for an airport that targets its treatment system design and operation at the long-term average while allowing for the variability around the long-term average that results from a well-operated system. This variability means that at certain times airports may discharge at a level that is greater than the long-term average. This variability also means that airports may at other times discharge at a level that is lower than the long-term average. To allow for possibly higher daily discharges, EPA has established the daily maximum limitation at a relatively high level (*i.e.,* the 99th percentile). EPA has consistently used the 99th percentile as the basis of the daily maximum limitation in establishing limitations for numerous industries for many years; numerous courts have upheld EPA's approach. EPA typically establishes limitations based upon statistical percentile estimates and has done so for the weekly average limitation in today's final rule. In its derivation of the weekly average NSPS for COD, EPA used an estimate of the 97th percentile of the weekly averages of the daily measurements. This percentile basis is the midpoint of the percentiles used for the daily maximum limitation (*i.e.,* 99th percentile of the distribution of daily values) and the monthly average limitation (*i.e.,* 95th percentile of the distribution of monthly average values). Courts have upheld EPA's use of these percentiles, and the selection of the 97th percentile of a weekly average of the daily measurements is a logical extension of this practice. Compliance with the daily maximum limitation is determined by a single daily value; therefore, EPA considers the 99th percentile to provide a reasonable basis for the daily maximum limitation by providing an allowance for an occasional extreme discharge. Because compliance with the monthly average limitation is based upon more than one daily measurement and averages are less variable than daily discharges, EPA has determined that facilities should be capable of controlling the average of daily discharges to avoid extreme monthly averages above the 95th percentile. In a similar manner to the monthly average limitation, compliance with the weekly average limitation also would be based upon more than one daily measurement. However, the airport would monitor for a shorter time and thus would have fewer opportunities to counterbalance highly concentrated daily discharges with lower ones. Consequently, EPA has determined that the 97th percentile is an appropriate basis for limiting average discharges on a weekly basis. EPA considers the use of the 97th percentile for the weekly average limitation a level

that is achievable for airports using the model technology. EPA also considers this level of control in avoiding extreme weekly average discharges to be possible for airports using the model technology.

4. Rationale for Establishing Limitation on Weekly Averages Instead of Monthly Averages for COD in Effluent Discharges

From a monitoring perspective, EPA considers the weekly average standard to be a better fit than the monthly average standards for the deicing discharges. In this situation, the weekly average standard would apply to every week that the treatment system operates during the deicing season. A weekly average standard preserves EPA's intention for an additional restriction beyond the daily maximum standard that supports its objective of having airports control their average discharges at the long-term average level.

When EPA establishes monthly average standards, EPA's objective is to provide an additional restriction to help ensure that facilities target their treatment systems to achieve the long-term average. The monthly average standard requires facilities to provide ongoing control that complements controls imposed by the daily maximum standard. To meet the monthly average standard, a facility must counterbalance a value near the daily maximum standard with one or more values well below the daily maximum standard. To achieve compliance, these values must result in a monthly average value at or below the monthly average standard.

The deicing season is unlikely to start at the beginning of a calendar month and close exactly at the end of a calendar month. This means that the facility would be monitoring at a reduced frequency during those two months. Increasing or decreasing monitoring frequency does not affect the statistical properties of the underlying distribution of the data used to derive the standard. However, monitoring less frequently theoretically results in average values that are more variable. For example, monthly average values based on 10 monitoring samples per month would be (statistically) expected to include some averages that are numerically larger (as well as some that are numerically smaller) than monthly average values based upon 20 monitoring samples. Because of this reduced monitoring, an airport might have trouble in complying with the monthly average standard even with an otherwise well-operated and controlled system. In other words, because it was not monitoring as frequently, the airport would have fewer opportunities to counterbalance high concentrations with lower values.

5. Rationale for Promulgating a Limitation Only for Daily Discharges of Ammonia in Effluent Discharges

Unlike the COD limitations, EPA believes that it is appropriate to rely only on a daily maximum limitation to ensure that airports appropriately control ammonia levels. As explained above, the technology basis for the COD effluent standards is a well operated and controlled AFB system whereas the technology basis for the ammonia limitation is product substitution. It is well documented that during start up, biological treatment systems, such as AFB, may require several days to acclimate the microorganisms. Once acclimated, well-operated and controlled AFB systems operate continuously (typically by managing a steady flow from their equalization tank). If the system only operated during storm events, it would have difficulties stabilizing and achieving the performance levels necessary to comply with the COD standards.

In contrast, with product substitution, the operator could consider the conditions associated with each storm event, and then decide whether to use urea. If the operator chose to use urea rather than product substitution, the operator would have to determine its approach for meeting the ammonia limitation. Anaerobic systems, such as AFB systems, would not be a good candidate because they generate, rather than treat, ammonia. However, depending on a specific airport's drainage system, a portion of airfield deicing stormwater may be routed to the treatment system utilized in treating the collected ADF. For this reason, by using the ammonia data from the AFB system which was preceded by product substitution for urea, EPA created an allowance for such situations. Because the choice to use urea or product substitution can vary on a daily basis, EPA has established only the daily maximum limitation for ammonia. Additionally, EPA expects airports to select product substitution (*i.e.,* non-urea deicers) rather than the compliance alternative that requires collection and treatment of runway deicing contaminated stormwater. Thus, it is possible that no airports will be subject to any limitation on ammonia discharges.

6. Calculation of Limitations for COD and Ammonia

For COD, EPA used nonparametric statistical methods to estimate the percentiles used as the basis of the daily maximum and weekly average standards. A simple nonparametric estimate of a particular percentile (*e.g.,* 99th) of an effluent concentration data set is the observed value that exceeds that percent (*e.g.,* 99 percent) of the observed data points.

For the daily maximum standard for COD, EPA used the nonparametric method to derive a 99th percentile of the more than 1,200 daily measurements for each unit, and then set the standard equal to the median of the two 99th percentile estimates, or 271 milligrams per liter (mg/L). The median is, by definition, the midpoint of all available data values ordered (*i.e.,* ranked) from smallest to largest. In this particular case, because there are two units, the median is equal to the arithmetic average (or mean).

For the weekly average standard of COD, EPA first calculated, for each unit, the arithmetic average of the measurements observed during each week, excluding weekends. EPA then used the nonparametric method to derive a 97th percentile of the more than 200 weekly averages for each unit, and set the standard equal to the median of the two 97th percentile estimates, or 154 mg/L.

For ammonia, EPA used a parametric approach in estimating the 99th percentile based upon the data collected during EPA's five-day sampling episode. The calculations assume the ammonia concentrations can be modeled by a lognormal distribution. EPA's selection of parametric methods, such as a model based on the lognormal distribution, used in developing limitations for other industries is well documented (*e.g.,* Iron and Steel [40 CFR part 420], Pulp, Paper and Paperboard [40 CFR part 430], and Metal Products and Machinery [40 CFR part 438] categories). Variance estimates based upon parametric methods can be adjusted for possible biases in the data. The limitation of 14.7 mg/L includes such an adjustment for possible bias from positive autocorrelation. When data are positively autocorrelated, it means that measurements taken close together in time (such as one or two days apart) are more similar than measurements taken further apart in time, such as a week or month apart. The adjusted variance then better reflects the underlying variability that would be present if the data were collected over a longer period.

7. Derivation of Long-Term Average for COD and Ammonia: Target Level for Treatment

Due to routine variability in treated effluent, an airport that discharges consistently at a level near the values of

the daily maximum standard or the weekly average standard, instead of the long-term average, may experience frequent values exceeding the standards. For this reason and as noted previously in this section, EPA recommends that airports design and operate the treatment system to achieve the long-term average for the model technology. Thus, a system that is designed to represent the BADCT level of control will be capable of complying with the promulgated standards.

For COD, EPA recommends that airports target treatment systems to achieve the long-term average value of 52.8 mg/L, which is the median of the two averages, of 52.28 mg/L and 53.40 mg/L, of the daily values from the two units. The daily allowance for variability, or the ratio of the standard to the long-term average, is 5.13. EPA usually refers to this allowance as the ''variability factor.'' In other words, the daily maximum standard of 271 mg/L is about five times greater than the long-term average achievable by the model technology. The weekly variability factor is 2.92.

For ammonia, EPA derived its recommended long-term average value of 5.24 mg/L from the statistical expected value of the lognormal distribution. The daily maximum limitation of 14.7 mg/L is about three times greater than the long-term average, of 5.24 mg/L, achievable by the ADF treatment model technology. Ammonia is generated as a byproduct of the model technology, and EPA expects the concentrations of ammonia to have similar variability to what is being treated (*i.e.,* COD).

8. Engineering Review of Effluent Limitations

In conjunction with the statistical methods, EPA performs an engineering review to verify that the limitations are reasonable based upon the design and expected operation of the control technologies and the facility conditions. During the site visit and sampling trip at the Albany treatment plant, EPA confirmed that the airport used the model technologies, specifically AFB. EPA subsequently contacted the plant personnel to obtain more information about the installation and operation of the model technologies. EPA used this engineering information to select the subset of data from which to develop the effluent limitations.

As part of this engineering review, EPA concluded that the values of the limitations were consistent with the levels that are achievable by the model technologies. Next, EPA compared the value of the effluent limitations to the data values used to calculate the limitations. None of the data selected for ammonia were greater than its daily maximum limitation, which supports the engineering and statistical conclusions that the limitation value is appropriate. Because of the statistical methodology used for the COD standards (*i.e.,* use of percentiles), some values were appropriately greater than the standards. See Section VI.C.3. Even though EPA would expect this statistically, EPA looked at the values that exceed the standards from an engineering perspective. EPA wanted to ensure there were no underlying conditions contributing to such exceedances. In particular, EPA looked at deicing season, influent concentrations, and start-up operations. In evaluating the impact of the deicing seasons, EPA concluded that the higher values did not seem to be predominant in any one season. In particular, the higher values occurred one to seven times in each of eight seasons. In evaluating influent concentrations, EPA found that influent concentrations were generally well controlled into the treatment plant. In general, the treatment system adequately treated even the extreme influent values, and the high effluent values did not appear to be the result of high influent discharges. In considering start-up operations, EPA noted that the higher values occurred in every month from December through May, except in April, and, thus, the standards appear to provide adequate allowance for start-up operations.

VII. Economic Analysis

A. Introduction

EPA's EA assesses the costs and impacts of the regulatory options considered today on the regulated industry. This section explains EPA's methodology and the results of its EA. With one exception, all costs, airport counts and other results in this section are presented using sample weights to expand results from the surveyed airports to represent the entire population of airports potentially affected by the rule. The single exception, the results of the debt service coverage analysis, is clearly marked as ''unweighted.'' In addition, all cost figures are presented in 2006 dollars.

B. Annualized Compliance Cost Estimates

EPA considered three regulatory options for today's final rule. Under all of these options, airports subject to BAT or NSPS would have requirements with respect to airfield deicing stormwater (certify no use of airfield deicing products that contain urea, or airfield pavement discharges must achieve a numeric limit for ammonia). EPA estimates that 198 existing airports—those that perform deicing operations with at least 1,000 annual non-propeller aircraft departures—are subject to the airfield deicing requirements.[4] In addition, for two of the options, a subset of those airports—airports with annual normalized ADF usage equal to or exceeding 60,000 gallons per year (55 airports)—would also need to meet requirements related to wastewater from aircraft deicing (ADF collection and COD discharge limitations). The regulatory options that EPA considered differ in the level of ADF collection required for aircraft deicing at existing airports. Option 1 would require 40 percent collection and treatment for all airports with at least 60,000 gallons of annual normalized ADF usage. Option 2 would set a two-tier requirement: 20 percent collection and treatment for airports with at least 60,000, but less than 460,000 gallons of annual normalized ADF usage, and 40 percent collection and treatment for airports with at least 460,000 gallons of annual ADF usage. Under Option 3, aircraft deicing discharge BAT limitations would continue to be established by the permitting authority on a case-by-case basis. Under all three options, new airports with at least 10,000 annual departures and located in an area with at least 3000 HDDs would also have to collect 60% of ADF available for discharge and store and treat this effluent to meet a COD effluent limit. For both new and existing airports with deicing discharges that do not meet the NSPS airfield or aircraft pavement applicability requirements, limitations would continue to be set by the permitting authority on a case-by-case basis using BPJ.

EPA selected Option 3 for promulgation in this final rule. EPA estimates the technologies identified in this notice to comply with the BAT limitations will cost existing airports $3.5 million annually. EPA has not estimated the cost for compliance with the NSPS, but separately discusses the potential for the NSPS to pose a barrier entry in section VII.E below.

[4] Because many airports do not meet the applicability criteria, EPA estimates that approximately 184 primary airports, 135 non-primary airports, and almost 3,000 general aviation airports are not required to meet the BAT effluent limitations guidelines and NSPS, but rather would be subject to site-specific BAT and NSPS requirements set on a best professional judgment basis.

In estimating costs associated with Option 1 and Option 2, EPA projects the effective service life of GCVs and block-and-pump technologies to be 10 years; all other components necessary to meet the options have an effective service life of 20 years. Therefore, EPA selected a 20-year analytic period and incorporated replacement capital expenditures in year 10, in addition to the initial capital expenditure. For example, EPA estimated total capital costs to include all initial and replacement capital expenditures for GCV and plug-and-pump for Option 1. However, because the replacement capital expenditures occur 10 years after promulgation, the discounted present value (PV) of those expenditures is less than their current value.

EPA uses 3 percent and 7 percent interest rates for two purposes. First, the interest rates are used to discount future capital replacement costs required when the 20-year analytic period exceeds the effective service life of a technology. Second, the interest rates represent the opportunity cost of capital to industry, and, thus, essentially the interest rate the industry may be charged if the industry borrows money.

EPA discounted and annualized the stream of capital costs projected to be incurred by industry over 20 years using two different discount rates, 3 percent and 7 percent, in accordance with EPA and OMB guidance (''Economic Analysis of Federal Regulations under Executive Order 12866,'' January 11, 1996). The PV of capital costs under the final rule over the 20-year analytic period is $6.02 million based on the discount rate of 3 percent, and $5.27 million using the 7 percent rate.

The annual cost of operating and maintaining the technologies identified as BAT for deicing for this final rule is estimated at $3.04 million. Adding this O&M cost to the annualized capital costs, the rule has aggregate national costs of $3.43 million per year using a 3 percent discount rate and annualized costs to industry of $3.5 million using a 7 percent rate (in 2006 dollars). Table VII–1 presents projected costs for the final rule, as well as the other option examined.

TABLE VII–1—COSTS TO EXISTING AIRPORTS THAT DEICE AIRCRAFT AND AIRFIELD PAVEMENT

[2006 $million—198 airports (weighted)]

Option	Total capital costs	Present value of capital costs	Annualized capital costs	Annual O&M costs	Total annualized compliance costs
3 Percent Real Discount Rate					
1	$319.9	$309.0	$20.2	$52.0	$72.1
2	250.3	243.7	15.9	28.4	44.3
3[a]	6.83	6.02	0.39	3.04	3.43
7 Percent Real Discount Rate					
1	319.9	299.0	26.4	52.0	78.4
2	250.3	237.6	21.0	28.4	49.4
3[a]	6.83	5.27	0.46	3.04	3.50

[a] Selected option.

C. Economic Impact Methodologies

For the purposes of the economic impact analysis, the distinguishing feature of airports that makes the analysis different from more traditional analyses EPA would perform for a for-profit manufacturing industry, is that all potentially affected airports are publicly owned and operated by local, county, or state governments, or by quasi-governmental authorities created to operate the airport. As governmental or quasi-governmental entities, airports do not earn a profit or loss in the traditional financial sense; in fact, many airports have been operated with the expectation that they will break even financially, with the airlines that use the airport legally required to cover expenditures in excess of budgeted costs.

Airlines may also be impacted by today's rulemaking. In the vast majority of cases, airlines are not directly subject to today's requirements. In such cases, impacts to airlines are considered secondary impacts. Historically, EPA determines economic achievability based on primary or direct impacts only (*i.e.,* impacts to NPDES permit holders directly subject to ELG requirements) and does not evaluate secondary impacts. At the time of the proposal, EPA elected to evaluate secondary impacts to airlines because of the unique contractual relationship between airports and airlines, because airlines are the entities that use ADF, and because airlines are occasionally co-permittees (but never the principal permittee) at an airport.

In a revision from the proposal and consistent with past effluent guideline economic achievability analyses, for today's final rule, EPA determined economic achievability based on primary or direct impacts only. EPA returned to its historical approach of evaluating economic achievability based on only primary impacts (here, impacts on airports and airline co-permittees) for today's final rule because the Agency concluded that ultimately these entities will be responsible for incurring the costs and associated impact of any additional regulation.

In the analyses described below, EPA first evaluates the economic achievability of the options assuming all costs are borne by airports, and the summaries of impacts to airports are based on that assumption. EPA also presents an analysis that shares compliance costs between affected airports and their co-permittee airlines, as applicable. Therefore, impacts to co-permittee airlines presented as follows are not in addition to the impacts to airports. To the extent that airports share costs with co-permittee airlines according to EPA assumptions, the costs and impacts to airports are reduced. This analysis is described in detail in the rulemaking record DCN AD01280. The following text describes the methodology and the results EPA used to evaluate economic impact associated with the three regulatory options considered for today's final rule, both under the assumption that airports incur 100 percent of compliance costs, and

the assumption that airports share compliance costs with co-permittee airlines.

1. Cost Annualization

Cost annualization is the first step in projecting the economic and financial impacts of the regulatory options rule. EPA projected the capital and operating and maintenance costs of the three regulatory options for each airport, then annualized those costs over 20 years. The method for estimating each airport's capital and operating costs is described in Section VI.A.

EPA used airport-specific interest rates based on recent General Airport Revenue Bonds (GARBs) issued to annualize compliance costs for the proposed rule. Based on public comments arguing that EPA underestimated the cost of capital to airports, EPA used a higher real interest rate of 7 percent to annualize airport capital costs for the final rule. However, EPA believes many airports will issue tax-exempt GARBs to fund capital expenditures. To the extent that airports use GARBs, the use of GARBs will lower the cost of capital, and reduce impacts to the financial health of the airports. EPA does not assume that airports will be able to fund capital expenditures using Airport Improvement Program (AIP) grants or Passenger Facility Charges (PFCs) because such funds are likely to already be committed to airport projects into the foreseeable future. However, to the extent that airports might use AIP or PFC funds for capital expenditures associated with this rule, it will also lower the cost of capital, and reduce impacts to the financial health of the airports relative to what EPA has projected in its analysis.

2. Airport Impact Methodology

Because all in-scope airports are nonprofit government or quasi-government entities (*e.g.,* port authorities), the effect of an effluent guideline on airport income statements and balance sheets is not best measured by a traditional closure analysis. Therefore, EPA chose to examine the financial impacts of the regulatory options using two measures. First, EPA compared total annualized compliance costs with airport revenues. Second, because many airports fund capital expenditures using debt financing, EPA examined the impact of additional debt on each airport's debt service coverage ratio (DSCR).

a. Revenue Test

EPA's ''Guidelines for Preparing Economic Analyses'' (2010) recommends the ''revenue test'' as a measure for impacts of programs that directly affect government and not-for-profit entities. EPA finds that the revenue test is appropriate in this case. The revenue test compares the total annualized compliance costs of each regulatory option with the revenues of the governmental entities. Although the current Guidelines do not specify the use of one and three percent for the revenue test, EPA's 2000 Guidelines did specify that use, and the Agency's analysis for the proposed rule followed that guidance; EPA applied the same test here.

The 2000 Guidelines suggest evaluating the affordability of a regulatory option as follows:

- If total annualized compliance costs are less than 1 percent of revenues, the option is generally considered affordable for the entity.
- If total annualized compliance costs are greater than 3 percent of revenues, the option is generally considered not affordable for the entity.

EPA used operating revenue as reported on Form 127 of the FAA's Airport Financial Reporting Program as the denominator for the revenue test ratio, and total annualized compliance costs as described under Cost Annualization as the numerator for the ratio.

Industry commenters on the proposed rule objected that the revenue test is too simplistic. EPA disagrees, and moreover, industry commenters were unable to provide any alternative test that would more accurately project economic impacts on the industry. Some industry commenters suggested that EPA examine different, more narrowly defined ratios, such as the ratio of compliance costs to aeronautical revenues, or the incremental cost per enplaned passenger. EPA did not choose to replace the revenue test with one of these variants because EPA determined that total operating revenues are the appropriate denominator for the test; the sole purpose of the airport is to support air transportation services. Landside revenues raised through parking, retail, and food concessions, for example, are not designed to provide a revenue stream to support the provision of a different service or product, but to allow airports to accumulate revenue from non-airline sources. Thus, the intent of these revenue streams is also to support the provision of air transportation services and is therefore a component of an airport's resources relevant to its implementation of these effluent limitation guidelines. Furthermore, industry commenters offered no suggestions for alternative thresholds for finding airport impacts, and, in fact, acknowledged that such thresholds do not exist in the case of their recommended incremental cost per enplaned passenger test. EPA did, however, perform several of these alternative tests as sensitivity analyses and determined that the resulting projections of economic impacts to the industry did not differ qualitatively from those under the revenue test analysis.

b. Debt Service Coverage Ratio

When creating quasi-governmental agencies such as port authorities, the legislation that created the agency typically includes a lower limit on the authority's DSCR. Airports owned and operated directly by a state or local government might also have direct limits on airport debt (if the airport has authority independent of the city or county government to incur debt). The authority will be in default on its debt if the DSCR falls below the relevant benchmark. A review of Comprehensive Annual Financial Reports for affected airports shows that generally the ratio of net revenues to debt service for any given year cannot fall below 1.25. Therefore, EPA estimated the impact debt financing will have on the post-regulatory DSCR for each airport incurring capital expenditures under each regulatory option.

Using the Airport Questionnaire responses, EPA collected each airport's current DSCR, and the net revenues and debt service used to calculate that ratio. For airports that belonged to multi-airport systems under the same ownership, DSCR was reported at the level of the entire system. Therefore, for each regulatory option, EPA aggregated compliance costs for all affected airports in the system, and performed a single calculation for the post-regulatory DSCR.

Some evidence suggests airports will pass on less than 100 percent of costs, at least in the short run, if there is concern an airline might withdraw service if the airport increases fees too much. This might occur if the airport has nearby competitors, or if airline finances are fragile. EPA wanted to determine if an airport would be in danger of default on its debt even if it was unable to pass through compliance costs to its airline customers. Thus, the Agency calculated post-regulatory DSCR in two ways: (1) Assuming costs are passed through to airlines in the form of higher landing fees, and (2) assuming no costs are passed through.

In the baseline, the DSCR is calculated by dividing airport net revenues by airport debt service. Assuming 100 percent cost pass-through

from airports to airlines, EPA estimated the post-regulatory DSCR of each regulatory option by: (1) Assuming zero change in airport net revenues in the numerator (more precisely, EPA assumes that annual increase in landing fees are exactly equal to incremental annual deicing costs, thus leaving net revenues unchanged), and (2) adding the annualized value of capital compliance costs to debt service in the denominator. The DSCR decreases even when assuming 100 percent cost pass-through; although the value of the numerator is unchanged, the denominator increases by the amount equal to annualized capital cost, decreasing the value of the ratio.

Assuming no cost pass-through from airports to airlines, EPA estimated the post-regulatory DSCR by for each regulatory option by: (1) Subtracting incremental annual deicing operating and maintenance costs from pre-regulatory airport net revenues in the numerator, and (2) adding the annualized value of capital compliance costs to debt service in the denominator. With zero cost pass-through, the numerator in the ratio decreases because incremental O&M costs are subtracted from existing revenues, while the denominator increases because incremental debt service is added to existing debt service; thus, the DSCR clearly falls.

All additional analyses, their methodologies, justifications, and results, are presented in the Economic Analysis (EA).

3. Co-Permittee Airline Impact Methodology

In response to public comment, EPA examined potential economic impacts to airlines that are directly subject to today's final regulation: those that are co-permittees on NPDES permits. EPA conducted analyses of impacts to airlines that are co-permittees at certain airports, under the assumption that co-permittee airlines would directly pay a share of the airport's compliance costs. EPA identified airline co-permittees through EPA's Airport Deicing Questionnaire, where airports had been asked to identify all co-permittees. While the questionnaire responses identified co-permittees, they did not provide any data or insight into how permit-related compliance costs are currently distributed to, and among, co-permittees, if at all. Although the general outlines of standard contractual relations between airports and airlines can be characterized (see section 2.8 of the EA), the inclusion of an airline on the airport's NPDES permit is not a common practice. In addition to reviewing information supplied in the questionnaires, EPA searched publicly available information, reviewed comment responses, and inquired of airline representatives on such relationships. Industry representatives did not provide EPA with information on these contractual relationships in the questionnaires or their comments on the proposed rule, nor did they provide this information to the Agency in pre-proposal meetings that were arranged to discuss the economic methodology of the rule. EPA was unable to gather any specific insight into these relationships or the distribution of compliance costs among the principal NPDES permit holder and its co-permittees. Thus, for purposes of this analysis, EPA assumed compliance costs would be distributed equally among the principal permittee (*i.e.,* airport) and its co-permittee airlines. EPA recognizes that some individual airports may incur a higher percentage of the compliance costs relative to their co-permittees and others may incur a lower percentage. However, for purposes of a national analysis, and with a lack of informative data, EPA finds a 50 percent distribution assumption to be reasonable.

EPA does not separately assign capital costs to airlines and annualize those costs using airline-specific costs of capital; it seems more likely that with responsibility for the physical site, the airport would take the lead and have those costs reimbursed by the co-permittees. Thus, EPA assigned 50 percent of the total annualized compliance costs collectively to the co-permittee airlines. For each model airport with co-permittees, EPA needed to determine how to apportion the co-permittee portion of the compliance costs to the individual co-permittees. As explained in previous text, EPA does not have data to determine if co-permittees currently incur any permit compliance-related costs, nor, if they do incur those costs, how they are distributed among co-permittees at individual airport locations. In the absence of specific information, EPA chose to attribute airport-specific compliance costs to each co-permittee based on its share of total landed weight at the airport. EPA chose this method because ADF usage should be roughly proportionate to the number and type of aircraft an airline typically uses at the airport, and therefore proportionate to the costs of collecting and treating that ADF. Share of landed weight can be considered a simple summary measure that reflects both relative usage and aircraft size. This approach is also consistent with how airports typically attribute airside operational costs to airlines. EPA then calculated an airline's total compliance costs by summing its airport-specific compliance costs over all airports at which the airline is a co-permittee. Finally, each airline's compliance costs were compared to its system-wide operating revenue, operating profit, and net income.

The comparison of one year's average annualized compliance costs with operating profit and net income is consistent with a typical economic impact analysis. In a typical economic impact analysis, EPA would project the affected entities' discounted compliance costs and cash flow over the period of analysis. If an entity's pre-regulatory discounted cash flow is positive, and its post-regulatory discounted cash flow is negative (*i.e.,* projected pre-regulatory discounted cash flow less discounted compliance costs), the entity would be projected to close as a result of the effluent guideline. EPA then typically examines economic achievability by looking at the total number of closures relative to the total number of in-scope companies. In this case, if average compliance costs in one year exceed average operating profit or net income for that year (*i.e.,* the ratio of compliance costs to operating profit or net income is greater than 100 percent), the airline can be projected to ''close'' as a result of the effluent guideline.

However, such an analysis is problematic for airlines for a number of reasons. First, a baseline closure, an entity with negative income prior to the promulgation of the effluent guideline, cannot be evaluated on the basis described above because the logic of that analysis requires that the entity's pre-regulatory income be greater than zero. As amply documented in the EA (and updated in DCN AD01285), the last decade has been financially difficult for the airline industry, and approximately half the U.S.-flag airlines incurring compliance costs as co-permittees under normal circumstances would be categorized as baseline closures and could not be analyzed by this standard.

Second, airlines have many options they can undertake in response to increased costs, short of going out of business. For example, airlines have the option to change service to a particular airport by increasing fares, decreasing service frequency, using different (typically smaller) aircraft, eliminating destinations flown to directly from that airport, or even eliminating service altogether to that airport.

To address the baseline closure issue, EPA included airline operating revenue as a third measure against which

compliance costs can be compared, along with operating profit and net income. The purpose of using operating revenue is solely because such a large proportion of the airline industry cannot be evaluated due to negative baseline operating profit and/or net income: 23 of 46 co-permittee airlines with financial data available have negative baseline operating profit, and 25 of 46 have negative baseline net income. Furthermore, classifying an entity as a baseline closure does not mean it will necessarily close; a business entity might earn negative operating profit or net income at some point in its financial history without closing permanently, and this appears to be particularly prevalent in the airline industry (see, for example, the Industry Profile in the EA). Rather than ignore roughly half of all co-permittee airlines, EPA chose to evaluate them using the ratio of compliance costs to operating profit to determine if the rule imposes costs that can be characterized as ''relatively small.'' The primary drawback of using operating revenue to measure economic impacts is that, unlike with operating profit or net income, there is no obvious threshold that determines what is economically achievable.

To respond to the issue of changing service levels at an airport, it would also be informative to perform, if possible, a closure analysis at the route level for each airline's routes associated with airports. However, EPA does not have airline financial data available, nor could it reasonably obtain airline financial data at either the route level or the airport level. Therefore, EPA must evaluate impacts to co-permittee airlines based on the only level at which airline financial data are available: their system-wide operations.

D. Results of Impact Analysis

1. Results of Airport Impact Analysis

a. Revenue Test Impact Results

Table VII–2 shows the projected financial impact of the regulatory options considered for today's rule based on the revenue test. Under Option 1, airports would incur $78.4 million in annualized costs (7 percent real interest rate), and 9 of the 198 airports (4.5 percent) are projected to incur costs exceeding 3 percent of operating revenue. Of the 198 BAT airports, 172 airports (87 percent) are projected to incur annualized compliance costs composing less than 1 percent of operating revenue. Under Option 2, airports would incur $49.4 million in annualized costs (7 percent real interest rate), and 5 of the 198 airports (2.5 percent) are projected to incur costs exceeding 3 percent of operating revenue. Of the 198 airports subject to BAT, 176 airports (89 percent) are projected to incur annualized compliance costs composing less than 1 percent of operating revenue. Under both Option 1 and Option 2, five airports incur costs but do not have airport-specific financial data because they are part of Alaska's Rural Aviation System (RAS), and therefore could not be analyzed. Under Option 3, airports would incur $3.5 million in annualized costs (7 percent real interest rate), and one of the 198 airports (0.5 percent) are projected to incur costs exceeding 3 percent of operating revenue. Of the 198 BAT airports, 190 airports (96 percent) are projected to incur annualized compliance costs composing less than 1 percent of operating revenue. Under Option 3, two airports incur costs but do not have airport-specific financial data because they are part of Alaska's RAS, and therefore could not be analyzed.

TABLE VII–2—FINANCIAL IMPACTS OF BAT OPTIONS ON AIRPORTS THAT DEICE

[2006 $million—198 airports (weighted)]

Option	Total annualized costs	Number of airports with ratio of annualized compliance costs to operating revenue of:			
		Less than 1%	Between 1% and 3%	Greater than 3%	Not analyzed [a]
1	$78.4	172	13	9	5
2	49.4	176	13	5	5
3 [b]	3.50	190	6	1	2

[a] Airports incurred compliance costs but are owned by the state of Alaska; financial impacts could not be analyzed because Alaska does not track revenue data for these airports.
[b] Selected option.

b. DSCR Impact Results

For multi-airport systems, the DSCR must be evaluated at the level of the owner, aggregating compliance costs incurred by all system airports. Thus, EPA analyzes entities owning single airports separately from multi-airport systems. Under today's final rule, among owners of single airports, none are projected to be in danger of default on its debt even if 0 percent of compliance costs are assumed to be passed through to airlines (see Table VII–3). EPA identified three multi-airport systems owning four airports projected to incur costs under the final rule (note these owners also owned other airports not projected to incur costs); the results presented in Table VII–4 show that today's final rule is projected to have no impact on the ability of multi-airport authorities to finance debt. EPA did not analyze impacts to the DSCR for the Alaska RAS (one system owning two BAT airports) because Alaska does not use debt financing to fund this system.

TABLE VII–3—IMPACT OF FINANCING BAT OPTIONS ON AIRPORT DEBT SERVICE COVERAGE RATIO—SINGLE AIRPORT OWNERS

[172 Airports (weighted)]

Option	Incur costs [a]	Not analyzed [a]	Owners with pre-regulatory DSCR > 1.25 and post-regulatory DSCR < 1.25	
			100% cost pass through	0% cost pass through
1	172	59	2	3
2	172	59	1	2
3 [b]	29	3	0	0

[a] Of 198 airports (weighted), each of the 172 airports was estimated to be both subject to BAT under Option 1 and Option 2 and the only airport controlled by its ownership. These columns represent the number of those 172 airports projected to incur costs under each option, and of those airports incurring costs, the number that cannot be analyzed due to lack of sufficient data. Under Option 3, 29 airports incur costs under BAT; three of which cannot be analyzed due to lack of sufficient data.

[b] Selected option.

TABLE VII–4—IMPACT OF FINANCING BAT OPTIONS ON AIRPORT DEBT SERVICE COVERAGE RATIO—MULTI AIRPORT OWNERS

[Nine airport authorities owning 21 in-scope airports (unweighted) [a]]

Option	Incur costs [b]		Not analyzed [b]		Owners with pre-regulatory DSCR > 1.25 and post-regulatory DSCR < 1.25	
	Owners	Airports	Owners	Airports	100% cost pass through	0% cost pass through
1	9	21	1	5	0	0
2	9	21	1	5	0	0
3 [c]	3	4	0	0	0	0

[a] Some airports that are part of a multi-airport system have a sample weight greater than one; because airports were not sampled based on ownership patterns, it is not appropriate to use the sample weight in this analysis. The results cannot be extrapolated to represent any airports and their ownership patterns other than themselves.

[b] EPA found nine distinct airport authorities owning 21 airports that were determined to be subject to BAT under Options 1 and 2. These columns represent the number of airport owners and the number of airports they owned that are projected to incur costs under each option, and of those owners and airports incurring costs, the number that cannot be analyzed due to lack of sufficient data. Four airports owned by three airport systems incur costs under Option 3.

[c] Selected option.

For the selected option, the DSCR analysis was performed on 26 airports owned by single airport authorities and 4 airports owned by 3 multi-airport authorities expected to incur costs under BAT (3 airports owned by single airport authorities cannot be analyzed). EPA projects that none of these airports are at risk for default on their debt.

c. Impacts to Alaska's RAS

Five airports operated by Alaska could not be analyzed using the revenue test or the DSCR as presented above; all five airports are projected to incur costs under Option 1 and Option 2, while only two of these five airports are projected to incur costs under Option 3. These airports are part of Alaska's RAS, which is not a self-supporting system; Alaska has determined these airports must remain open despite financial loses to provide access to otherwise isolated rural communities. EPA evaluated economic impacts to these airports separately, which is described as follows.

Alaska operates two airport systems. The Alaska International Airport System (Ted Stevens Anchorage International Airport and Fairbanks International Airport) is a major enterprise fund of the state of Alaska, and considered to be self-sufficient; in short, the Alaska International Airport System operates in the same manner as most other multi-airport authorities in the United States. Alaska's second system, the RAS, which consists of 256 rural airports, is not a self-sufficient government unit and loses money every year. EPA determined that five RAS airports (Bethel, Ketchikan International, Sitka Rocky Gutierrez, Nome, and Ralph Wien Memorial) would be subject to BAT requirements. Due to the nature of transportation in Alaska, it is vital that these airports remain in operation despite not being profitable; approximately 82 percent of Alaskan communities are not served by roads, and these communities rarely have a practical alternative to air transportation for access (see DCN AD01336). According to the Alaska Department of Transportation and Public Facilities, RAS airports ''are funded through a combination of user fees, state, local, or tribal funds, and federal funds.'' However, the rural airports have very limited opportunities for generating revenue; in 2004 revenues from airport users, concessions, and leasing of airport property comprised less than 17 percent of the cost of operating the system (DCN AD05081). The system is largely reliant on state subsidies to pay O&M costs at these airports. Therefore, EPA evaluated impacts to the RAS separately.

EPA estimated compliance costs for the five RAS airports subject to BAT. EPA used the estimated yearly contribution of $23 to $24 million by the state of Alaska to cover the operating costs of the RAS (DCN AD05081) as a proxy for RAS operating revenues for the purpose of measuring economic impacts; this is an underestimate of RAS revenues because it does not account for the unknown revenue stream from other sources. Under the selected BAT option in the final rule, projected compliance

costs for the five RAS airports together total $61,000, which compose 0.26 percent of the state's contribution to airport operations. EPA therefore determined that because compliance costs to the RAS compose less than 3 percent of the system's revenues, the rule is economically achievable to the RAS.

2. Results of Co-Permittee Airline Impact Analysis

Under Options 1 and 2, EPA determined that 27 airports subject to BAT and incurring costs listed 75 individual airlines as co-permittees. However, under the selected Option 3, six airports subject to BAT and incurring costs listed 28 individual airlines as co-permittees. Twenty-seven of these co-permittee airlines were U.S.-flagged, and one was foreign-owned under Option 3. On average, each of the 27 U.S.-flagged air carriers was a co-permittee at two airports, with a range of co-permitting of between one to four airports. Under an assumption of a 50:50 split of compliance costs between airports and co-permittee airlines, these 27 carriers would incur $180,000 in annualized compliance costs, and the foreign-flag carrier would incur less than $150 in annualized compliance costs.

Twenty-five of the 27 U.S. co-permittee airlines have available financial data. Ten co-permittees have positive baseline operating profits, while nine have positive baseline net income, and therefore are eligible to be analyzed using these metrics. EPA projected that none of these airlines will incur costs exceeding 3 percent of operating profit or net income under Option 3, which is well short of the 100 percent threshold that would indicate a definitive closure. Furthermore, none of the 25 airlines were projected to incur compliance costs exceeding 1 percent of operating revenues under Option 3.

Finally, to the extent that 50 percent of airport compliance costs are shared with co-permittee airlines, impacts to airports are reduced as measured by the ratio of compliance costs to operating revenue. EPA projects that no airports incur costs exceeding 3 percent of revenues under the promulgated option using the assumptions of the co-permittee airline analysis. Assuming no costs are shared with co-permittee airlines, EPA projected that one airport incurs costs exceeding 3 percent of revenues under this option.

3. Economic Achievability

Based on the analyses presented above, EPA has determined that the selected option is economically achievable. EPA finds that the promulgated option is economically achievable both when airports are assumed to incur 100 percent of compliance costs, and when airports and their applicable airline co-permittees are assumed to share compliance costs.

Under previous rulemaking efforts that directly impose compliance costs on government agencies, EPA used the revenue test to evaluate impacts to these agencies; when projected compliance costs exceed 3 percent of operating revenues, the rule is judged to be unaffordable for a facility. As shown in Table VII–2, only one airport, which represents 0.5 percent of the airports subject to BAT, is projected to incur costs exceeding 3 percent of operating revenue when airports are assumed to incur 100 percent of compliance costs. EPA used several conservative assumptions in evaluating impacts to airports; costs were annualized using a real 7 percent interest rate, which is significantly higher than airports typically pay for debt financing. At the 7 percent real interest rate, EPA demonstrated that airports' ability to service debt would not, in general, be negatively affected by the rule. EPA also did not take into account airports' ability to access other funding for capital expenditure, such as AIP grants or PFCs. Also, EPA performed its analysis of airport impacts without distributing any costs to co-permittee airlines. As such, the estimates of impacts at airports with co-permittees may be overstated.

As noted in the previous section, EPA examined a number of alternative measures of economic impacts for airports in response to public comments on the proposed rule. However, EPA found none of these alternative approaches to be preferable to the revenue test method. None of the approaches provided a clear dividing line for determining what impacts might or might not be economically achievable for airports. That is, even if EPA selected one of industry's alternative measures, EPA would still have to determine some threshold that distinguishes impacts that are economically achievable from those that are not; industry did not provide such thresholds with their preferred measures, and for one measure specifically stated they did not know the appropriate threshold. Nevertheless, EPA did perform sensitivity analyses to determine what affect the use of these alternative measures might have on its conclusions on economic achievability of the final rule. EPA's sensitivity analyses found that using these alternative measures would not substantively change the overall results on the final rule's economic achievability. The results of these alternative analyses are not presented in this preamble, but are included in the EA as sensitivity analyses.

With respect to airlines that are NPDES co-permittees, none of these airlines are shown to incur a demonstrable impact under the selected option on three airline income measures: operating revenue, operating profit, or net income. Therefore, EPA finds the costs to be economically achievable for co-permittee airlines for today's final rule.

Finally, EPA also assumed compliance costs would not be passed through to airlines and/or their passengers in the form of higher rates and charges. As previously explained, EPA did assume costs would be shared by co-permittee airlines. The no-pass-through assumption is conservative and EPA believes that airports and, ultimately, airlines will likely pass through costs to reduce the cost and impact of the rule, which is further support for EPA's conclusion that today's final rule is economically achievable.

E. Economic Impacts for New Sources

EPA has determined that the NSPS in the final rule would not impose a barrier to entry for new sources. DIA is the only ''greenfield'' airport, or an airport built on undeveloped land or land not previously used for aviation, that definitely meets the scope of this rulemaking, and was built in the past 25 years.[5] DIA was developed with deicing pads and an extensive treatment system for collected ADF; information from DIA demonstrates that the CDPs, along with the extensive treatment system, comprised 3.6 percent of the cost of building a new airport, and did not pose a barrier to entry (DCN AD01260).

As previously indicated, the building of major greenfield airports has become a relatively rare occurrence. Conversion of ex-military airports (*e.g.,* Orlando International) appears to be a much more common source of sites for cities seeking to increase air transportation access. Such conversions would not be considered ''new sources'' under today's rule. EPA reviewed FAA's National Plan of Integrated Airport Systems (NPIAS) reports published between 2002 and 2010, and found that the development of any new commercial service airports

[5] DIA opened in 1995, but new, major airports built prior to Denver predate it by 20 or more years: Dallas-Fort Worth, which opened in 1973, George Bush International in Houston, Texas, and Washington Dulles, which opened in the 1960s.

is relatively rare, but a smaller commercial service greenfield airport is more likely to be built, as compared to a major airport. In 2002, FAA expected 125 airports, none of which were commercial service airports, to open within the next five years. Furthermore, when queried in 2011, FAA indicated that they had no applications for any new airports that would be subject to NSPS in today's rule, nor were they aware of any expected applications. However, two new primary airports recently opened in Panama City, Florida (May 2010), and St. George, Utah (January 2011). A new, smaller commercial airport is more likely than a large airport such as DIA, EPA wanted to examine the possible barrier to entry for new smaller commercial airports that might be subject to new source requirements.

Based on incomplete data published in the NPIAS, EPA assumes that the St. George airport, with a planned service level of 55,000 annual enplanements, cost $159 million (approximately $145 million in 2006 dollars). The Panama City airport, with a planned service level of 225,000 annual enplanements, appears to have cost $318 million (approximately $289 in 2006 dollars) in the same period. Because eligibility for the ELG is partly based on non-propeller driven aircraft departures, EPA estimated departures for these two airports based on expected annual enplanements. Among the 198 existing airports subject to BAT requirements, only 14 airports in the lower 48 states have fewer than 100,000 annual enplanements, and only six airports have fewer than 60,000 annual enplanements. Thus, EPA believes an airport like St. George might be too small to be subject to the requirements of this new source performance standard.

EPA then looked to Panama City as a model for a barrier to entry analysis for small, commercial facilities. Clearly, due to its location, an airport such as Panama City airport will not be subject to NSPS requirements. However, this airport is the only airport EPA found with data available on construction costs, and is of sufficient size that it might be subject to the ELG were it located further north. Therefore, EPA used Panama City's cost data to represent a new, relatively small airport that could be subject to NSPS.

Based on the costs of constructing CDPs and related ADF wastewater treatment system at Denver, EPA estimated the average capital cost per departure of constructing a CDP and treatment system of appropriate size to meet the Denver airport's operating requirements as total capital cost of the deicing pad and treatment system divided by average annual departures. Thus, the average capital cost of a CDP and related ADF wastewater treatment system is approximately $897 per average annual departure at Denver. In addition, EPA estimated annual departures at Panama City; existing commercial service airports with annual enplanements between 200,000 and 300,000 have, on average, about 32.3 passengers per departure, so EPA expects Panama City will average somewhat less than 6,959 departures per year[6]. Therefore, EPA estimates that should an airport the size of Panama City need to build a CDP and ADF wastewater treatment system, the capital cost of that pad will be about $6.2 million, or about 2.2 percent of the initial cost of the airport.

Therefore, after comparing costs for CDPs and associated treatment systems at small and large airports in comparison to overall airport construction costs and finding that such pads and treatment systems cost from 2.2 percent to 3.3 percent of the cost of building a new airport, EPA has determined that the NSPS in the final rule would not impose a barrier to entry to new sources (DCN AD01260).

F. Cost and Pollutant Reduction Comparison

Today's final rule is expected to reduce COD and ammonia loads by 16.4 million pounds at an annualized cost of $3.5 million, for a cost of $0.21 per pound of pollutant removed.

TABLE VII–5—POLLUTANT REMOVALS, COSTS AND COST-REASONABLENESS OF BAT OPTIONS FOR AIRPORTS THAT DEICE (WEIGHTED)

Option	Total pollutant removals (million lb)	Total annualized costs (2006 $ million)	Cost/lb pollutant removed	Incremental cost/lb pollutant removed
1	33.0	$78.4	$2.37	$10.4
2	30.2	49.4	1.64	3.3
3[a]	16.4	3.50	0.21	0.21

[a] Selected option.

EPA has reviewed the relative cost per pound of pollutants removed in previous effluent guidelines and has found that the cost per pound presented in today's final airport deicing rule is similar to or less expensive than many guidelines promulgated to date including Aluminum Forming (40 CFR part 467), $2.42/lb; Landfills (40 CFR part 445), $15.00/lb; and Waste Combustors (40 CFR part 444), $38.83/lb. EPA notes that the selected option is eight times more cost effective than the next more stringent option based on average cost/lb removed, and sixteen times more cost effective than the next more stringent option based on incremental cost/lb removed.

G. Small Business Analysis

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (hereinafter referred to as RFA), acknowledges that small entities have limited resources, and makes it the responsibility of regulating federal agencies to avoid burdening such entities unnecessarily. The ultimate goal of RFA is to ensure that small entities do not incur disproportionate adverse economic impacts as a result of a regulation. The first step in this process is to determine the number and type of small entities potentially affected by the regulation.

The RFA (5 U.S.C. 601) defines three types of small entities: Small business, small not-for-profit organization, and small governmental jurisdictions. Airport ownership is composed of states, county, city governments, and

[6] EPA notes that NSPS for ADF collection and treatment only applies to airports that have at least 10,000 annual departures. Because Panama City is the only airport of its size for which EPA has data and because it is close to, but does not exceed, the size cut-off for NSPS applicability, EPA concludes that new airports with greater than 10,000 annual departures would similarly not experience a barrier to entry.

single and multi-purpose port authorities. Single and multi-purpose port authorities are quasi-governmental agencies created by legislation to maintain and operate airports, shipping ports, and other government-owned facilities such as bridges.

The RFA defines a small government entity as governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000. After matching each airport-owning governmental entity with its population, EPA estimates that:

- 72 airports are owned by small government entities.
- 20 airports owned by small government entities are subject to BAT requirements in today's final rule.
- Three airports owned by small government entities and subject to BAT requirements incur costs under the promulgated option in today's final rule.

Although many Alaskan airports are relatively small when measured by service level, most of these airports are owned by the state of Alaska and therefore are not considered small for the purposes of the RFA; 10 of the 11 surveyed Alaskan airports are not small by this standard.

One of the 20 BAT airports owned by small government entities is expected to incur total annualized compliance costs exceeding three percent of airport operating revenues.

TABLE VII–6—FINANCIAL IMPACTS OF BAT OPTIONS ON SMALL AIRPORTS THAT DEICE [a]

[2006 $million—20 airports (weighted)]

Option	Total annualized costs	Number of airports with ratio of annualized compliance costs to operating revenues of:			
		Less than 1%	Between 1% and 3%	Greater than 3%	Not analyzed [b]
1	$0.34	19	0	1	0
2	0.34	19	0	1	0
3 [c]	0.31	19	0	1	0

[a] An airport is considered small if the governmental entity that owns the airport serves a region with less than 50,000 people.
[b] Airports incurred compliance costs but financial impacts could not be analyzed due to lack of airport revenue data.
[c] Selected option.

EPA found that 18 airlines that are co-permittees at BAT airports are small by Small Business Administration (SBA) standards; 16 of these airlines had available financial data. Six airlines that are small by SBA standards are co-permittees at BAT airports that incur costs under the promulgated option, and five of these airlines have available financial data. None of the five small co-permittee airlines were projected to incur compliance costs exceeding 1 percent of operating revenues under Option 3. When comparing compliance costs with operating profits and net income, three small airlines had positive baseline operating profits and net income, and none are projected to incur costs exceeding 3 percent of either measure under Option 3. Again, these findings are well short of the 100 percent threshold that would indicate a definitive closure.

One airport with airline co-permittees on its NPDES permit is small by SBA standards. This airport's projected compliance costs exceed 3 percent of airport revenue if it does not share compliance costs with its co-permittee airlines. Its costs do not exceed 3 percent of revenue if it does share compliance costs with its co-permittee airlines.

EPA concludes that small entities are not disproportionately affected by this effluent limitations guideline. Only a fraction of in-scope airports are small by SBA standards, and only one of those airports is projected to incur costs exceeding 3 percent of operating revenues. Furthermore, this airport is not projected to exceed that threshold if 50 percent of its compliance costs are shared with co-permittee airlines. EPA also concludes that small airlines are not disproportionately affected by the rule. Airlines are only subject to the rule if they are co-permittees on an airport's NPDES permit. Six co-permittee airlines are small by SBA standards; five of these airports have available financial data. As previously described, analysis of these airlines shows that under the assumption of 50:50 costs sharing with affected airports, none come close to a threshold that indicates a significant impact of their financial situation.

VIII. Environmental Assessment

A. Environmental Impacts

EPA has evaluated environmental impacts associated with the discharge of wastewater from airport deicing activities (Environmental Impact and Benefit Assessment [EIB]). As discussed in Section VI.B, deicing wastewater discharges can increase the loadings of multiple pollutants to receiving surface waters.

The most widely recognized pollutant from deicing activity is oxygen-demanding material, measured as either COD or BOD_5. All primary ingredients in both aircraft and airfield deicers exert oxygen demand. Propylene glycol and ethylene glycol are the primary ingredients in aircraft deicers. Acetate salts, formate salts, propylene glycol, ethylene glycol, and urea are the primary ingredients in airfield deicers. Propylene glycol and ethylene glycol, in particular, exert extremely high levels of oxygen demand when they decay in the environment. Acetates, formates, and urea exert lower, though still significant, levels of oxygen demand.

Acetate or formate salts, the primary ingredients in many airfield deicers, also contain potassium or sodium. Potassium and sodium can raise overall salinity levels or cause ion imbalances in surface waters. Urea, another primary airfield deicer ingredient, decomposes in water to produce ammonia, a toxic compound, and nitrates, a nutrient pollutant that can increase the incidence of algal blooms in surface waters.

Aircraft and airfield deicers also contain additives in addition to the primary ingredients. These additives serve a variety of purposes, such as reducing fluid surface tension, thickening, and fire and corrosion inhibition. Because deicer manufacturers consider the identity and quantity of additives in their formulations to be proprietary information, EPA was unable to obtain complete information on the nature and use of these additives.

EPA was able to obtain some limited information through various public sources, and identified several additives with toxic properties. These additives include nonylphenol ethoxylates, alcohol ethoxylates, triazoles, and

polyacrylic acid, among others. Although toxic, these additives directly influence the effectiveness and safety of deicing and anti-icing formulations and are therefore essential components. Because deicer formulations change periodically, some of the additives EPA identified may not be present in current formulations. Deicing fluid manufacturers are also investigating ways to formulate deicing and anti-icing compounds with the use of less toxic, or non-toxic, additives.

Airports in the United States discharge deicing wastewater to a wide variety of water body types, including streams, rivers, lakes and estuaries. Many airports discharge deicing wastewater to small streams with limited waste dilution and assimilation capacities. Impacts from deicing wastewater discharges have been documented in a variety of surface waters adjacent to or downstream of a number of airports in the United States. Some locations experienced acute impact events, whereas other locations have experienced chronically degraded conditions. Observed impacts to surface waters include both physical and biological impacts. Some surface waters have been listed as impaired under section 303(d) of the CWA because they do not meet applicable state water quality standards. Physical impacts include elevated levels of glycol, salinity, ammonia, and other pollutants; depressed oxygen levels; foaming; noxious odors; and discoloration. Biological impacts include reduced organism abundance, fish kills, modified community composition, and reduced species diversity.

Deicing wastewater discharges have impaired both aquatic community health and human uses of water resources. Available documentation indicates multiple cases of hypoxic conditions and severe reduction in aquatic organism levels in surface waters downstream of deicing wastewater discharge locations. Documented human use impacts include contamination of surface drinking water sources, contamination of groundwater drinking water sources, degraded surface water aesthetics due to noxious odors and discolored water in residential areas and parklands, and degradation of fisheries.

B. Environmental Benefits

EPA has evaluated environmental benefits associated with today's final rule to reduce the discharge of pollutants from airport deicing activities. This assessment is described in detail in the EIB. The final rule is expected to decrease COD discharges associated with airport runway deicing and anti-icing activities by approximately 12.0 million pounds per year. The rule is also estimated to reduce ammonia discharges by 4.4 million pounds. Note these do not count benefits from the NSPS, which were not estimated quantitatively, due to the difficulty of predicting when and where in-scope new airports may be built. However, EPA projects qualifying new airport construction over the next decade to be minimal.

The decline in pollutant loadings will reduce environmental impacts to surface waters adjacent to and downstream of these airports. A variety of surface waters have improved in quality after reductions in deicing pollutant loadings. Documented improvements have included abatement of noxious odors, decline in fish kill frequency, and partial recovery of community species diversity and organism abundance in small water bodies.

Today's final rule will decrease pollutant loadings to multiple surface waters currently listed as impaired under CWA section 303(d). The rule will also reduce pollutant loadings to surface drinking water intakes, parks, and residential areas downstream of airports. Groundwater aquifers will also benefit. See the EIB for additional details.

IX. Non-Water Quality Environmental Impacts

Sections 304(b) and 306 of the CWA require EPA to consider non-water-quality environmental impacts (including energy requirements) associated with effluent limitations guidelines and standards. As explained in Section V, EPA evaluated three regulatory options for today's rule. The first two options are based on technologies to control aircraft and airfield deicing discharges and the third option is based on technology to control only airfield deicing discharges. Section V also explains that EPA selected Option 3 as the basis for the final requirements.

To comply with the requirements to consider non-water quality environmental impacts, EPA first performed a formal analysis of the potential impact of the Option 1 technologies on energy consumption, air emissions, and solid waste generation. Because Option 2 is similar to Option 1, but would result in less operational changes at a subset of airports and therefore lead to less non-water quality impacts than Option 1, EPA did not perform a formal analysis of non-water quality impacts associated with Option 2. Instead, EPA concluded that the results for Option 2 will be similar to or less than Option 1. Because Option 3 is based only on technology to control airfield deicing discharges, EPA also analyzed impacts for Option 3. As described below, there are no non-water quality impacts associated with the regulatory option selected for the basis of the final regulation, Option 3. There are no increases in energy usage, air emissions, or solid waste generation associated with substituting one airfield deicing product with another. For a more in-depth discussion of EPA's formal analysis of non-water quality impacts, see the TDD.

A. Energy Requirements

1. Options 1 and 2

Net energy consumption associated with Option 1 and Option 2 considers electrical requirements for pumping ADF-contaminated stormwater from collection areas to storage, electrical requirements for operating AFB bioreactors, and fuel requirements for GCVs. There is no net energy consumption associated with product substitution, the technology basis for Option 3.

EPA estimates that the total incremental electrical usage for Option 1 to pump ADF-contaminated stormwater into storage tanks would be approximately 1.2 million kilowatt hours per year (kWh/yr). EPA also developed a relationship between electrical use and COD removal by the AFB bioreactors based on information provided by Albany International (ALB) airport. Using the information from ALB, EPA estimated the electrical requirement for COD removal for Option 1 as approximately 1.3 kWh/lb COD removed. Using this unit rate, EPA estimated total electrical requirements to remove COD for Option 1 to be a maximum additional 22 million kWh/yr.

EPA also analyzed fuel use by GCVs collecting ADF-contaminated stormwater. EPA used Airport Questionnaire data for diesel fuel costs for GCVs, and then estimated an average diesel fuel use based on the unit cost for diesel fuel of $2.07/gallon.[7] EPA then estimated annual fuel usage per gallon of applied ADF to be 0.08 gallons per gallon of ADF applied. Using this relationship, EPA estimated that the total incremental consumption of No. 2 diesel fuel, at all airports subject to BAT and installing additional collection

[7] This diesel fuel price was the average reported by the Energy Information Administration for the 2004 to 2005 winter season, the same period that EPA is analyzing for airport deicing activity.

equipment, to be 354,500 gallons per year.

EPA compared incremental diesel fuel use by GCVs as a result of Option 1 to diesel fuel use on a national basis. Approximately 25.4 million gallons of No. 2 diesel fuel was consumed per day in the United States in 2005. The diesel fuel requirement associated with Option 1 is less than 0.004 percent of the annual amount of diesel fuel consumed.

EPA also considered qualitatively the potential for Options 1 and 2 to cause flight delays and possibly greater jet fuel use as a result. EPA was not able to quantify this effect, because EPA was not able to project how many flights would be delayed for how long or how much extra fuel use this might entail. However, EPA's selection of Option 3 will also ensure that there are no unacceptable energy impacts associated with increased jet fuel use.

2. Option 3

EPA did not identify any additional energy consumption associated with the Option 3 technology. There is no change in energy consumption associated with substituting one airfield deicer with another.

B. Air Emissions

1. Options 1 and 2

Additional air emissions as a result of Option 1 could be attributed to added diesel fuel combustion by GCVs collecting ADF-contaminated stormwater and from anaerobic treatment of ADF. Emissions from these sources are discussed below. There could also be increases in emissions from aircraft operations associated with Option 1, but EPA was not able to quantify this effect.

a. Emissions From GCV Collection

EPA estimated the air emissions from the Option 1 ADF collection requirement. As discussed in Section IX.A above, EPA conservatively estimated that GCVs collecting ADF-contaminated stormwater at airports will consume an additional 354,500 gallons of No. 2 diesel fuel per year. To estimate air emissions related to combustion of No. 2 diesel fuel in the internal combustion engines on GCVs, EPA used published emission factors for internal combustion engines. The Agency selected emission factors for gasoline and diesel industrial engines because EPA assumed this class to be a more representative population of engines. To estimate emissions from the GCVs, EPA first converted the additional 354,500 gallons of diesel fuel to million British thermal units and then applied the appropriate emission factors. The calculated annual emissions indicate that an additional 4,070 tons per year of CO_2 will be emitted from GCVs combusting additional diesel fuel to comply with the rule. CO_2 is the primary greenhouse gas attributed to climate change, and the 4,070 additional tons per year that would be associated with the rule is very small, as relative to other sources. For example, in 2006, industrial facilities combusting fossil fuels emitted 948 million tons of CO_2 equivalents. An additional 4,070 tons per year from GCVs is less than a 0.0004 percent increase in the overall CO_2 emissions from all industrial sources.

b. Emissions From AFB Treatment Systems

Anaerobic digestion of glycols found in ADF-contaminated stormwater generates biogas containing approximately 60 percent methane and 40 percent CO_2. Airports installing AFBs for treatment of ADF-contaminated stormwater are expected to burn a portion of the gas in onsite boilers in order to maintain reactor temperature. The remainder of gas can be either combusted in a microturbine for electricity generation or flared. Regardless of the combustion technology, nearly all biogas generated by AFBs is converted to CO_2, the primary greenhouse gas. EPA calculates a maximum 3,730 additional tons per year of CO_2 generation for 40 percent ADF collection, which is very small relative to other sources. For example, in 2006, industrial facilities combusting fossil fuels emitted 948 million tons of CO_2 equivalents. An additional 3,730 tons per year of CO_2 from AFB treatment is less than 0.0004 percent of the annual industrial CO_2 emissions nationwide.

2. Option 3

EPA did not identify any additional air emissions associated with the Option 3 technology. There is no change in air emissions associated with substituting one airfield deicer with another.

C. Solid Waste Generation

1. Options 1 and 2

AFB bioreactors will generate sludge that will require disposal, probably in an offsite landfill. To estimate annual sludge generation by the AFB bioreactors that may be installed at airports to treat ADF-contaminated stormwater under Option 1, EPA first estimated the potential COD removal for the collection and treatment scenarios and then applied published anaerobic biomass yield information to estimate total sludge generation on a national basis. The biomass yield calculation, which simply multiplies the COD removal by the yield, is a rough method of estimating sludge generation and does not account for other factors such as degradation or inorganic material (*e.g.,* AFB media) that may be entrained into the sludge. However, this method does provide an order of magnitude estimate of sludge generation that can be compared to other types of common biological treatment systems to determine if AFB sludge generation would be unusually high at airports treating ADF-contaminated stormwater.

To provide some perspective on the potential total amount of biomass produced annually by the AFB biological reactors treating ADF-contaminated stormwater, EPA compared the most conservative biomass generation estimate with its national biosolids estimates for all domestic wastewater treatment plants throughout the United States. Approximately 8.2 million dry tons of biosolids were produced in 2010. EPA estimates that AFB bioreactors treating ADF-contaminated stormwater will increase biosolids generation in the United States by approximately 271 dry tons/year or less than 0.003 percent of dry ton biosolids produced in the United States in 2010.

2. Option 3

EPA did not identify any additional sludge generation associated with the Option 3 technology. There is no change in sludge generation associated with substituting one airfield deicer with another.

X. Regulatory Implementation

A. Relation of ELGs and Standards to NPDES Permits

Effluent guidelines act as a primary mechanism to control the discharge of pollutants to waters of the United States. Today's final rule will be applied to airports through incorporation in individual or general NPDES permits issued by EPA or authorized states under section 402 of the Act.

The Agency has developed the limitations for this final rule to cover the discharge of pollutants from this point source category. Those permits issued after this rule is effective must incorporate the effluent limitations guidelines and NSPS in this rule. For airports below the regulatory thresholds in this rule, EPA intends to allow permitting authorities to apply technology-based requirements on a best professional judgment basis. Also, for any airport discharges, under section 510 of the CWA, states may require

effluent limitations under state law as long as they are no less stringent than the requirements of this rule. Finally, in addition to requiring application of the technology-based effluent limitations guidelines and standards in this rule, section 301(b)(1)(C) of CWA requires the permitting authority to impose more stringent effluent limitations on discharges as necessary to meet applicable water quality standards.

For individual permits, ELG provisions are typically incorporated when those permits are renewed, although permit authorities may require modification upon promulgation upon consent of the permittee. EPA will revise its MSGP to include the airport deicing provisions when the permit is renewed, and authorized states will proceed likewise with their respective general permits.

B. Effective Date

The effective date for today's final rule is June 15, 2012.

C. Compliance With the NSPS Requirement

1. Applicability

The final rule establishes airfield pavement deicing effluent controls for new primary airports with 1,000 non-propeller aircraft departures annually. For a subset of these airports—certain airports located in cold climatic zones—it also establishes ADF effluent controls.

A new airport that opens with less than 1,000 departures would not be subject to today's requirements. However, if the number of departures at this new airport later increases above the departure threshold, then § 449.11 becomes applicable. For the ADF collection and treatment NSPS requirements, if a new airport located in an area that has more than 3,000 annual heating degree days and estimates that within five years of commencing operations it will exceed 10,000 annual departures, EPA expects it to plan during initial construction to be able to install facilities that comply with the ADF collection and treatment requirement should the departure threshold of the ADF collection and treatment threshold be exceeded. If the new airport elects not to do so, it must still meet all applicable ADF collection and discharge requirements in the event it exceeds the departure threshold within five years of construction. During the planning process for a new airport, FAA requires the airport sponsors to prepare long-range aviation forecasts, including estimates of passenger enplanement levels and use of jet aircraft. See FAA Advisory Circular 150/5070–6B, Chapter 7, ''Aviation Forecasts.'' These forecasts will provide a sufficient basis for a new source airport to estimate if it will be likely to exceed the departure threshold.

2. Demonstrating Compliance With the NSPS Collection Requirement

The NSPS ADF collection requirement differs from end-of-pipe effluent limitations with regard to demonstrating compliance. Compliance with the collection requirement may not always be determined through end-of-pipe sampling and analysis. Additionally, the amount of ADF available for collection can vary depending on the weather and icing conditions at the time of application. As in the proposed rule, today's final rule provides three procedures for selection by the permittee, for demonstrating compliance with the ADF collection requirement.

To use the first procedure, at § 449.20(b), a permittee certifies to the permitting authority that it is operating its collection system in accordance with specifications for the applicable technology. The specifications describe design and operating practices for the technologies. As long as these technologies are operated and maintained as required, the permittee will be deemed in compliance with the associated collection rate. The only reporting requirement for this procedure is for the permitted facilities to certify to the permit authority that it is operating according to the specifications.

Since it is not practical for EPA to provide operating specifications for all potential collection technologies, the procedure at § 449.20(b)(2) allows an airport with an individual permit to propose performing ADF collection with a technology other than those described in the regulations. The permit authority may allow, on a case-by-case basis, an alternative ADF collection technology as the manner in which the permittee must demonstrate compliance with its collection requirement. The Director may also allow alternate operating parameters for one of the technologies listed elsewhere in § 449.20, as requested and demonstrated by the permittee. For example, an airport may operate a CDP, and through more aggressive collection measures, have data to show that 60 percent of available ADF for its aircraft deicing operations as a whole is collected, without necessarily having all flights deiced in the designated collection area(s). Another example would be an airport that uses a technology other than CDPs, with clearly detailed technical specifications and data demonstrating it achieves 60 percent collection of the available ADF. A third example would be an airport that is unable or unwilling to use a standard set of collection technologies and operating procedures, and instead elects to demonstrate compliance with the ADF collection requirement by regular monitoring of applied and collected ADF. See § 449.20(a)(3). EPA has not published a specific monitoring methodology for a permittee to demonstrate its compliance with the collection requirement, but expects that such a demonstration would involve some type of mass-balance analysis. This procedure would be developed by the permittee, prior to the permitting authority proposing the permit, so that the method would be subject to public comments prior to incorporation into the permit. As long as the permittee is able to demonstrate to the permit authority's satisfaction that the specified technology is designed to achieve the collection requirement as set forth in § 449.11(a)(1), the only reporting requirement for this provision is for the permittee to certify that it is operating and maintaining its technology as required in its permit.

3. P2 Approaches

Several P2 approaches and technologies are described above in Section IV.D.3. Although EPA did not identify any of these technologies as a basis for NSPS, these technologies may be effective at reducing available ADF. Moreover, future P2 technologies may become available to aid in meeting the NSPS requirements. Permittees using P2 technologies that reduce the volume of, or quantity of, pollutants in, available ADF may request a credit to be applied to the ADF collection requirement. Under § 449.20 (b)(2)(ii), a permittee may request a credit by providing documentation of the volumes or loads associated with the available ADF that would be generated in the absence of the P2 approach and the volumes or loads associated with the available ADF reduced through the use of P2. Once the permit authority determines that the reduction values are demonstrated, it will adjust the ADF collection requirement by subtracting the P2-based available ADF reductions from the original ADF collection requirement. The following two examples show how an airport may use the P2 provisions to reduce the amount of ADF that is required for collection.

a. P2 Example #1

On average, Airport X uses 600 gallons of Type I ADF and 500 gallons of Type IV ADF per flight and has 1,000

flights during a deicing season. In order to meet the 60 percent collection requirement, the airport must demonstrate the collection and treatment (or equivalent source reduction of) 300,000 gallons of available ADF.

• 600 gallons Type I × 75% available for collection + 500 gallons × 10% available for collection = 500 gallons available ADF/flight

• 500 gallons available ADF/flight × 1,000 flights × 60 percent collection = 300,000 gallons for collection.

The airport decides to install an IR deicing system and wants to use it in combination with GCVs as the basis for its 60 percent collection requirement. The airport provides data to its permit authority that use of an IR deicing system reduces 90 percent of the available ADF per aircraft and that the new IR facility has the capability of comfortably handling 600 flights per deicing season. This reduction is equivalent to the collection of 270,000 gallons of available ADF as shown below:

• 500 gallons available ADF/flight × 90 percent reduction in available ADF = 450 gallons ADF reduction per flight

• 600 flights × 450 gallon reduced = 270,000 gallons ADF reduced.

Therefore, the airport would need to collect an additional 30,000 gallons of available ADF during the deicing season:

• 300,000 gallons of ADF required for control − 270,000 gallons of ADF reduced = 30,000 gallons to collect.

EPA's documentation shows that GCVs collect 20 percent of available ADF. In order to collect the remaining 30,000 gallons, the airport would need to use GCVs when deicing 300 flights during the deicing season.

• 500 gallons of available ADF/flight × 20 percent collection = 100 gallons of ADF collected per flight.

• 300 flights × 100 gallons collected per flights = 30,000 gallons of ADF collected.

In this example, for every 1,000 flights where deicing would be appropriate, the airport could use the IR for 600 flights, GCVs for 300 flights, and may elect to collect nothing for 100 flights. More generically, for every one flight deiced with no collection, three flights must be deiced in an area with GCV collection and six flights must be sent through the IR system. The airport would have the flexibility to apply these technologies as appropriate for each event. For example, if the airport was experiencing exceptional delays for a particular event, the airport could forgo collection during that event as long as it had documentation to demonstrate that over the deicing season the combination of these technologies was applied in a manner to theoretically achieve the required percentage.

b. P2 Example #2

On average, Airport Y uses 300 gallons of available ADF per flight and has 8,000 flights during the deicing season. In order to meet the 60 percent collection requirement, the airport must demonstrate the collection and treatment (or equivalent source reduction of) 1,440,000 gallons of available ADF.

• 300 gallons available ADF/flight × 8,000 flights × 60 percent collection = 1,440,000 gallons for collection.

Airport Y has recently installed forced air nozzles and covered deicing booms, and has provided data to its permit authority that use of these technologies together reduces 65 percent of the available ADF per aircraft.

Airport Y deices all of its aircraft using these forced air nozzles and covered deicing booms, resulting in a source reduction of 1,560,000 gallons of ADF per deicing season.

• 300 gallons of Available ADF/flight × 65 percent reduction = 195 gallons of ADF reduced per flight

• 8000 flights × 195 gallons reduced per flights = 1,560,000 gallons of ADF reduced.

As a result, Airport Y is in compliance with the 60 percent collection requirement simply through the use of the P2 technologies.

D. Alternative Compliance Option for Pavement Deicers Containing Urea

While EPA expects that most airports will choose product substitution to meet the pavement deicer requirement in § 449.10(b) or § 449.11(b), airports may continue to use pavement deicers containing urea if they meet the alternative effluent limitation. An airport that chooses this alternative is required to perform an analysis for ammonia in airfield pavement discharges at all locations where pavement deicing with deicers containing urea is occurring and must achieve the numeric limitations for ammonia prior to any dilution or commingling with other non-deicing discharges. The sampling frequency, analytical method, and reporting procedures are determined by the permit authority.

E. COD Effluent Monitoring for New Source Direct Dischargers

New source direct dischargers subject to § 449.11(a) are required to sample and analyze the discharges from their treatment system for COD prior to any dilution or commingling with other non-deicing waters. The sampling frequency, analytical method, and reporting procedures are determined by the permit authority. Permittees must follow the sampling protocol specified in Appendix A of Part 449.

F. Best Management Practices

Sections 304(e), 308(a), 402(a), and 501(a) of the CWA authorize the Administrator to prescribe best management practices (BMPs) as part of effluent guidelines and standards or as part of a permit. EPA's BMP regulations are found at 40 CFR 122.44(k). Section 304(e) of the CWA authorizes EPA to include BMPs in effluent limitation guidelines for certain toxic or hazardous pollutants to control ''plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage.'' CWA section 402(a)(1) and NPDES regulations (40 CFR 122.44(k)) also provide for BMPs to control or abate the discharge of pollutants when numeric limitations and standards are infeasible. In addition, CWA section 402(a)(2), read in concert with CWA section 501(a), authorizes EPA to prescribe as wide a range of permit conditions as the Administrator deems appropriate in order to ensure compliance with applicable effluent limitations and standards and such other requirements as the Administrator deems appropriate.

There are no BMPs specified in today's final rule. However, existing NPDES permits for airports include BMP requirements, and some permits may have included, as required BMPs, the technologies that EPA has identified as a basis for BAT or NSPS in today's rule. Other BMPs included in airport permits include dikes, curbs, and other control measures to contain leaks and spills as part of good ''housekeeping'' practices. Under section 510 of the CWA or section 301(b)(1)(C), a permitting authority on a facility-by-facility basis may choose to incorporate BMPs into the permit. See the TDD for a detailed discussion of P2 and BMPs used by airports and airlines.

G. Upset and Bypass Provisions

A ''bypass'' is an intentional diversion of the streams from any portion of a treatment facility. An ''upset'' is an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. EPA's regulations concerning bypasses and upsets for direct dischargers are set forth at 40 CFR 122.41(m) and (n). The bypass

provisions could be used to address situations where an emergency application of ADF or pavement deicer was necessary to ensure safe operation of an aircraft or airfield, provided the conditions for its use are met.

H. Variances and Modifications

The CWA requires application of effluent limitations established pursuant to Section 301 to all direct dischargers. However, the statute provides for the modification of these national requirements in a limited number of circumstances. The Agency has established administrative mechanisms to provide an opportunity for relief from the application of the national effluent limitations guidelines for categories of existing sources for toxic, conventional, and nonconventional pollutants.

1. Fundamentally Different Factors (FDF) Variance

EPA, with the concurrence of the state, may develop effluent limitations different from the otherwise applicable requirements if an individual discharger is fundamentally different with respect to factors considered in establishing the limitation of standards applicable to the individual discharger. Such a modification is known as an FDF variance. EPA, in its initial implementation of the effluent guidelines program, provided for the FDF modifications in regulations, which were variances from the BCT effluent limitations, BAT limitations for toxic and nonconventional pollutants, and BPT limitations for conventional pollutants for direct dischargers. FDF variances for toxic pollutants were challenged judicially and ultimately sustained by the Supreme Court (*Chemical Manufacturers Association* v. *Natural Resources Defense Council,* 479 U.S. 116 (1985)).

Subsequently, in the Water Quality Act of 1987, Congress added new CWA Section 301(n). This provision explicitly authorizes modifications of the otherwise applicable BAT effluent limitations, if a discharger is fundamentally different with respect to the factors specified in CWA Section 304 (other than costs) from those considered by EPA in establishing the effluent limitations. CWA Section 301(n) also defined the conditions under which EPA may establish alternative requirements. Under Section 301(n), an application for approval of a FDF variance must be based solely on (1) information submitted during rulemaking raising the factors that are fundamentally different or (2) information the applicant did not have an opportunity to submit. The alternate limitation must be no less stringent than justified by the difference and must not result in markedly more adverse non-water quality environmental impacts than the national limitation.

EPA regulations at 40 CFR part 125, subpart D, authorizing the regional administrators to establish alternative limitations, further detail the substantive criteria used to evaluate FDF variance requests for direct dischargers. Thus, 40 CFR 125.31(d) identifies six factors (*e.g.,* volume of process wastewater, age and size of a discharger's facility) that may be considered in determining if a discharger is fundamentally different. The Agency must determine whether, based on one or more of these factors, the discharger in question is fundamentally different from the dischargers and factors considered by EPA in developing the nationally applicable effluent guidelines. The regulation also lists four other factors (*e.g.,* inability to install equipment within the time allowed or a discharger's ability to pay) that may not provide a basis for an FDF variance. In addition, under 40 CFR 125.31(b) (3), a request for limitations less stringent than the national limitation may be approved only if compliance with the national limitations would result in either (a) a removal cost wholly out of proportion to the removal cost considered during development of the national limitations, or (b) a non-water quality environmental impact (including energy requirements) fundamentally more adverse than the impact considered during development of the national limits. The legislative history of Section 301(n) underscores the necessity for the FDF variance applicant to establish eligibility for the variance. EPA's regulations at 40 CFR 125.32(b)(1) are explicit in imposing this burden upon the applicant. The applicant must show that the factors relating to the discharge controlled by the applicant's permit which are claimed to be fundamentally different are, in fact, fundamentally different from those factors considered by EPA in establishing the applicable guidelines. In practice, very few FDF variances have been granted for past ELGs. An FDF variance is not available to a new source subject to NSPS.

2. Economic Variances

Section 301(c) of the CWA authorizes a variance from the otherwise applicable BAT effluent guidelines for nonconventional pollutants due to economic factors. The request for a variance from effluent limitations developed from BAT guidelines must normally be filed by the discharger during the public notice period for the draft permit. Other filing periods may apply, as specified in 40 CFR 122.21(m)(2). Specific guidance for this type of variance is provided in ''Draft Guidance for Application and Review of Section 301(c) Variance Requests,'' dated August 21, 1984, available on EPA's Web site at *http://www.epa.gov/npdes/pubs/OWM0469.pdf.*

3. Water Quality Variances

Section 301(g) of the CWA authorizes a variance from BAT effluent guidelines for certain nonconventional pollutants due to localized environmental factors. These pollutants include ammonia, chlorine, color, iron, and total phenols.

I. Information Resources

The Transportation Research Board (TRB), a division of the National Academies of Science, established a research panel to develop fact sheets on deicing practices to assist airports in reducing their deicing chemical usage and discharges. A report was prepared in 2009 under TRB's Airport Cooperative Research Program, titled ''Deicing Planning Guidelines and Practices for Stormwater Management Systems.'' This report (DCN AD01191) and the fact sheets (DCN AD01192) are available in the docket for today's rule.

XI. Statutory and Executive Order (EO) Reviews

A. EO 12866: Regulatory Planning and Review and EO 13563: Improving Regulation and Regulatory Review

EPA submitted this action to OMB for review under EO 12866 (58 FR 51735, October 4, 1993) and EO 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

OMB has approved the information collection requirements contained in this rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2040–0285. Section 449.10(a) requires that airports certify annually on the non-use of airfield pavement deicers containing urea (unless they choose to comply with a numeric limit for ammonia instead).

EPA estimates it will take an annual average of 198 hours and $6,534 for permittees to collect and report the information required by the rule. This estimate is based on average labor rates obtained from EPA's airport questionnaire. EPA estimates that the

time and cost for permit authorities to review the information submitted in response to requirements in the rule is negligible. EPA estimates that there will be no start-up or capital cost associated with the information described above. Burden is defined at 5 CFR 1320(b).

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. In addition, EPA is amending the table in 40 CFR part 9 of currently approved OMB control numbers for various regulations to list the regulatory citations for the information requirements contained in this final rule.

C. Regulatory Flexibility Act

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For the purposes of assessing the impacts of today's final rule on small entities, EPA determined that all airports expected to be subject to BAT requirements are owned by government entities. The RFA defines a small government entity as governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000 (5 U.S.C. 601 (5)). After considering the economic impact of today's final rule on small entities, including consideration of alternative regulatory approaches, I certify that this action will not have a significant economic impact on a substantial number of small entities. After matching each airport-owning governmental entity with its population, EPA estimates that 20 of 198 airports subject to BAT, or 10 percent, are owned by small government entities. EPA projected impacts on these small airports using the revenue test described in Section VII.C.2.a. EPA found that one of the 20 small BAT airports are expected to incur annualized compliance costs exceeding 3 percent of airport operating revenues.

In general, airlines are not directly subject to the final rule. In a small number of cases, airlines are co-permittees on NPDES permits at certain airports, and such co-permittee airlines are therefore subject to the final rule. EPA determined that 18 airlines considered small by SBA standards are co-permittees, but based on the analytic approach described in Section VII.C.3, none are expected to be significantly impacted by the rule

Although this final rule will not have a significant economic impact on a substantial number of small entities, EPA undertook a number of steps to minimize the impact of this rule on small entities. According to the FAA NPIAS (2007–2011), there are almost 3,000 public use general aviation and reliever airports in the United States, some of which have substantial cargo service. Many, if not most, of these airports are likely to be owned by small government entities. Also likely to be owned by small governmental entities are approximately 135 non-primary commercial service airports. EPA has chosen not to regulate any general aviation, reliever, or non-primary commercial service airports under today's final rule. EPA also estimates that in addition to the 20 small government-owned primary commercial airports, another 52 primary commercial airports are owned by small government entities, but will be out-of-scope of the regulation because little or no ADF is used at those airports.

D. Unfunded Mandates Reform Act (UMRA)

This rule does not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. As explained in Section VII and the TDD, the annual cost of the rule is $3.5 million. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

By statute, a small government jurisdiction is defined as a government with a population less than 50,000 (5 U.S.C. 601). Because all in-scope airports are owned by a government or governmental agency, the definition for a small airport is identical for the purposes of both UMRA and SBREFA. If the rule exceeds annual compliance costs of $100 million in aggregate, all provisions of UMRA will need to be met. If the rule does not exceed $100 million in aggregate costs, but small airports are significantly or uniquely affected by the rule, EPA will be required to develop the small government agency plan required under section 203 of UMRA because these airports are owned by small governments.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The scope of the rule focuses on the airports that are the largest users of ADF. The rule is not projected to exceed $100 million in aggregate annual compliance costs. Further, as discussed in Section XI.C, EPA has determined the rule will not have significant economic impact on a substantial number of small entities.

E. EO 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in EO 13132 (64 FR 43255, August 10, 1999). Today's final rule requires airports to implement water pollution control requirements through a long-established regulatory mechanism (*i.e.,* NPDES) which is jointly administered by EPA and states. EPA expects the rule will have little effect on the relationship between, or the distribution of power and responsibilities among, the federal and state governments. Thus, EO 13132 does not apply to this action. In the spirit of EO 13132 and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicited comment on the proposed action from state and local officials, however, none were received on the topic of federalism.

F. EO 13175: Consultation and Coordination With Indian Tribal Governments

This rule does not have tribal implications, as specified in EO 13175 (65 FR 67249, November 6, 2000). It will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes. Today's rule contains no federal mandates for tribal governments and does not impose any enforceable duties on tribal governments. Thus, EO 13175 does not apply to this rule. In the spirit of EO 13175 and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicited comment on the proposed rule on tribal impacts. No comments were received on this topic.

G. EO 13045: Protection of Children From Environmental Health and Safety Risks

This rule is not subject to EO 13045 (62 FR 19885, April 23, 1997) because it is not an economically significant rule pursuant to EO 12866.

H. EO 13211: Energy Effects

This rule is not a ''significant energy action'' as defined in EO 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. As explained in Section IX.A, EPA determined that today's final rule will not require any additional energy usage.

I. National Technology Transfer Advancement Act (NTTAA)

Section 12(d) of the NTTAA of 1995, (Pub. L. 104–113, sec. 12(d); 15 U.S.C. 272) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The rulemaking involves technical standards. Therefore, the Agency conducted a search to identify potentially applicable voluntary consensus standards. However, EPA identified no such standards, and none were brought to EPA's attention in comments. Therefore, EPA decided to use the technology-based controls for aircraft and airfield pavement deicing discharges described in Section V.

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

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

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. The rule will reduce the negative effects of discharges from airports to the nation's waters, to benefit all of society, including minority communities.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the FR. A major rule cannot take effect until 60 days after it is published in the FR. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective June 15, 2012.

Appendix A to the Preamble: Abbreviations and Definitions Used in This Document

AAIA: Airport and Airway Improvement Act
ACI–NA: Airports Council International–North America
ADF: Aircraft deicing fluid (includes anti-icing fluid)
AFB: Anaerobic fluidized bed
AIP: Airport Improvement Program
ALB: Albany International Airport
ATA: Air Transport Association
BADCT: Best available demonstrated control technology
BAT: Best available technology economically achievable, as defined by sec. 301(b)(2)(A) and sec. 304(b)(2)(B) of the CWA
BCT: Best conventional pollutant control technology
BMP: Best management practice
BOD_5: Biochemical oxygen demand
BPJ: Best Professional Judgment
BPT: Best conventional pollutant control technology
CBI: Confidential Business Information
CDP: Centralized deicing pad
CO_2: Carbon dioxide
COD: Chemical oxygen demand
CWA: Clean Water Act
CWT: Centralized waste treatment
DIA: Denver International Airport
DSCR: Debt service coverage ratio
EA: Economic Analysis
EIB: Environmental Impact and Benefit
EO: Executive Order
EPA: U.S. Environmental Protection Agency
ELG: Effluent limitation guideline
FAA: Federal Aviation Administration
FDF: Fundamentally different factor
GARB: General airport revenue bonds
HDD: Heating degree day
IR: Infrared
GCV: Glycol collection vehicle
MSGP: Multi-Sector General Permit
Net income: Operating profit minus interest, taxes, depreciation, and non-operating profits and losses
NOAA: National Oceanic and Atmospheric Administration
NOI: Notice of Intent to discharge under a general permit (40 CFR 122.28(b)(2))
Normalized ADF: ADF less any water added by the manufacturer or customer before ADF application.
NPDES: National Pollutant Discharge Elimination System, as defined by sec. 402 of the CWA
NPIAS: National Plan of Integrated Airport Systems
NSPS: New Source Performance Standards, as defined by sec. 306 of the CWA
NTTAA: National Technology Transfer Advancement Act
O&M: Operations and maintenance
Operating profit: Revenues minus cost of providing those services
P2: Pollution prevention
PFC: Passenger Facility Charges
POTW: Publicly owned treatment works
PSES: Pretreatment standards for existing sources
PSNS: Pretreatment standards for new sources
PV: Present value
RAS: Rural Aviation System
Revenues: Money received for services rendered
RFA: Regulatory Flexibility Act
SBA: Small Business Administration
TDD: Technical Development Document
ThOD: Theoretical oxygen demand
TRB: Transportation Research Board
UMRA: Unfunded Mandates Reform Act
U.S.C.: United States Code

List of Subjects

40 CFR Part 9

Reporting and recordkeeping requirements.

40 CFR Part 449

Environmental protection, Airline, Airport deicing, Airports, Waste treatment and disposal, Water pollution control.

Dated: April 25, 2012.

Lisa P. Jackson,

Administrator.

For the reasons set out in the preamble, 40 CFR chapter I is amended as follows:

PART 9—[AMENDED]

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 7 United States Code (U.S.C.) 135 *et seq.,* 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.,* 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.,* 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

■ 2. In § 9.1, the table is amended by adding a new heading and entry to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

* * * * *

40 CFR citation	OMB control No.
* * * * *	
Airport Deicing Point Source Category	
449.10(a)	2040–0285

* * * * *

■ 3. Part 449 is added to read as follows:

PART 449—AIRPORT DEICING POINT SOURCE CATEGORY

Subpart A—Airport Deicing Category

Sec.
449.1 Applicability.
449.2 General definitions.
449.10 Effluent limitations representing the best available technology economically achievable (BAT).
449.11 New source performance standards (NSPS).
449.20 Monitoring, reporting and recordkeeping requirements.

Subpart B—[Reserved]

Appendix A to Part 449—Sampling Protocol for Soluble COD

Authority: 33 U.S.C. 1311, 1314, 1316, 1318, 1342, 1361 and 1370.

Subpart A—Airport Deicing Category

§ 449.1 Applicability.

This part applies to discharges of pollutants from deicing operations at Primary Airports.

§ 449.2 General definitions.

The following definitions apply to this part:

Aircraft deicing fluid (ADF) means a fluid (other than hot water) applied to aircraft to remove or prevent any accumulation of snow or ice on the aircraft. This includes deicing and anti-icing fluids.

Airfield pavement means all paved surfaces on the airside of an airport.

Airside means the part of an airport directly involved in the arrival and departure of aircraft, including runways, taxiways, aprons, and ramps.

Annual non-propeller aircraft departures means the average number of commercial turbine-engine aircraft that are propelled by jet, *i.e.,* turbojet or turbofan, that take off from an airport on an annual basis, as tabulated by the Federal Aviation Administration (FAA).

Available ADF means 75 percent of the normalized Type I aircraft deicing fluid and 10 percent of the normalized Type IV aircraft deicing fluid, excluding aircraft deicing fluids used for defrosting or deicing for safe taxiing.

Centralized deicing pad means a facility on an airfield designed for aircraft deicing operations, typically constructed with a drainage system separate from the airport main storm drain system.

COD means Chemical Oxygen Demand.

Collection requirement means the requirement in § 449.11 for the permittee to collect available ADF.

Defrosting means the removal of frost contamination from an aircraft when there has been no active precipitation.

Deicing mean procedures and practices to remove or prevent any accumulation of snow or ice on:

(1) An aircraft; or

(2) Airfield pavement.

Deicing for safe taxiing means the application of ADF necessary to remove snow or ice to prevent damage to a taxiing aircraft.

FAA Advisory Circular means a guidance document issued by the FAA on methods, procedures, or facility design.

Heating degree day means the number of degrees per day the daily average temperature is below 65 degrees Fahrenheit. The daily average temperature is the mean of the maximum and minimum temperature for a 24-hour period. The annual heating degree day value is derived by summing the daily heating degree days over a calendar year period.

Normalized Type I or Type IV aircraft deicing fluid means ADF less any water added by the manufacturer or customer before ADF application.

Primary Airport means an airport defined at 49 U.S.C. 47102 (15).

§ 449.10 Effluent limitations representing the best available technology economically achievable (BAT).

Except as provided in 40 CFR 125.30 through 125.32, any existing point source with at least 1,000 annual non-propeller aircraft departures must comply with the following requirements representing the degree of effluent reduction attainable by the application of BAT. The BAT requirements for point sources with less than 1,000 annual non-propeller aircraft departures are beyond the scope of this regulation and shall be determined by the permit authority on a site-specific basis.

(a) *Airfield pavement deicing.* There shall be no discharge of airfield pavement deicers containing urea. To comply with this limitation, any existing point source must certify annually that it does not use airfield deicing products that contain urea or alternatively, airfield pavement discharges at every discharge point must achieve the numeric limitations for ammonia in Table I, prior to any dilution or commingling with any non-deicing discharge.

TABLE I—BAT LIMITATIONS

Wastestream	Pollutant	Daily maximum
Airfield Pavement Deicing	Ammonia as Nitrogen	14.7 mg/L.

(b) [Reserved]

§ 449.11 New source performance standards (NSPS).

New sources with at least 1,000 annual non-propeller aircraft departures must achieve the following new source performance standards. The new source performance standards for point sources with less than 1,000 annual non-propeller aircraft departures are beyond the scope of this part and shall be determined by the permit authority on a site-specific basis.

(a) *Aircraft deicing.* Except for new airports located in Alaska, all new sources located in an area that, at the time of construction, had more than

3,000 annual heating degree days, and are estimated, within five years of commencing operations, to exceed 10,000 annual departures, must comply with the following requirements upon the date the facility exceeds 10,000 annual departures. New source performance standards that apply prior to that date, new source performance standards for sources that project they will not exceed 10,000 annual departures within five years of commencing operations, and new performance standards for airports in Alaska, are beyond the scope of this regulation and shall be determined by the permit authority on a site-specific basis.

(1) *Collection requirement.* The new source must collect at least 60 percent of available ADF.

(2) *Numerical effluent limitation.* The new source must achieve the performance standards in Table II for available ADF collected pursuant to paragraph (a)(1) of this section. The limitation must be met at the location where the effluent leaves the onsite treatment system utilized for meeting these requirements and before commingling with any non-deicing discharge.

TABLE II—NSPS

Wastestream	Pollutant	Daily maximum	Weekly average
Aircraft Deicing	COD	271 mg/L	154 mg/L.

(b) *Airfield pavement deicing.* There shall be no discharge of airfield pavement deicers containing urea. To comply with this limitation, any new source must certify annually that it does not use airfield deicing products that contain urea or alternatively, airfield pavement discharges at every discharge point must achieve the numeric limitations for ammonia in Table III, prior to any dilution or commingling with any non-deicing discharge.

TABLE III—NSPS

Wastestream	Pollutant	Daily maximum
Airfield Pavement Deicing	Ammonia as Nitrogen	14.7 mg/L.

§ 449.20 Monitoring, reporting and recordkeeping requirements.

(a) *Demonstrating compliance with the ADF collection requirement for dischargers subject to NSPS collection requirements in § 449.11.* Except as provided in 40 CFR 125.30 through 125.32, an individual permittee shall select a procedure under either paragraphs (a)(1), (2), or (3) of this section in its permit application as the procedure for the permittee to demonstrate compliance with the applicable collection, reporting and recordkeeping requirements of this Part. A procedure selected by the permittee under paragraph (a)(2) of this section may be included in the permit only with the Director's approval, as described in paragraph (a)(2) of this section. For general permits, use of alternative methods for determining compliance with the ADF collection requirement for dischargers subject to NSPS collection requirements in this part will be at the discretion of the Director.

(1) The permittee shall maintain records to demonstrate, and certify annually, that it is operating and maintaining one or more centralized deicing pads. This technology shall be operated and maintained according to the technical specifications set forth in paragraphs (a)(1)(i) through (iv) of this section. For both individual and general permits, these technical specifications shall be expressly set forth as requirements in the permit. The permittee's demonstration and valid certification are sufficient to meet the applicable NSPS collection requirement without the permittee having to determine the numeric percentage of available ADF collected.

(i) Each centralized deicing pad shall be sized and sited in accordance with all applicable FAA advisory circulars.

(ii) Drainage valves associated with the centralized deicing pad shall be activated before deicing activities commence, to collect available ADF.

(iii) The centralized deicing pad and associated collection equipment shall be installed and maintained per any applicable manufacturers' instructions, and shall be inspected, at a minimum, at the beginning of each deicing season to ensure that the pad and associated equipment are in working condition.

(iv) All aircraft deicing shall take place on a centralized deicing pad, with the exception of defrosting and deicing for safe taxiing.

(2) *Alternative technology or specifications.* (i) An individual permit (or a general permit at the discretion of the Director) may allow one of the following alternative procedures for demonstrating compliance with its collection requirement, instead of the procedure in paragraph (a)(1) of this section. The permittee must submit all information and documentation necessary to support this request. An individual permittee may request this alternative procedure in its initial permit application or permit renewal application. During the term of an individual permit, the permittee may also request this alternative procedure as a permit modification, subject to the requirements and procedures at 40 CFR 122.62 and 40 CFR part 124. If the Director determines, in his or her discretion, that the requested alternative procedure will achieve the collection requirement in the permit, the Director shall approve the request:

(A) The use of a different ADF collection technology from the centralized deicing pad technology specified in paragraph (a)(1) of this section; or

(B) The use of the same ADF collection technology, but with different specifications for operation and/or maintenance.

(ii) *Pollution prevention credit.* A permittee may apply for, and obtain, full or partial credit towards compliance with the available ADF collection requirement. To obtain credit the permittee must demonstrate to the Director's satisfaction that it employs a pollution prevention technique that reduces the volume of, or quantity of, pollutants in, available ADF. The credit shall be equivalent to the demonstrated reduction, as determined by the Director.

(iii) The Director shall set forth technical specifications for proper operation and maintenance of the chosen collection technology, as

appropriate, and compliance with these technical specifications must be required by the permit. The permit shall also require the permittee to maintain records sufficient to demonstrate compliance with these requirements. This demonstration constitutes compliance by the permittee with the percent capture requirement without the permittee having to determine the numeric percentage of ADF that it has collected. Before the Director may approve an alternate technology under this subsection, the permittee must demonstrate to the Director's satisfaction that the alternate technology will achieve the applicable percent capture requirement.

(3) The permittee shall maintain records, by means deemed acceptable by the Director, and report at a frequency determined by the Director, on the volume of ADF sprayed and the amount of available ADF collected in order to determine the compliance with the collection requirement.

(b) *Monitoring requirements*—(1) *COD limitation.* Permittees subject to the ADF collection and discharge requirements specified in § 449.11 must conduct effluent monitoring to demonstrate compliance with the COD limitation for all ADF that is collected. Compliance must be demonstrated at the location where the effluent leaves the on-site treatment system utilized for meeting these requirements and before commingling with any non-deicing discharge. Effluent samples must be collected following the protocol in Appendix A to this part.

(2) *Ammonia limitation.* If a permittee chooses to comply with the compliance alternative specified in § 449.10(a) or § 449.11(b), the permittee must conduct effluent monitoring at all locations where pavement deicing with a product that contains urea is occurring, prior to any dilution or commingling with any non-deicing discharge.

(c) *Recordkeeping.* (1) The permit shall provide that the permittee must maintain on site, during the term of the permit, up to five years, records documenting compliance with paragraphs (a) through (b) of this section. These records include, but are not limited to, documentation of wastewater samples collected and analyzed, certifications, and equipment maintenance schedules and agreements.

(2) At the Director's discretion, a requirement may be included in the permit for the permittee to collect, and maintain on site during the term of the permit, up to five (5) years of data on the annual volume of ADF used.

Subpart B—[Reserved]

Appendix A to Part 449—Sampling Protocol for Soluble COD

This sampling protocol applies only to samples collected for use in measurement of COD when demonstrating compliance with the regulations set forth in this part. Collect a representative sample of the effluent from the airport deicing treatment system, based on the discharge permit requirements (*e.g.,* a grab sample or a composite sample). Because only the COD sample is filtered, do not use in-line filters if collecting a sample with a compositing device.

A. Grab Samples

1. Cap the container and shake the grab sample vigorously to mix it. Remove the plunger from a 10-milliliter (mL) or larger Luer-lock plastic syringe equipped with an Acrodisc Luer-lock filter containing a 1.5-µm glass fiber filter (Whatman 934–AH, or equivalent), and fill the syringe body with sample.

2. Replace the plunger and filter the sample into a clean 50-mL screw-cap glass, plastic, or fluoropolymer bottle.

Note: If testing is being done in the field, or with a test kit product (*e.g.,* Hach Method 8000), the filtrate may be collected in the test kit vial or container.

3. Additional 10-mL volumes of sample may be filtered and the filtrate added to the same sample bottle. This additional volume may be used to repeat sample analyses or to prepare Quality Control (QC) samples, as needed.

4. Unless the filtered sample will be analyzed within 15 minutes, preserve the filtered sample with H_2SO_4 to pH <2. Cap the bottle and label with the sample number. Place in a cooler on ice prior to shipping.

5. Once at the analytical laboratory, the sample must be stored at ≤6 degrees Celsius and analyzed within 28 days of collection (see the requirements for COD in Table II at 40 CFR part 136).

6. Analyze the sample using a method approved for COD in Table IB at 40 CFR part 136.

Note: Because this procedure is specific to this point source category, it does not appear by name in 40 CFR part 136.

7. Report the sample results as Soluble COD in units of milligrams per liter (mg/L). There is no Chemical Abstracts Service (CAS) Registry Number for soluble COD.

B. Composite Samples

1. If the sample will be analyzed in a fixed laboratory (as opposed to field testing), transfer at least 50 mL of well-mixed sample from the compositing device into a clean 50-mL screw-cap glass, plastic, or fluoropolymer bottle. Preserve the sample with H_2SO_4 to pH <2. Cap the bottle and label with the sample number. Place in a cooler on ice prior to shipping.

2. Once at the analytical laboratory, the sample must be stored at ≤6 degrees Celsius and analyzed within 28 days of collection (see the requirements for COD in Table II at 40 CFR part 136).

3. Prior to analysis, remove the sample from cold storage and allow it to warm to room temperature. Shake the sample vigorously to mix it.

4. Remove the plunger from a 10-mL or larger Luer-lock plastic syringe equipped with an Acrodisc Luer-lock filter containing a 1.5-µm glass fiber filter (Whatman 934–AH, or equivalent), and fill the syringe body with sample.

5. Replace the plunger and filter the sample into a clean COD vial or other suitable container.

6. Additional 10-mL volumes of sample may be filtered and the filtrate added to separate containers, as needed, to provide samples for repeat analyses or to prepare QC samples.

7. Analyze the sample using a method approved for COD in Table 1B at 40 CFR part 136.

Note: Because this procedure is specific to this point source category, it does not appear by name in 40 CFR part 136.

8. Report the sample results as Soluble COD in units of mg/L. There is no CAS Registry Number for soluble COD.

[FR Doc. 2012–10633 Filed 5–15–12; 8:45 am]

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